

SCAC MEETING AGENDA-2nd AMENDED
Friday, August 11, 2017
9:00 a.m.

Location: State Bar of Texas
1414 Colorado Street, Room 101
Hatton Sumners Room
Austin, Texas 78701
(512) 427-1463

1. WELCOME (Babcock)

2. STATUS REPORT FROM CHIEF JUSTICE HECHT

Chief Justice Hecht will report on Supreme Court actions and those of other courts related to the Supreme Court Advisory Committee since the June 9 meeting.

3. GUIDELINES FOR SOCIAL MEDIA USE BY JUDGES

216-299a Sub-Committee Members:

Prof. Elaine Carlson – Chair

Hon. David Peeples – Vice Chair

Hon. Kent Sullivan

Alistair B. Dawson

O. C. Hamilton

Robert Meadows

Thomas C. Riney

- (a) Judges' Use of Social Media (Proposal for Discussion)– August 8, 2017
- (b) Code of Judicial Conduct-Pre-2002 and Current Canon 5; Canon 3-B(10)
- (b1) Rules of Engagement
- (b2) ABA Formal Opinion

4. PROPOSED AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT AND POLICIES ON ASSISTANCE TO COURT PATRONS BY COURT AND LIBRARY STAFF

Judicial Administration Sub-Committee Members:

Nina Cortell - Chair

Hon. David Peeples – Vice Chair

Hon. Tom Gray

Prof. Lonny Hoffman

Hon. David Newell

Hon. Bill Boyce

Michael A. Hatchell

Kennon Wooten

- (b3) August 2, 2017 Email from Nina Cortell re Proposals Regarding Self-Represented Litigants
- (c) TAJC Report for SCAC on TAJC Amendment and Policies-July 6, 2017
- (d) TAJC Proposed Amendment To The Code of Judicial Conduct w/Combined Exhibits-May 2, 2016
- (e) Canon 3: Texas Code of Judicial Conduct

5. TEXAS RULE OF CIVIL PROCEDURE 145

15-165a Sub-Committee Members:

*Richard Orsinger – Chair
Frank Gilstrap – Vice Chair
Professor Alexandra Albright
Professor Elaine Carlson
Nina Cortell
Professor William Dorsaneo
O. C. Hamilton
Pete Schenkkan
Hon. Anahid Estevez
Trish McAllister w/Texas Access To Justice*

- (f) April 23, 2017 Memo from Rule 15-165a Subcommittee regarding Report on Suggested Changes to TRCP 145

6. SUPERSEDEAS RULES FOR STATE-ACTOR APPELLANTS

Appellate Rules Sub-Committee Members:

*Prof. William Dorsaneo – Chair
Pamela Baron – Vice Chair
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley*

- (g) July 20, 2017 Memo from Appellate Rules Subcommittee regarding Amendment to TRAP 24

7. TEXAS RULE OF APPELLATE PROCEDURE 11

Appellate Rules Sub-Committee Members:

*Prof. William Dorsaneo – Chair
Pamela Baron – Vice Chair
Hon. Bill Boyce
Hon. Brett Busby
Prof. Elaine Carlson
Frank Gilstrap
Charles Watson
Evan Young
Scott Stolley*

- (h) July 20, 2017 Memo from Appellate Rules Subcommittee regarding Amendment to TRAP 11

**PROPOSAL FOR DISCUSSION
AUGUST 11, 2017 SCAC MEETING**

**Proposed subsection J below would be added to the Code of Judicial Conduct
(Canon 4—Conducting the Judge’s Extra-Judicial Activities to Minimize the Risk
of Conflict With Judicial Obligations)**

J. Use of Electronic Social Media.

[Alternative A]: The provisions of this Code apply to a judge’s use of electronic social media platforms.

[Alternative B]: The provisions of this Code that govern a judge’s communications in person, on paper, and by electronic methods also govern a judge’s use of electronic social media platforms. In all communications, a judge must avoid conduct that undermines the judge’s independence and integrity, and the appearance of impartiality.

COMMENT

Electronic social media platforms have become powerful communication tools for persons holding public office. Social media platforms allow easy and quick communication, with the prospect of instant forwarding to larger audiences. But the features that make social media platforms politically useful can also threaten ethical standards that govern judges.

Social media communications differ from traditional in-person and written communications. A statement or photograph can be disseminated to thousands in an instant—without the actual consent or knowledge of the person who posted it (or any person mentioned in the statement or pictured in the photograph). Postings can also invite response and discussion, over which the original poster has no control. Seemingly private remarks can quickly be taken out of context and broadcast in much wider circles than the speaker intended. Like written statements, statements and photographs on social media can lie dormant and then be recirculated long after the original posting. Social media platforms also create new and unique relationships, such as “friends” and “followers”. Postings can be “liked” in an instant, without pause for reflection or thought. All this can undermine public perceptions of judicial dignity, integrity, and impartiality. Careless statements could also be the basis for recusal motions that might undermine confidence in the judiciary.

All parts of this Code apply to a judge’s use of electronic social media platforms. Judges must take care that their use of social media platforms satisfies the Code’s high standards of dignity, integrity, and impartiality, and Canon 5’s prohibition of inappropriate political activity.

From the CODE OF JUDICIAL CONDUCT

Pre-2002 Canon 5:

Canon 5. Refraining From Inappropriate Political Activity

(1) A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.

(2) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent.

(3) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or

judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B(10).

(4) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(5) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

Amended by orders of June 30, 1993, and Nov. 4, 1993, eff. March 1, 1994; order of Sept. 21, 1994, eff. Jan. 1, 1995; order of March 1, 1996; order of Oct. 30, 1997, eff. Jan. 1, 1999; order of June 21, 1999, eff. July 1, 1999.

Current Canon 5:

Canon 5. Refraining From Inappropriate Political Activity

(1) A judge or judicial candidate shall not:

(i) make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;

(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or

(iii) make a statement that would violate Canon 3B(10).

(2) A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and ex-

press his or her views on political matters in accord with this Canon and Canon 3B(10).

(3) A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

(4) A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the "Act"), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

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CODE OF JUDICIAL CONDUCT, CANON 3-B (10) [current]

(10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section 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 section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.

79 Tex. B.J. 100

Texas Bar Journal
February, 2016

Feature
The Judiciary

RULES OF ENGAGEMENT
Exploring Judicial Use of Social Media

John G. Browning¹ Don Willett²

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We live in a wired world where Twitter processes more than one billion tweets every 48 hours. Harnessing technology has helped courts be more transparent than ever; witness, for example, the Texas Supreme Court’s webcasting and archiving of oral arguments, providing free online access to court records, and, of course, enabling Texans to file documents electronically. Judges continue to use social networking in their personal and professional lives to greater extents than before, as they seek to not only stay connected to the community they serve but also to reap the practical benefits of raising funds and voter awareness in judicial elections.

Yet, not surprisingly, more judges using such platforms often translates to more judges using social media badly, despite the guidance available from judicial ethics opinions in 15 states, a 2013 American Bar Association formal ethics opinion that green-lighted judicial use of social media, and, for federal judges, Opinion 112 issued in 2014 by the Judicial Conference of the United States Committee on Codes of Conduct. For some jurists, the problems arise in the context of election campaigns, such as when District Judge Jan Satterfield of Kansas liked the Facebook page of a candidate for sheriff, which was viewed by the Kansas Commission on Judicial Qualifications as an impermissible endorsement.¹ For others, the problem is the unfortunate overlap between personal lives and professional personas, such as the resignation of Dianna Bennington, a former city court judge in Indiana whose personal Facebook posts during an acrimonious child support dispute with her children’s father led to a finding of “injudicious behavior.”²

Other judges have courted criticism and faced recusal motions and disciplinary actions for using social media sites in their judicial capacities. For example, in July 2015, Galveston County District Court Judge Michelle Slaughter faced a trial before a special court of review after appealing a public admonition from the State Commission on Judicial Conduct. The charges centered on Facebook posts she had made referencing cases pending in her court, including a criminal trial dubbed the “boy in the box” case by local media. The commission claimed that Slaughter’s posts were inconsistent with her duties as a judge, cast doubt on her impartiality, and undermined public confidence in the judiciary. She maintained that her brief, factual statements (such as the post that a “big criminal trial” was starting) did not comment on the evidence or witnesses and did not indicate any learning toward one side or the other. Moreover, she argued that her Facebook posts were simply part of her fulfillment of a campaign promise to be transparent and to keep the public informed about the cases being tried in her court.

In a per curiam opinion issued September 30, 2015, the Special Court of Review of Texas dismissed the public admonition and found Slaughter not guilty of all charges.³ Noting social media’s “transformative effect on society” as well as the fact that “no rule, canon of ethics, or judicial *101 ethics opinion in Texas prohibits Texas judges from using social media outlets like Facebook,” the court found no evidence that Slaughter’s online comments “would suggest to a reasonable person the judge’s probable decision on any particular case or that would cause reasonable doubt on the judge’s capacity to act impartially as a judge.”⁴ The court also rejected the notion that her postings or the fact that she was recused from the underlying case amounted to any misuse of her office or a violation of the Canons of the Code of Judicial Conduct, although it did caution that “comments made by judges about pending proceedings” may “detract from the public trust and confidence in the administration of justice.”⁵

Recent episodes involving judges who went beyond innocuous factual statements illustrate the validity of the Texas Court of Special Review's concerns. In November 2015, Senior Judge Edward Bearse was publicly reprimanded by the Minnesota Board on Judicial Standards for his Facebook posts about cases he was presiding over--including one that resulted in a vacated verdict.⁶ Bearse (who had served on the bench for 32 years, retired in 2006, and was sitting statewide by appointment) referred to Hennepin County District Court in one post as "a zoo."⁷ In another, he reflected on a case in which the defense counsel had to be taken away by an ambulance mid-trial, likely to result "in chaos because defendant has to hire a new lawyer who will most likely want to start over and a very vulnerable woman will have to spend another day on the witness stand. ..."⁸ During *State v. Weaver*, a sex trafficking trial, Bearse posted the following:

Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do.⁹

After a guilty verdict, the prosecutor discovered Bearse's Facebook post and disclosed it to the defense, who successfully moved for a new trial because of the prejudgment implied by the post. Bearse explained that he was new to Facebook, was unaware of privacy settings, and didn't realize his posts were publicly viewable. The board concluded that he had put his "personal communication preferences above his judicial responsibilities," given at least the appearance of a lack of impartiality, and had engaged in "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."¹⁰

In Kentucky, Circuit Court Judge Olu Stevens ignited a firestorm of controversy with his Facebook posts. Early in 2015, Stevens went on Facebook to vent his frustration with a victim impact statement made by the mother of a white child who had witnessed a home invasion by two black men and was supposedly "in constant fear of black men." In his post, Stevens--who is African-American--condemned the statements and accused the mother of attributing "her own views to her child as a manner of sanitizing them."¹¹ And after he dismissed a nearly all-white jury panel--upon request from the public defender--in a case with an African-American defendant, Stevens posted about it on Facebook, prompting prosecutors to seek his recusal from all pending criminal cases. The situation reached the Kentucky Supreme Court, with Stevens's posts also denouncing Commonwealth's Attorney Thomas Wine for alleged racism and including the comment, "Going to the Kentucky Supreme Court to protect the right to impanel alt-white juries is not where we need to be in 2015. Do not sit silently. Stand up. Speak up."¹² Wine demanded Stevens's disqualification due to the "inflammatory" Facebook posts.¹³

Kentucky Supreme Court Chief Justice John D. Minton Jr. ordered the parties to mediate their differences. And although an agreement was reached in December, just days later Wine claimed that Stevens had violated the accord with yet another Facebook post in which he asserted that his critics' goal was "taking my position in order to silence me."¹⁴

Venturing onto Twitter can also be problematic for judges who neglect to diligently self-censor. The 9th Circuit is currently weighing a challenge to a ruling by U.S. District Court Judge William B. Shubb in the case of *U.S. v. Sierra Pacific Industries*.¹⁵ The case arose out of a 2007 wildfire that devastated nearly 65,000 acres in California. The federal government, which blamed lumber producer Sierra Pacific, reached a settlement that the lumber company sought to vacate. Shubb denied Sierra Pacific's motion. In its appeal, the company pointed out that not only was Shubb a Twitter follower of the federal prosecutors on the case--and had purportedly received tweets about the merits of the case from the Eastern District of California's Twitter handle (@EDCAnews)--but also that he himself had tweeted about the case from his then-public Twitter account (@Nostalgist1). Shubb allegedly tweeted, "Sierra Pacific still liable for Moonlight Fire damages," and also linked to a news article about the case--all while the case was still pending.¹⁶ As Sierra Pacific's lawyers pointed out, the tweet was inaccurate (no finding of liability was ever made) and it also increased the appearance of bias and "prejudices Sierra Pacific and all Defendants in the pending state court appeal regarding the Moonlight Fire."¹⁷

With judges elected in 39 states (including Texas), social media is a fruitful way to engage with the community as well as an invaluable means of raising visibility, building awareness, and leveraging the support of key influencers and opinion leaders. Texas--along with many courts and judicial ethics authorities across the country--has rejected the notion that a person's mere status as a Facebook "friend" or other social networking connection with a judge is enough to convey the appearance of a special relationship or position of influence with that judge.¹⁸

However, judges need to be mindful of the power, specific features, and limitations of sites like Facebook and Twitter. "Judge" need not be synonymous with humorless fuddy-duddy, but certain cardinal rules must be followed. Chief among

these is that the ethical restrictions applicable to every other means of communication are just as applicable *102 to social media. For example, judges shouldn't discuss pending cases--period. And before posting, tweeting, or responding to what someone else has posted or tweeted, judges need to ask themselves whether their statement could be seen as inappropriate or conveying partiality or bias. Judges are free to use social media, a terrific, low-cost way to remove distance and demystify the judiciary. But they must exercise caution, taking care to honor the distinctive constitutional role they've taken on as well as the public's confidence in the judiciary. Whether they're crafting a 140-page opinion or a 140-character tweet, judges must always be judicious.

Footnotes

- ^{a1} **JOHN G. BROWNING** is a partner in Passman & Jones in Dallas, where he handles commercial litigation, employment, health care, and personal injury defense matters in state and federal courts. He is an award-winning legal journalist for his syndicated column, "Legally Speaking," and the author of the Social Media and Litigation Practice Guide and a forthcoming casebook on social media and the law. He is an adjunct professor at Southern Methodist University Dedman School of Law.
- ^{a2} **JUSTICE DON WILLET** has served on the Texas Supreme Court since 2005. A former drummer and rodeo bull rider, he is the grateful son of a heroic single mother, the blessed husband of a sainted wife, and the exhausted co-founder of three wee Willetts. You can find the Tweeter Laureate of Texas (@JusticeWillett) on Twitter, Facebook, and Instagram.
- ¹ *Kansas judge Causes Stir With Facebook 'Like,' Real Cleat Politics* (July 29, 2012), http://www.reatelearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_html.
- ² *In re the Honorable Dianna L. Bennington*, No. 18S00-1412-JD-733, (Ind. Feb. 10, 2015), <http://caselaw.findlaw.com/in-supreme-court/1691967.html>.
- ³ *In re Honorable Michelle Slaughter, Presiding Judge of the 405th Judicial District Court, Galveston County, Texas*, Docket No. 15-0001 (Special Court of Review of Texas, Sept. 30, 2015).
- ⁴ *Id.* (Citing John G. Browning, "Social Media and the Law: Symposium [Keynote Address](#)," 68 *U Miami L. Rev.* 353, 359 (2014).)
- ⁵ *Id.*
- ⁶ *In the Matter of Senior Judge Edward W. Bearse, Amended Public Reprimand* (Minnesota Board on judicial Standards, File No. 15-7, Nov, 20, 2015).
- ⁷ *Id.*
- ⁸ *Id.*
- ⁹ *Id.*
- ¹⁰ *Id.*
- ¹¹ Andrew Wolfson, *Judge Slams Victims for Tot's 'Black Men' Fear*, *Courier-Journal* (April 15, 2015), <http://www.courier-journal.com/story/news/local/2015/04/10/judge-slams-victimstots-black-men-fear/25581605/>.

- ¹² Jacob Gershman, *Prosecutors Want Judge Off Criminal Casts Because of Facebook Posts*, Wall Street Journal Law Blog (Nov. 18, 2015), <http://blogs.wsj.com/law/2015/11/18/prosecutors-want-judge-off-criminal-cases-because-of-facebook-posts/>.
- ¹³ Matthew Glowicki, *Judge Kicked Off Cases Over Online Comments*, Courier-Journal (Nov. 19, 2015), <http://www.courier-journal.com/story/news/local/2015/11/18/prosecutorwants-judge-off-cases-over-racial-stand/75957606/>.
- ¹⁴ Matthew Glowicki and Andrew Wolfson, *Wine Renews Call to Take Olu Stevens Off Cases*, Courier-Journal (Dec. 14, 2015), <http://www.courier-journal.com/story/news/crime/2015/12/14/prosecutors-say-judge-broke-mediation-agreement/77290214/>.
- ¹⁵ David Lat, *A Federal Judge and His Twitter Account: A Cautionary Tale*, Above the Law (Nov. 18, 2015), www.abovethelaw.com/2015/11/18/a-federal-judge-and-his-twitter-account-a-cautionary-tale/.
- ¹⁶ *U.S. v. Sierra Pacific Industries, et al*, No. 15-15799, Appellants' Motion for Judicial Notice (9th Cir. Nov. 6, 2015).
- ¹⁷ *Id.*
- ¹⁸ See *Youkers v. State*, 400 S.W.3d 200 (Tex. App.--Dallas [5th Dist.] 2013).

AMERICAN BAR ASSOCIATION

Formal Opinion 462 Judge's Use of Electronic Social Networking Media

February 21, 2013

*A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.*¹

In this opinion, the Committee discusses a judge's participation in electronic social networking. The Committee will use the term "electronic social media" ("ESM") to refer to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons.²

Judges and Electronic Social Media

In recent years, new and relatively easy-to-use technology and software have been introduced that allow users to share information about themselves and to post information on others' social networking sites. Such technology, which has become an everyday part of worldwide culture, is frequently updated, and different forms undoubtedly will emerge.

Social interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch. This opinion examines to what extent a judge's participation in ESM raises concerns under the Model Code of Judicial Conduct.

Upon assuming the bench, judges accept a duty to "respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system."³ Although judges are full-fledged members of their communities, nevertheless, they "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens...."⁴ All of a judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner "that promotes public confidence in the independence, integrity, and impartiality of the judiciary," and must "avoid impropriety and the appearance of impropriety."⁵ This requires that the judge be sensitive to the appearance of relationships with others.

The Model Code requires judges to "maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives."⁶ Thus judges must be very thoughtful in their interactions with others, particularly when using ESM. Judges must assume that comments posted to an ESM site will not remain within the circle of the judge's connections. Comments, images, or profile information, some of which might prove embarrassing if publicly revealed, may be electronically transmitted without the judge's knowledge or permission to persons unknown to the judge or to other unintended recipients. Such dissemination has the potential to compromise or appear to

¹ This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2012. The laws, court rules, regulations, rules of professional and judicial conduct, and opinions promulgated in individual jurisdictions are controlling.

² This opinion does not address other activities such as blogging, participation on discussion boards or listserves, and interactive gaming.

³ Model Code, Preamble [1].

⁴ Model Code Rule 1.2 cmt. 2.

⁵ Model Code Rule 1.2. *But see* Dahlia Lithwick and Graham Vyse, "Tweet Justice," SLATE (April 30, 2010), (describing how state judge circumvents ethical rules prohibiting ex parte communications between judges and lawyers by asking lawyers to "de-friend" her from their ESM page when they're trying cases before her; judge also used her ESM account to monitor status updates by lawyers who appeared before her), *article available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2010/04/tweet_justice.html.

⁶ Model Code, Preamble [2].

compromise the independence, integrity, and impartiality of the judge, as well as to undermine public confidence in the judiciary.⁷

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.⁸

A judge who participates in ESM should be mindful of relevant provisions of the Model Code. For example, while sharing comments, photographs, and other information, a judge must keep in mind the requirements of Rule 1.2 that call upon the judge to act in a manner that promotes public confidence in the judiciary, as previously discussed. The judge should not form relationships with persons or organizations that may violate Rule 2.4(C) by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also take care to avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A), and avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C). Indeed, a judge should avoid comment about a pending or impending matter in any court to comply with Rule 2.10, and take care not to offer legal advice in violation of Rule 3.10.

There also may be disclosure or disqualification concerns regarding judges participating on ESM sites used by lawyers and others who may appear before the judge.⁹ These concerns have been addressed in judicial ethics advisory opinions in a number of states. The drafting committees have expressed a wide range of views as to whether a judge may “friend” lawyers and others who may appear before the judge, ranging from outright prohibition to permission with appropriate cautions.¹⁰ A judge who has an ESM connection with a lawyer or party who has a pending or impending matter before the court must evaluate that ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of the person before the court.¹¹ In this regard, context is significant.¹² Simple

⁷ See Model Code Rule 1.2 cmt. 3. Cf. New York Jud. Eth. Adv. Op. 08-176 (2009) (judge who uses ESM should exercise appropriate degree of discretion in how to use the social network and should stay abreast of features and new developments that may impact judicial duties). Regarding new ESM website developments, it should be noted that if judges do not log onto their ESM sites on a somewhat regular basis, they are at risk of not knowing the latest update in privacy settings or terms of service that affect how their personal information is shared. They can eliminate this risk by deactivating their accounts.

⁸ Jeffrey Rosen, “The Web Means the End of Forgetting”, N.Y. TIMES MAGAZINE (July 21, 2010) *accessible at* <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all>.

⁹ See, e.g., California Judges Ass’n Judicial Ethics Comm. Op. 66 (2010) (judges may not include in social network lawyers who have case pending before judge); Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2009-20 (2009) (judge may not include lawyers who may appear before judge in social network or permit such lawyers to add judge to their social network circle); Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (judges should be mindful of “whether on-line connections alone or in combination with other facts rise to the level of ‘a close social relationship’ that should be disclosed and/or require recusal); Ohio Sup. Ct. Bd. of Comm’rs on Grievances and Discipline Op. 2010-7 (2010) (judge may have ESM relationship with lawyer who appears as counsel in case before judge as long as relationship comports with ethics rules); South Carolina Jud. Dep’t Advisory Comm. on Standards of Jud. Conduct, Op. No. 17-2009 (magistrate judge may have ESM relationship with lawyers as long as they do not discuss anything related to judge’s judicial position). See also John Schwartz, “For Judges on Facebook, Friendship Has Limits,” N.Y. TIMES, Dec. 11, 2009, at A25. Cf. Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-04 (2010) (judge’s judicial assistant may add lawyers who may appear before judge to social networking site as long as the activity is conducted entirely independent of judge and without reference to judge or judge’s office).

¹⁰ See discussion in Geyh, Alfani, Lubet and Shaman, JUDICIAL CONDUCT AND ETHICS (5th Edition, forthcoming), Section 10.05E.

¹¹ California Judges Assn. Judicial Ethics Comm. Op. 66 (need for disclosure arises from peculiar nature of online social networking sites, where evidence of connection between lawyer and judge is widespread but nature of connection may not be readily apparent). See also New York Jud. Eth. Adv. Op. 08-176 (judge must consider whether any online connections, alone or in combination with other facts, rise to level of close social relationship requiring disclosure and/or recusal); Ohio Opinion 2010-7 (same).

¹² Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-06 (2010) (judge who is member of voluntary bar association not required to drop lawyers who are also members of that organization from organization’s ESM site; members use the site to communicate among themselves about organization and other non-legal matters). See also Raymond McKoski,

designation as an ESM connection does not, in and of itself, indicate the degree or intensity of a judge's relationship with a person.¹³

Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge knows that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal.¹⁴ The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally.¹⁵ A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification.¹⁶ For example, a judge may decide to disclose that the judge and a party, a party's lawyer or a witness have an ESM connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification. However, nothing requires a judge to search all of the judge's ESM connections if a judge does not have specific knowledge of an ESM connection that rises to the level of an actual or perceived problematic relationship with any individual.

Judges' Use of Electronic Social Media in Election Campaigns

Canon 4 of the Model Code permits a judge or judicial candidate to, with certain enumerated exceptions, engage in political or campaign activity. Comment [1] to Rule 4.1 states that, although the Rule imposes "narrowly tailored restrictions" on judges' political activities, "to the greatest extent possible," judges and judicial candidates must "be free and appear to be free from political influence and political pressure."

Rule 4.1(A)(8) prohibits a judge from personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4. The Code does not address or restrict a judge's or campaign committee's method of communication. In jurisdictions where judges are elected, ESM has become a campaign tool to raise campaign funds and to provide information about the candidate.¹⁷ Websites and ESM promoting the candidacy of a judge or judicial candidate may be

"Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from 'Big Judge Davis'," 99 KY. L.J. 259, 291 (2010-11) (nineteenth century judge universally recognized as impartial despite off-bench alliances, especially with Abraham Lincoln); Schwartz, *supra* note 9 ("Judges do not drop out of society when they become judges.... The people who were their friends before they went on the bench remained their friends, and many of them were lawyers.") (quoting New York University Prof. Stephen Gillers).

¹³ See Ethics Committee of the Ky. Jud. Formal Jud. Eth. Op. JE-119 (2010) (designation as an ESM follower does not, in and of itself, indicate the degree or intensity of judge's relationship with the person).

¹⁴ See, e.g., New York Judicial Ethics Advisory Opinion 08-176, *supra* n. 8. See also Ashby Jones, "Why You Shouldn't Take It Hard If a Judge Rejects Your Friend Request," WALL ST. J. LAW BLOG (Dec. 9, 2009) ("'friending' may be more than say an exchange of business cards but it is well short of any true friendship"); Jennifer Ellis, "Should Judges Recuse Themselves Because of a Facebook Friendship?" (Nov. 2011) (state attorney general requested that judge reverse decision to suppress evidence and recuse himself because he and defendant were ESM, but not actual, friends), available at <http://www.jlellis.net/blog/should-judges-recuse-themselves-because-of-a-facebook-friendship/>.

¹⁵ See Jeremy M. Miller, "Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)," 33 PEPPERDINE L. REV. 575, 578 (2012) ("Judges should not, and are not, expected to live isolated lives separate from all potential lawyers and litigants who may appear before them.... However, it is also axiomatic that justice, to be justice, must have the appearance of justice, and it appears unjust when the opposing side shares an intimate (but not necessarily sexual) relationship with the judge").

¹⁶ Rule 2.11 cmt. 5.

¹⁷ In a recent survey, for judges who stood for political election, 60.3% used social media sites. 2012 CCPIO New Media and Courts Survey: A Report of the New Media Committee of the Conference of Court Public Information Officers (July 31, 2012), available at <http://ccpio.org/blog/2010/08/26/judges-and-courts-on-social-media-report-released-on-new-medias-impact-on-the-judiciary/>.

established and maintained by campaign committees to obtain public statements of support for the judge's campaign so long as these sites are not started or maintained by the judge or judicial candidate personally.¹⁸

Sitting judges and judicial candidates are expressly prohibited from “publicly endorsing or opposing a candidate for any public office.”¹⁹ Some ESM sites allow users to indicate approval by applying “like” labels to shared messages, photos, and other content. Judges should be aware that clicking such buttons on others’ political campaign ESM sites could be perceived as a violation of judicial ethics rules that prohibit judges from publicly endorsing or opposing another candidate for any public office.²⁰ On the other hand, it is unlikely to raise an ethics issue for a judge if someone “likes” or becomes a “fan” of the judge through the judge's ESM political campaign site if the campaign is not required to accept or reject a request in order for a name to appear on the campaign's page.

Judges may privately express their views on judicial or other candidates for political office, but must take appropriate steps to ensure that their views do not become public.²¹ This may require managing privacy settings on ESM sites by restricting the circle of those having access to the judge’s ESM page, limiting the ability of some connections to see others, limiting who can see the contact list, or blocking a connection altogether.

Conclusion

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

¹⁸ Florida Sup. Ct. Jud. Eth. Adv. Comm. Op. 2010-28 (July 23, 2010).

¹⁹ Model Code Rule 4.1(A)(3).

²⁰ See “Kansas judge causes stir with Facebook ‘like’,” The Associated Press, July 29, 2012, *available at*

http://www.realclearpolitics.com/news/ap/politics/2012/Jul/29/kansas_judge_causes_stir_with_facebook_like_.html.

²¹ See Nevada Comm’n on Jud. Disc. Op. JE98-006 (Oct. 20, 1998) (“In expressing his or her views about other candidates for judicial or other public office in letters or other recorded forms of communication, the judge should exercise reasonable caution and restraint to ensure that his private endorsement is not, in fact, used as a public endorsement.”).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CHAIR: Paula J. Frederick, Atlanta, GA ■ James J. Alfini, Houston, TX ■ T. Maxfield Bahner, Chattanooga, TN ■ Nathaniel Cade, Jr., Milwaukee, WI ■ Lisa E. Chang, Atlanta, GA ■ Donald R. Lundberg, Indianapolis, IN ■ J. Charles Mokriski, Boston, MA ■ Ellen A. Pansky, South Pasadena, CA ■ Jennifer A. Paradise, New York, NY ■ Richard H. Underwood, Lexington, KY

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Walker, Marti

From: Cortell, Nina <Nina.Cortell@haynesboone.com>
Sent: Wednesday, August 2, 2017 11:49 AM
To: Walker, Marti; 'Martha Newton'
Cc: 'Peeples, David'
Subject: Proposals Regarding Self-Represented Litigants to be Considered at August 11 Meeting of the TSCAC
Attachments: TAJC Report for SCAC on TCJC Amendment and Policies.pdf; TAJC Report Combined Exhibits SCAC Meeting 8-11-17.pdf

Marti and Martha,

Attached are the TAJC proposals and accompanying report, which should be distributed to the full committee for consideration at the next meeting, along with this email.

The attached proposals have been considered by the Judicial Administration Subcommittee. What follows is an overview of the Subcommittee's views.

1. There is general agreement as to the stated need to assist self-represented litigants, but a divergence of opinion on how best to address the need. Because the divergence of opinion at the subcommittee level is over approach/policy vs. wording, we thought it best to submit the TAJC proposals "as is" for consideration by the full committee.
2. Some subcommittee members were amenable to the suggested proposals in principle, provided we consider limiting principles such as application to non-jury vs jury trials and/or limiting to family law cases.
3. But others, while recognizing the stated need, disagree with a Code amendment approach. Here are some of these sentiments:
 - a. Mandatory judicial education is seen as a preferred option.
 - b. There was a concern that amending the Code creates more problems than it solves. Also, if certain judges are already making accommodations, then is it correct to say that is not already permitted under the Code? Don't judges already have this inherent power? And if we add something that is discretionary, are we accomplishing the goal?
 - c. As for Clerks, why not, for consistency purposes, have a trained clerk or clerks in every clerk's office to act as ombudsman to SRL's?
 - d. There was concern about creating two different standards in the same case. One member expressed it this way: "We need to take care that proposals to improve access to justice do not compromise justice itself."
 - e. Finally, one subcommittee member asked for consideration of more comprehensive reform, such as moving certain dockets out of traditional litigation and into an administrative realm.

Judge David Peeples will lead the discussion for the Subcommittee.

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**Report on Proposed Amendments to the Code of Judicial Conduct, and
Texas Supreme Court Policies on Assistance to Court Patrons
by Clerks and by Court Personnel
Submitted by the Texas Access to Justice Commission**

July 6, 2017

Purpose

Recent data from the Office of Court Administration indicates that number of pro se filers is growing in comparison to overall filings. From FY 2011 through FY 2015, the total number of family law filings decreased by 14.3% but the number of self-represented litigant (“SRL”)¹ family law case filings increased by 27.4%. During the same time frame, the total number of probate filings was up by 1.7%, yet the number of SRL probate filings increased by almost 12%. The percentage of SRL filings is also significant. Today, at least one in five family law cases is filed by a person representing themselves.

The influx of litigants representing themselves has placed a burden on the court system. Litigants do not know what to do, and judges, clerks, and court personnel are unsure of what information they can legally and ethically give. The Texas Access to Justice Commission submitted proposed amendments to the Code of Judicial Conduct,² Texas Supreme Court Policies on Assistance to Court Patrons by Clerks,³ and Texas Supreme Court Policies on Assistance to Court Patrons by Court Personnel⁴ to provide clarification and direction to the judiciary when interacting with people who are representing themselves in court proceedings.

Introduction and Background

The Supreme Court of Texas established the Texas Access to Justice Commission (“Commission”) in 2001 to serve as the statewide umbrella organization for all efforts to expand access to justice in civil legal matters for the poor.⁵ It is the role of the Commission to assess national and statewide trends on access to justice issues facing the poor and to develop initiatives that increase access and reduce barriers to the justice system. The Commission is comprised of eleven appointees of the Court, seven appointees of the State Bar of Texas, and three ex-officio public appointees.

¹ Throughout this report, the term “self-represented litigant” will be used in favor of “pro se litigant” to further the use of plain English terms.

² See Exhibit 1.

³ See Exhibit 2.

⁴ See Exhibit 3.

⁵ Supreme Court of Texas Misc. Docket 01-9065, Order Establishing the Texas Access to Justice Commission, April 26, 2001. See Exhibit 4.

Because only 10% of the legal needs in Texas are currently being met by legal aid and pro bono lawyers, the Commission has focused on increasing the ability of self-represented litigants to navigate the courts. Our court system was designed for lawyers with specialized knowledge, not self-represented litigants. It's not surprising that this lack of information about court processes and procedures severely hampers self-represented litigants from pursuing their case to completion. They do not understand the legalese pervasive in the court's lexicon. Their pleadings are routinely rejected due to insufficiency or incompleteness by clerks who do not explain how to remedy the problem when asked, even if it is simply that they need to sign their name. Their cases are left in limbo when they do not know how to serve the opposing party in a legally sufficient manner or dismissed when they fail to set the case for hearing.

Clerks and court personnel are unclear on what type of information or assistance they can provide. While they have no problem guiding a new lawyer through court procedures and processes, like service of process or how to set a hearing, they are not sure whether they are able to provide this same information to a self-represented litigant. They often err on the side of giving no information at all, which creates frustration for all involved and ultimately ends up causing the courts to operate inefficiently.

In 2010, the Commission, Texas Office of Court Administration, Texas Access to Justice Foundation, and Texas Legal Services Center attempted to address this issue by editing a manual entitled "Legal Information vs. Legal Advice: Guidelines and Instructions for Clerks and Court Personnel Who Work with Self-Represented Litigants in Texas State Courts." The 25-page manual outlines the roles and responsibilities of clerks and court personnel, states that they should not give legal *advice* but should provide legal *information*, defines "legal advice," and provides scenarios to help clerks and court personnel recognize the differences between legal information and legal advice.

To augment the written manual and provide further guidance, the Commission developed a presentation highlighting the differences between legal information and legal advice. From 2011 to 2013, this presentation was offered to clerks, court personnel, and judges in local, regional, and state-wide meetings across Texas, including at the Texas Association for Court Administration Annual Conference in October 2012.⁶

Despite the wide-spread dissemination of trainings on the differences between legal information and legal advice, clerks had problems instituting these practices in their jurisdictions. The Commission received reports that when attendees went back to their counties, they were not successful at getting decision-makers, who were not present at the training, to adopt these practices. Several times, Commission staff were told that judges prevented court personnel from providing any legal information to self-represented litigants and put pressure on clerks not to institute those policies. Many judges feel that it's best to have a bright line approach than to risk court personnel giving legal advice instead of legal information. Other judges simply do not want to address the line between legal information and legal advice for clerks and court personnel because they themselves are unclear on acceptable interactions between judges and self-represented litigants. The Texas Code of Judicial Conduct, last amended in 2002, is silent on the matter.

⁶Presentations given in Galveston: Regional District and County Clerk meeting (9-22-11), Waco: Regional District and County Clerk meeting (10-19-11), Amarillo: Regional District and County Clerk meeting (11-17-11), College Station: Clerks School (1-11-12), Austin: Shared Solutions Summit (1-11-2012), Abilene: Regional District and County Clerks meeting (3-9-12), Hondo (4-2012), Tom Green (6-12), Rockport: District and County Clerk meeting (10-10-12), Texas Association for Court Administration annual conference (10-25-12), Austin (11-14-12), Laredo (2012), Victoria (2012), and Texas Association of Domestic Relations Conference (10-2013).

Partially addressing the issue of judicial interaction with self-represented litigants, the ABA Model Code of Judicial Conduct added a comment to Rule 2.2 in 2007:⁷ “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.” Sixteen states have added a substantially similar comment to their Codes of Judicial Conduct⁸ while nineteen states and the District of Columbia revised and expanded the provision on making reasonable accommodations for self-represented litigants.⁹ Texas has not yet taken either step.

Going a step farther to clarify the relationship between a judge and an SRL, the Conference of Chief Justices and the Conference of State Court Administrators (“CCJ/CSCA”) passed a resolution on July 25, 2012, entitled “Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Represented Litigants.”¹⁰ Finding that “judges would benefit from additional guidance regarding their role in cases involving self-represented litigants,” the resolution recommends that ABA Model Rule 2.2 should specifically address self-represented litigants through the following language:

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators recommend that states consider adopting Rule 2.2 with the inclusion of the following emphasized wording:

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) 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; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators suggest states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants.

Research and Recommendations

Informal guidance through a manual and trainings on the differences between legal information and legal advice provided insufficient results in Texas for the both the judiciary and courthouse staff. In light of the Conference of Chief Justices and the Conference of State Court Administrators resolution, the Commission set out to propose changes to the Texas Code of Judicial Conduct to formalize the CCJ/CSCA’s recommendations on judicial interaction with self-represented litigants.

The Texas Code of Judicial Conduct does not follow the structure of the ABA Model Rules. However, several states have maintained substantially similar language to Texas and have incorporated provisions

⁷ See Exhibit 5.

⁸ Arizona, Connecticut, Georgia, Hawai’i, Indiana, Minnesota, Nebraska, Nevada, North Dakota, Oklahoma, Pennsylvania, Tennessee, Utah, Washington, West Virginia, and Wyoming.

⁹ Arkansas, California, Colorado, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New Jersey, New York, Ohio, and Wisconsin.

¹⁰ See Exhibit 6.

on interacting with self-represented litigants in either text or comments. Texas Canon 3B(8)¹¹ is linguistically similar to Colorado Code of Judicial Conduct Rule 2.6(A),¹² District of Columbia Code of Judicial Conduct Rule 2.6(A),¹³ Illinois Supreme Court Rules 63(A)(4),¹⁴ Kansas Code of Judicial Conduct Rule 2.6,¹⁵ Maine Code of Judicial Conduct Rule 2.6,¹⁶ Maryland Code of Judicial Conduct Rule 2.6,¹⁷ Massachusetts Code of Judicial Conduct Rule 2.2,¹⁸ Montana Code of Judicial Conduct Rule 2.6(A),¹⁹ and Wisconsin Code of Judicial Conduct SCR 60.04(hm).²⁰

The CCJ/CSCA resolution called for language about self-represented litigants to be in the text of a rule rather than following the ABA Model Code approach, where self-represented litigants are only mentioned in a comment. Following the examples set by Illinois and Wisconsin (footnotes 14 and 20 above) as well

¹¹ The relevant portion of Texas Code of Judicial Conduct Canon 3B(8) states, “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.”

¹² Colorado Code of Judicial Conduct Rule 2.6(A): 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.

¹³ District of Columbia Code of Judicial Conduct Rule 2.6(A): 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.

¹⁴ Illinois Supreme Court Rule 63(A)(4): 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 may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard.

¹⁵ Kansas Code of Judicial Conduct Rule 2.6(A): 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.

¹⁶ Maine Code of Judicial Conduct Rule 2.6(A): 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.

¹⁷ Maryland Code of Judicial Conduct Rule 2.6 (a): 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.

¹⁸ Massachusetts Code of Judicial Conduct Rule 2.6 (a): 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.

¹⁹ Montana Code of Judicial Conduct Rule 2.6(A): 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.

²⁰ Wisconsin Code of Judicial Conduct Rule 60.04(hm): A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to the law. 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.

as Louisiana,²¹ Maine,²² Missouri,²³ New Hampshire,²⁴ and New York,²⁵ the Commission recommends explicitly stating that judges are allowed to make reasonable accommodations to all litigants, including self-represented litigants. Current Canon 3B(8) states, “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.” Following the recommendation of the CCJ/CSCA, the Commission proposes amending the statement by including this italicized language:

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 *and may make reasonable accommodations to afford litigants, including self-represented litigants, that right.*

Further, acting on the CCJ/CSCA suggestion that the comments reflect specific actions judges may take, the Commission primarily referred to Rules promulgated in Colorado, District of Columbia, Iowa, Louisiana, Maine, Massachusetts, Montana, Ohio, and Wisconsin as well as case law to delineate permissible actions.²⁶ Actions outlined in the proposed Comment are intended to be illustrative and permissive, not exhaustive or required. As such, the Commission proposes the following Comment to be added to Canon 3.B(8):

When pro se litigants appear in court, they should comply with the rules and orders of the court and should be held to the same standards as litigants with counsel. *See Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). It is not a violation of a judge’s duty to remain impartial for a judge to make reasonable accommodations to ensure all litigants the opportunity to have their matters fairly heard. By way of illustration, a judge may (either directly or through court personnel subject to the judge’s discretion and control): (1) construe pleadings to facilitate consideration of the issues raised;²⁷ (2) provide information about the proceeding and evidentiary and foundational

²¹ Louisiana Code of Judicial Conduct Canon 3A(4): A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person.

²² Maine Code of Judicial Conduct Rule 2.6(C). A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.

²³ Missouri Code of Judicial Conduct Rule 2-2.2: (A) A judge shall uphold and apply the law, and shall perform all duties of judicial office promptly, efficiently, fairly and impartially. (B) A judge may make reasonable efforts, consistent with the law and court rules, to facilitate all litigants, including self-represented litigants, being fairly heard.

²⁴ New Hampshire Code of Judicial Conduct Rule 2.2: (A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially. (B) 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.

²⁵ New York Code of Judicial Conduct Rule 100.3(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.

²⁶ See Exhibit 7 for text and comments of referred Codes. See Exhibit 8 for all states and the District of Columbia’s Judicial Codes, Rules, and Canons referring to self-represented litigants.

²⁷ Colorado, Massachusetts, Montana, and Wisconsin

requirements;²⁸ (3) attempt to make legal concepts understandable;²⁹ (4) ask neutral questions to elicit or clarify information;³⁰ (5) modify the traditional manner of taking evidence;³¹ (6) permit narrative testimony;³² (7) allow litigants to adopt their pleadings as their sworn testimony;³³ (8) refrain from using legal jargon by explaining legal concepts in everyday language;³⁴ (9) explain the basis for a ruling;³⁵ (10) make referrals to any resources, such as legal services or interpretation and translation services, available to assist the litigant in the preparation of the case;³⁶ (11) invite or appoint an amicus curiae to present a particular issue;³⁷ and/or (12) inform litigants what will be happening next in the case and what is expected of them.³⁸

Before submitting the recommendation to the supreme court, the Commission presented its proposal to groups of judges attending continuing education conferences. Judges confirmed that the number of SRLs at courthouses is increasing and that more guidance on permissible and effective strategies to assist them through the legal process is needed. The feedback on the proposed changes to the Code was generally positive.

Supreme Court Policies

The Commission's considerable efforts to address interaction between clerks and court personnel through informal guidelines and training did not lead to substantial change. Augmenting amendments to the Code of Judicial Conduct with Supreme Court-sanctioned policies for clerks and court personnel as to what services may be offered to all court patrons, not just self-represented parties, will help provide comprehensive guidelines for all people who access the courts. The Commission is proposing two policies that differ only in audience: the Texas Supreme Court Policies on Assistance to Court Patrons by Court Personnel is directed towards to court personnel subject to a judge or judicial administrator's direction and control, such as court staff, bailiffs, law librarians and staff, and court volunteers, while the Texas Supreme Court Policies on Assistance to Court Patrons by Clerks focuses exclusively on court clerks. Based on feedback from a few clerks and because many clerks are elected officials, we felt that that clerks would respond more positively to a policy directed solely to them.

While drafting these proposals, the Commission reviewed policies governing interaction between court patrons and court that exist in state Codes of Ethics promulgated by judicial councils (California), by circuit court administrative order (Florida), for municipal court clerks (Georgia), through proposed Supreme

²⁸ Colorado, District of Columbia, Louisiana, Iowa, Massachusetts, Montana, Ohio, and Wisconsin. *See also* Maine (explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed).

²⁹ Colorado, Massachusetts, and Montana

³⁰ District of Columbia, Louisiana, Massachusetts, Montana, and Wisconsin

³¹ Colorado, District of Columbia, Iowa, Massachusetts, Montana, Ohio, and Wisconsin

³² Wisconsin

³³ Wisconsin

³⁴ District of Columbia, Iowa, Louisiana, Montana, Ohio, and Wisconsin

³⁵ Colorado, District of Columbia, Iowa, Louisiana, Massachusetts, Montana, and Ohio

³⁶ Colorado, District of Columbia, Iowa, Louisiana, Massachusetts, Montana, Ohio, and Wisconsin. *See also* ME (inform unrepresented persons of free legal aid and similar assistance that is available in the courthouse or otherwise).

³⁷ *See Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000).

³⁸ Wisconsin

Court rule amendments (Wisconsin), in model codes of conduct for court/judicial employees (Michigan, Nevada, North Dakota, Ohio), and in Codes of Judicial Conduct (Illinois, Maine).

The Illinois Supreme Court Policy on Assistance to Court Patrons by Circuit Clerks, Court Staff, Law Librarians, and Court Volunteers³⁹ served as the template for our proposed policies. We maintained many of the permitted and prohibited services but augmented it with more precise definitions and eliminated redundancies.

The crux of both the proposed Policies on Assistance to Court Patrons is the definition of “legal information” found in Section (b)(3):

"Legal information" means neutral information about the law and the legal process. Legal information includes information regarding court procedures and records, forms, pleadings, practices, due dates and legal authority provided in statutes, cases, or rules. Legal information is different from legal advice, which involves giving guidance regarding an individual’s legal rights and obligations in light of his or her particular facts and circumstances.

This definition briefly outlines the permissible information a clerk or other court personnel can convey to any court patron. It highlights that legal information is neutral and does not require analysis of a patron’s facts and circumstances. For concrete examples of the definition, section (c) of the policy delineates sixteen permitted services that are examples of providing legal information. These services are intended to be illustrative and permissive rather than requirements. To provide further clarity, section (d) lists nine prohibited services. These services are examples of legal advice that clerks and court personnel should not give under any circumstances.

During the course of giving presentations throughout the state, it became clear that there were varying beliefs on whether such simple things as telling people where to file their pleadings was information or advice, let alone whether assisting someone in finding the appropriate pleading was information or advice. These are issues that are constantly discussed among court staff, law librarians, and clerks. Aside from basic things, such as the provision of signage and giving directions within the courthouse building, there is no true consensus on any one issue. Knowing that specificity would cut through the debate and uncertainty, the Commission decided it would be best to provide a longer list of specific examples of what constituted legal information versus legal advice instead of a shorter list of general examples.

Conclusion

The number of self-represented litigants in Texas courts will continue to rise. All members of the judiciary – judges, clerks, and court personnel – need direction from the Texas Supreme Court on permissible interactions with all litigants, but especially those who are self-represented. Because years of informal guidance and trainings did not give sufficient clarity, a Texas Supreme Court-sanctioned, comprehensive roadmap outlining permissible ways for judges, clerks, and court personnel to work with all litigants, included those self-represented, would provide much-needed guidance in this critical area.

³⁹ See Exhibit 9

**PROPOSED AMENDMENT TO
THE CODE OF JUDICIAL CONDUCT**

Current Canon 3.B(8)

(8) 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 other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;
- (c) obtaining 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 the substance of the advice, and affords the parties reasonable opportunity to respond;
- (d) consulting with other judges or with court personnel;
- (e) considering an ex parte communication expressly authorized by law.

Proposed Amendments to Canon 3.B(8)

(8) 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 and may make reasonable accommodations to afford litigants, including self-represented litigants, that right. A judge shall not initiate, permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;

(b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

(c) obtaining 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 the substance of the advice, and affords the parties reasonable opportunity to respond;

(d) consulting with other judges or with court personnel;

(e) considering an ex parte communication expressly authorized by law.

COMMENT

When pro se litigants appear in court, they should comply with the rules and orders of the court and should be held to the same standards as litigants with counsel. See *Wheeler v. Green*, 157 S.W.3d 439, 444 (Tex. 2005). It is not a violation of a judge's duty to remain impartial for a judge to make reasonable accommodations to ensure all litigants the opportunity to have their matters fairly heard. By way of illustration, a judge may (either directly or through court personnel subject to the judge's discretion and control): (1) construe pleadings to facilitate consideration of the issues raised;¹ (2) provide information about the proceeding and evidentiary and foundational requirements;² (3) attempt to make legal concepts understandable;³ (4) ask neutral questions to elicit or clarify information;⁴ (5) modify the traditional manner of taking evidence;⁵ (6) permit narrative testimony;⁶ (7) allow litigants to adopt their pleadings as their sworn testimony;⁷ (8) refrain from using legal jargon by explaining legal concepts in everyday language;⁸ (9) explain the basis for a ruling;⁹ (10) make referrals to any resources, such as legal services or interpretation and translation services, available to assist the litigant in the preparation of the case;¹⁰ (11) invite or appoint an amicus curiae to present a particular issue;¹¹ and/or (12) inform litigants what will be happening next in the case and what is expected of them.¹²

¹ CO, MA, MT, WI

² LA, OH, DC, CO, IA, MA, MT, WI. *See also* ME (explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed).

³ CO, MA, MT

⁴ LA, DC, MA, MT, WI

⁵ OH, DC, CO, IA, MA, MT, WI

⁶ WI

⁷ WI

⁸ LA, OH, DC, IA, MT, WI

⁹ LA, OH, DC, CO, IA, MA, MT

¹⁰ LA, OH, DC, CO, IA, MA, MT, WI. *See also* ME (inform unrepresented persons of free legal aid and similar assistance that is available in the courthouse or otherwise).

¹¹ *See Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000).

¹² WI

**PROPOSED TEXAS SUPREME COURT POLICY
ON ASSISTANCE TO COURT PATRONS
BY DISTRICT AND COUNTY CLERKS AND THEIR STAFF**

(a) Purpose and Scope.

The purpose of this policy is to provide guidance to district and county clerks and personnel subject to their direction and control as to what services may and may not be offered to assist court patrons to achieve fair and efficient resolution of their cases.

Services permitted under this policy should be provided in the same manner to all court patrons. No court patron should be denied these services on the basis of being a self-represented litigant.

(b) Definitions.

- (1) "Court patron" means any person, such as an attorney, self-represented litigant, or member of the public, who is accessing the judicial system.
- (2) "Self-represented litigant" means any individual accessing the judicial system who is not represented by an attorney.
- (3) "Legal information" means neutral information about the law and the legal process. Legal information includes information regarding court procedures and records, forms, pleadings, practices, due dates and legal authority provided in statutes, cases, or rules. Legal information is different from legal advice, which involves giving guidance regarding an individual's legal rights and obligations in light of his or her particular facts and circumstances.

(c) Permitted Services. Clerks and their staff may provide legal information to court patrons, including assisting them as follows:

- (1) Providing information about court rules, court terminology and court procedures, including, but not limited to, requirements for service, filing, scheduling hearings, and compliance with local procedure;
- (2) Informing court patrons of legal resources and referrals if available, including, but not limited to:
 - a. Pro bono legal services;
 - b. Low-cost legal services;
 - c. Limited scope legal services;
 - d. Legal aid programs and hotlines;
 - e. Law and public libraries;
 - f. Non-profit alternative dispute resolution services;

- g. Lawyer referral services;
 - h. Internet-based resources;
 - i. Court-sponsored or court-affiliated educational classes, including parenting education and traffic safety classes and alternative dispute resolution services;
 - j. Units or departments of government; or
 - k. Domestic violence resources.
- (3) Encouraging self-represented litigants to obtain legal advice from a lawyer;
 - (4) Providing information about security protocols at the courthouse and directions around the courthouse, including, but not limited to, photocopier and telephone locations, children's waiting room locations, and other courthouse offices;
 - (5) Offering educational classes and informational materials;
 - (6) Assisting court patrons in identifying and providing forms and related instructions based on the court patron's description of what he or she wants to request from the court. Clerks and their staff must provide forms for the waiver of filing fees or other forms as required by law;
 - (7) Explaining the nature of the information required to fill out the forms;
 - (8) Informing court patrons if no approved form exists to accomplish the request and directing the court patron to other legal resources;
 - (9) Recording on forms verbatim information provided by the self-represented litigant if that person is unable to complete the forms due to language, disability or literacy barriers;
 - (10) Reviewing documents and forms for completeness, such as checking for signature, notarization, correct county name, and case number, and if incomplete, stating why the document or form is incomplete;
 - (11) Providing assistance to court patrons pursuing self-guided research;
 - (12) Providing docket information, including but not limited to:
 - a. Stating whether an order has been issued;
 - b. Explaining how to get a copy if one was not provided;
 - c. Reading the order to the individual if requested; or
 - d. Providing instructions about how to access such information.
 - (13) Informing court patrons of the process for requesting a foreign language or sign language interpreter;
 - (14) Instructing a court patron on how to obtain access to a case file that has not been restricted by statute, rule or order, and provide access to such a file;
 - (15) Providing the same services and information to all parties to an action, as requested; or
 - (16) Providing other services consistent with the intent of this policy.

(d) Prohibited Services. Clerks and their staff shall not:

- (1) Recommend whether a case should be brought to court or comment on the merits of a pending case;
- (2) Give an opinion about what will happen if a case is brought to court;
- (3) Represent court patrons in court;
- (4) Provide legal analysis, strategy or advice to a court patron;
- (5) Disclose information in violation of the law;
- (6) Deny a self-represented litigant access to the court, the court docket, or any services provided to other court patrons;
- (7) Tell a court patron anything he or she would not repeat in the presence of any other party involved in the case;
- (8) Refer a court patron to a specific lawyer or law firm, except for as provided by section (c)(2); or
- (9) Otherwise engage in the unauthorized practice of law.

(e) Unauthorized Practice of Law and Privilege. Services provided in accordance with section (c) of this policy do not constitute the unauthorized practice of law and do not create an attorney-client relationship. Information exchanged in accordance with section (c) of this policy is neither confidential nor privileged, except as otherwise protected by law.

**PROPOSED TEXAS SUPREME COURT POLICY
ON ASSISTANCE TO COURT PATRONS
BY COURT STAFF, LAW LIBRARIANS, AND COURT VOLUNTEERS**

(a) Purpose and Scope.

The purpose of this policy is to provide guidance to court personnel subject to a judge or judicial administrator's direction and control, such as court staff, bailiffs, law librarians and staff, and court volunteers, as to what services may and may not be offered to assist court patrons to achieve fair and efficient resolution of their cases.

Services permitted under this policy should be provided in the same manner to all court patrons. No court patron should be denied these services on the basis of being a self-represented litigant.

(b) Definitions.

- (1) "Court patron" means any person, such as an attorney, self-represented litigant, or member of the public, who is accessing the judicial system.
- (2) "Self-represented litigant" means any individual accessing the judicial system who is not represented by an attorney.
- (3) "Legal information" means neutral information about the law and the legal process. Legal information includes information regarding court procedures and records, forms, pleadings, practices, due dates and legal authority provided in statutes, cases, or rules. Legal information is different from legal advice, which involves giving guidance regarding an individual's legal rights and obligations in light of his or her particular facts and circumstances.

(c) Permitted Services. Court personnel, acting in a non-lawyer capacity on behalf of the court, may provide legal information to court patrons, including assisting them as follows:

- (1) Providing information about court rules, court terminology and court procedures, including, but not limited to, requirements for service, filing, scheduling hearings, and compliance with local procedure;
- (2) Informing court patrons of legal resources and referrals if available, including, but not limited to:
 - a. Pro bono legal services;
 - b. Low-cost legal services;
 - c. Limited scope legal services;
 - d. Legal aid programs and hotlines;

- e. Law and public libraries;
 - f. Non-profit alternative dispute resolution services;
 - g. Lawyer referral services;
 - h. Internet-based resources;
 - i. Court-sponsored or court-affiliated educational classes, including parenting education and traffic safety classes and alternative dispute resolution services;
 - j. Units or departments of government; or
 - k. Domestic violence resources.
- (3) Encouraging self-represented litigants to obtain legal advice from a lawyer;
 - (4) Providing information about security protocols at the courthouse and directions around the courthouse, including, but not limited to, photocopier and telephone locations, children's waiting room locations, and other courthouse offices;
 - (5) Offering educational classes and informational materials;
 - (6) Assisting court patrons in identifying and providing forms and related instructions based on the court patron's description of what he or she wants to request from the court. Court personnel must provide forms for the waiver of filing fees or other forms as required by law;
 - (7) Explaining the nature of the information required to fill out the forms;
 - (8) Informing court patrons if no approved form exists to accomplish the request and directing the court patron to other legal resources;
 - (9) Recording on forms verbatim information provided by the self-represented litigant if that person is unable to complete the forms due to language, disability or literacy barriers;
 - (10) Reviewing documents and forms for completeness, such as checking for signature, notarization, correct county name, and case number, and if incomplete, stating why the document or form is incomplete;
 - (11) Providing assistance to court patrons pursuing self-guided research;
 - (12) Providing docket information, including but not limited to:
 - a. Stating whether an order has been issued;
 - b. Explaining how to get a copy if one was not provided;
 - c. Reading the order to the individual if requested; or
 - d. Providing instructions about how to access such information.
 - (13) Informing court patrons of the process for requesting a foreign language or sign language interpreter;
 - (14) Instructing a court patron on how to obtain access to a case file that has not been restricted by statute, rule or order, and provide access to such a file;
 - (15) Providing the same services and information to all parties to an action, as requested; or
 - (16) Providing other services consistent with the intent of this policy.

(d) Prohibited Services. Court personnel, acting in a non-lawyer capacity on behalf of the court, shall not:

- (1) Recommend whether a case should be brought to court or comment on the merits of a pending case;
- (2) Give an opinion about what will happen if a case is brought to court;
- (3) Represent court patrons in court;
- (4) Provide legal analysis, strategy or advice to a court patron;
- (5) Disclose information in violation of the law;
- (6) Deny a self-represented litigant access to the court, the court docket, or any services provided to other court patrons;
- (7) Tell a court patron anything he or she would not repeat in the presence of any other party involved in the case;
- (8) Refer a court patron to a specific lawyer or law firm, except as provided by section (c)(2); or
- (9) Otherwise engage in the unauthorized practice of law.

(e) Unauthorized Practice of Law and Privilege. Services provided in accordance with section (c) of this policy do not constitute the unauthorized practice of law and do not create an attorney-client relationship. Information exchanged in accordance with section (c) of this policy is neither confidential nor privileged, except as otherwise protected by law.

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 01- 9065

ORDER ESTABLISHING TEXAS ACCESS TO JUSTICE COMMISSION

1. In 1999, a statewide planning process for legal services to the poor was initiated in Texas. The Texas planning group consisted of a broad range of individuals representing this Court, the State Bar of Texas, the Texas Equal Access to Justice Foundation, the Texas Bar Foundation, and the network of legal-service providers throughout the state.

2. During the statewide planning process, the following problems were identified:

- many gaps exist in developing a comprehensive, integrated statewide civil legal-services delivery system in Texas;
- many poor people in Texas are underrepresented, in that they receive limited advice from a legal-services provider when they would in fact be better served by full representation on a civil legal matter;
- inadequate funding and well-intentioned but uncoordinated efforts stand in the way of a fully integrated civil legal-services delivery system;
- achieving a committed and active justice community in Texas is essential to the effective delivery of civil legal services;
- while many organizations throughout the state share a commitment to improving access to justice, no single group is widely accepted as having ultimate responsibility for progress on the issues; and
- leadership that is accepted by the various stakeholder organizations committed to achieving full access, and empowered to take action, is essential to realizing equal justice for all in Texas.

3. At the conclusion of the statewide planning process, the planning group adopted an action plan with a broad range of goals and strategies. The cornerstone of the recommendations was that

an Access to Justice Commission be established by this Court to serve as the umbrella organization for all efforts to expand access to justice in civil matters in Texas. The organization would serve as a coordinator to assist all participants in developing strategic alliances to effectively move ideas to action. The Commission would report semi-annually on its progress to both the Court and the State Bar of Texas. The Court, having reviewed the report of the planning group and having received the endorsement of the Board of Directors of the State Bar of Texas, **HEREBY ORDERS:**

1. The Texas Access to Justice Commission is created to develop and implement policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Texas residents.

2. The Texas Access to Justice Commission will:

- identify and assess current and future needs for access to justice in civil matters by low-income Texans;
- develop and publish a strategic plan for statewide delivery of civil legal services to low-income Texans;
- foster the development of a statewide integrated civil legal-services delivery system;
- work to increase resources and funding for access to justice in civil matters and to ensure that the resources and funding are applied to the areas of greatest need;
- work to maximize the wise and efficient use of available resources, including the development of local, regional, and statewide coordination systems and systems that encourage the coordination or sharing of resources or funding;
- develop and implement initiatives designed to expand civil access to justice;
- work to reduce barriers to the justice system by addressing existing and proposed court rules, procedures, and policies that negatively affect access to justice for low-income Texans; and
- monitor the effectiveness of the statewide system and services provided and periodically evaluate the progress made by the Commission in fulfilling the civil legal needs of low-income Texans.

3. The Texas Access to Justice Commission consists of fifteen members appointed by this Court and by the State Bar of Texas. A member of the Commission serves a three-year term. The terms of the members are staggered. A member may not be appointed to serve more than two successive full three-year terms. A member who has served two successive full terms is not eligible for reappointment until the third anniversary of the date that the member's last full term on the Commission expired.

4. This Court will appoint eight members to the Texas Access to Justice Commission as follows:

- a justice of the Supreme Court of Texas;
- a judge or justice from a county with a population of 650,000 or more;
- a judge or justice from a county with a population of less than 650,000;
- a member of the Texas Equal Access to Justice Foundation Board of Directors;
- two representatives of a state or federally funded legal-services program; and
- two at-large members who have demonstrated a commitment to and familiarity with access-to-justice issues in Texas.

5. The State Bar of Texas will appoint seven members to the Texas Access to Justice Commission as follows:

- two members of the State Bar of Texas Board of Directors;
- an attorney member of the State Bar of Texas;
- a member of the Texas Bar Foundation Board of Directors;
- two representatives of a state or federally funded legal-services program; and
- an at-large member who has demonstrated a commitment to and familiarity with access-to-justice issues in Texas.

6. This Court and the State Bar of Texas will coordinate appointments to the Texas Access to Justice Commission to assure that:

- at least three members of the Commission are nonattorney public representatives;
- members of the Commission appointed to represent a state or federally funded legal-services program reflect a diversity among Legal Service Corporation funded programs and programs funded from other sources, staff and pro bono based programs, and general civil legal-services programs and specific service- or client-based programs; and
- the members of the Commission reflect the diverse ethnic, gender, legal, and geographic communities located in Texas.

7. This Court will designate the presiding officer of the Texas Access to Justice Commission, after consultation with the President of the State Bar of Texas.

8. The Governor is invited to designate a person to serve as an ex-officio member of the Commission. The Speaker of the House and the Lieutenant Governor each are invited to designate one member of that presiding officer's chamber to serve as an ex-officio member of the Texas Access to Justice Commission. A member appointed by the Governor, Speaker, or Lieutenant Governor serves at the pleasure of the appointing officer.

9. In making initial appointments to the Texas Access to Justice Commission, this Court will designate three members as having a one-year term, three members as having a two-year term, and two members as having a full three-year term.

10. In making initial appointments to the Texas Access to Justice Commission, the State Bar of Texas will designate two members as having a one-year term, two members as having a two-year term, and three members as having a full three-year term.

11. The Texas Access to Justice Commission will submit any strategic plan for statewide delivery of legal services to low-income Texans to this Court and the Executive Committee of the State Bar Board for approval.

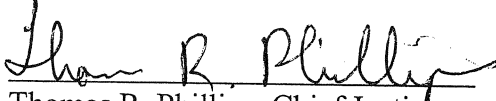
12. The State Bar of Texas has agreed to provide staff and financial support for the Texas Access to Justice Commission. Proposed budgets of the Texas Access to Justice Commission will be subject to the State Bar's annual budgetary process for presentation to the Board of Directors and ultimate approval by this Court. Supervision of the budget of the Commission is the responsibility of the State Bar of Texas. The Commission and staff supporting the Commission will comply with the fiscal policies of the State Bar of Texas.


13. The Texas Access to Justice Commission is subject to sections 81.033 and 81.034 of the Texas Government Code, and is also subject to other relevant provisions of Chapter 81 of the Texas Government Code.

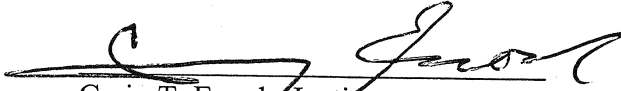
14. The Texas Access to Justice Commission may adopt rules as necessary for the performance of the Commission's duties.

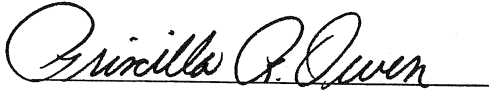
15. The Texas Access to Justice Commission will file, at least every six months, a status report on the progress of the Commission's duties. The Commission will send a copy of the report to both this Court and the State Bar of Texas. The initial progress report will be filed not later than December 1, 2001. The Commission will also provide an oral progress report at each State Bar board meeting.


BY THE COURT, IN CHAMBERS, this 26th day of April, 2001.



Thomas R. Phillips, Chief Justice

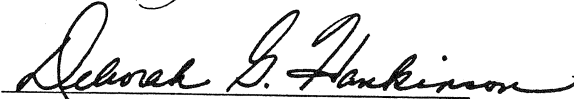

Nathan L. Hecht, Justice

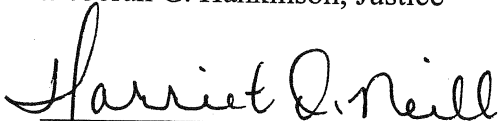

Craig T. Enoch, Justice

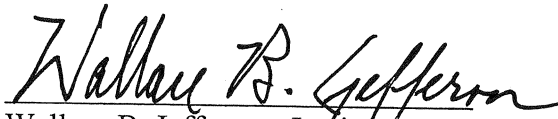

Priscilla R. Owen, Justice


James A. Baker, Justice


Greg Abbott, Justice


Deborah G. Hankinson, Justice


Harriet O'Neill, Justice


Wallace B. Jefferson, Justice

1

2 **RULE 2.2**

3 ***Impartiality and Fairness***

4

5 **A judge shall uphold and apply the law,* and shall perform all duties of judicial**
6 **office fairly and impartially.***

7

8 **COMMENT**

9

10 [1] To ensure impartiality and fairness to all parties, a judge must be objective and
11 open-minded.

12

13 [2] Although each judge comes to the bench with a unique background and personal
14 philosophy, a judge must interpret and apply the law without regard to whether the judge
15 approves or disapproves of the law in question.

16

17 [3] When applying and interpreting the law, a judge sometimes may make good-faith
18 errors of fact or law. Errors of this kind do not violate this Rule.

19

20 [4] It is not a violation of this Rule for a judge to make reasonable accommodations
21 to ensure pro se litigants the opportunity to have their matters fairly heard.

**Resolution 2
In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to
Reference Cases Involving Self-Representing Litigants**

WHEREAS, the Conference of Chief Justices and the Conference of State Court Administrators have long recognized the importance of access to justice for all; and

WHEREAS, access to courts extends both to lawyer-represented and self-represented litigants; and

WHEREAS, judges would benefit from additional guidance regarding their role in cases involving self-represented litigants; and

WHEREAS, Rule 2.2 of the 2007 ABA Model Code of Judicial Conduct on impartiality and fairness addresses a judge's role in cases involving self-represented litigants only in the "comments" section; and

WHEREAS, the Conferences agree that Rule 2.2 should specifically address cases involving self-represented litigants;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators recommend that states consider adopting Rule 2.2 with the inclusion of the following emphasized wording:

(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

(B) 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; and

BE IT FURTHER RESOLVED that the Conference of Chief Justices and the Conference of State Court Administrators suggest states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants.

Adopted as proposed by the Access, Fairness and Public Trust Committee at the 2012 Annual Meeting on July 25, 2012.

**Colorado
Rule 2.6(A)**

Rule

Rule 2.6(A): Ensuring the Right to Be Heard

(A) 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.

Comment

Rule 2.6: [2] The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

**District of Columbia
Rules 2.2 and 2.6**

Rules

Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.6(A): 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.

Comments

Rule 2.2 Comment [4]: It is not a violation of this Rule for a judge to make reasonable accommodations to ensure litigants who do not have the assistance of counsel the opportunity to have their matters fairly heard. See Comment [1A] to Rule 2.6, which describes the judge's affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard.

Rule 2.6(A) Comment: [1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. [1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. Pursuant to Rule 2.2, the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. In some circumstances, particular accommodations for self-represented litigants may be required by decisional or other law. Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.

Iowa
Rule 51:2.2

Rule

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Comment

[4] It is not a violation of this rule for a judge to make reasonable accommodations to ensure 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 in the preparation of the case.

Louisiana
Canon 3A(4)

Rule

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person. "Steps judges may consider in facilitating the right of self-represented litigants to be heard, and which (they might find) are consistent with these principles include, but are not limited to:

- (1) making referrals to any resources available to assist the litigant in preparation of the case;
- (2) providing brief information about the proceeding and evidentiary and foundational requirements;
- (3) asking neutral questions to elicit or clarify information;
- (4) attempting to make legal concepts understandable by minimizing use of legal jargon; and
- (5) explaining the basis for a ruling."

Maine
Rules 2.6 (A) and (C)

Rule

A. 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.

C. A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.

**Massachusetts
Rule 2.2**

Rules

Rule 2.2: A judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly.

Rule 2.6 (a): 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.

Comments

Rule 2.2 Comment [4]: It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

Rule 2.6(a) Comment [1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.* The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or other law.* In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard. "

**Montana
Rules 2.2, 2.5(A), and 2.6(A)**

Rules

Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.5(A): A judge shall perform judicial and administrative duties competently and diligently.

Rule 2.6(A): 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.

Comments

Rule 2.2 Comment [5]: A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. Steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to: liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources

available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

Rule 2.5 Comment [4]: ...a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.

Rule 2.6[1]: The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. Steps judges may consider in facilitating the right to be heard include, but are not limited to: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) asking neutral questions to elicit or clarify information; (3) modifying the traditional order of taking evidence; (4) refraining from using legal jargon; (5) explaining the basis for a ruling; and (6) making referrals to any resources available to assist the litigant in the preparation of the case.

Ohio Rule 2.2 and 2.6(A)

Rules

Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.6(A): 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.

Comments

Rule 2.2 Comment [4]: To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law.

Rule 2.6(A) Comment [1A]: The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

**Wisconsin
Rule 60.04(hm)**

Rule

A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to the law. 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.

Comment

A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate consideration of the issues raised. 2. Provide information or explanation about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.

State	Rule/Canon Number	Text	Comment
Model Rule	2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.
Alabama	Canon 3(A)(4)	A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte communications concerning a pending or impending proceeding.	
Alaska	Canon 3(B)(7)	A judge shall accord to every person the right to be heard according to law.	
Arizona	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[4] It is not a violation of this rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.
Arkansas	Rule 2.2(B) ¹	A judge may make reasonable accommodations, consistent with the law and court rules, to facilitate the ability of all litigants to be fairly heard.	[4] 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 heard. Examples of accommodations that may be made include but are not limited to (1) making referrals to any resources available to assist the litigant in the preparation of the case; (2) liberally construing pleadings to facilitate consideration of the issues raised; (3) providing general information about proceeding and foundational requirements; (4) attempting to make legal concepts understandable by using plain language whenever possible; (5) asking neutral questions to elicit or clarify information; (5) modifying the traditional order of taking evidence; and (6) explaining the basis for a ruling.

State	Rule/Canon Number	Text	Comment
California	Canon 3B(8)	A judge shall dispose of all judicial matters fairly, promptly, and efficiently. A judge shall manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.	The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of the matters fairly and with patience. For example, when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard.
Colorado	Rule 2.6(A)	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.	[2] The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.
Connecticut	Rule 2.2	A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.	(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.
Delaware	Rule 2.2 and 2.6(A)	Rule 2.2: A judge should be faithful to the law and maintain professional competence in it. Rule 2.6(A): A judge should accord to every person who is legally interested in a proceeding, or to the person's lawyer, full right to be heard according to law.	

State	Rule/Canon Number	Text	Comment
District of Columbia	Rule 2.2 and 2.6	<p>Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.</p> <p>Rule 2.6(A): 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.</p>	<p>Rule 2.2 Comment [4]: It is not a violation of this Rule for a judge to make reasonable accommodations to ensure litigants who do not have the assistance of counsel the opportunity to have their matters fairly heard.</p> <p>Rule 2.6(A) Comment [1]: The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. [1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. Pursuant to Rule 2.2, the judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person; however, in the interest of ensuring fairness and access to justice, judges should make reasonable accommodations that help litigants who are not represented by counsel to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law. In some circumstances, particular accommodations for self-represented litigants may be required by decisional or other law. Steps judges may consider in facilitating the right to be heard include, but are not limited to, (1) providing brief information about the proceeding and evidentiary and foundational requirements, (2) asking neutral questions to elicit or clarify information, (3) modifying the traditional order of taking evidence, (4) refraining from using legal jargon, (5) explaining the basis for a ruling, and (6) making referrals to any resources available to assist the litigant in the preparation of the case.</p>
Florida	Canon 3B(7)	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.	

State	Rule/Canon Number	Text	Comment
Georgia	Rule 2.8	(A) Judges shall require order and decorum in proceedings over which they preside. (B) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and shall require similar conduct of all persons subject to their direction and control. (C) Judges 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.	[2] 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.
Hawaii	Rule 2.2	A judge shall uphold and apply the law and shall perform all the duties of judicial office fairly and impartially.	[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.
Idaho	Rule 2.2	A judge shall uphold and apply the law and shall perform all the duties of judicial office fairly and impartially.	[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. A judge's ability to make reasonable accommodations for self-represented litigants does not oblige a judge to overlook a self-represented litigant's violation of a clear order, to repeatedly excuse a self-represented litigant's failure to comply with deadlines, or to allow a self-represented litigant to use the process to harass the other side.
Illinois	Canon 3(A)(4) - (Rule 63(A)(4)) ²	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 may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of self-represented litigants to be fairly heard.	
Indiana	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.

State	Rule/Canon Number	Text	Comment
Iowa	Rule 51:2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[4] It is not a violation of this rule for a judge to make reasonable accommodations to ensure 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 in the preparation of the case.
Kansas	Rules 2.2 and 2.6(A) (Rule 601B)	<p>Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.</p> <p>Rule 2.6(A): 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.</p>	<p>Rule 2.2 Comment: [4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. On the other hand, judges should resist unreasonable demands of assistance that might give an unrepresented party an advantage. If an accommodation is afforded a self-represented litigant, the accommodation shall not relieve the self-represented litigant from following the same rules of procedure and evidence that are applicable to a litigant represented by an attorney.</p> <p>Rule 2.6 Comment: [2] Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to ensure a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an advantage. If the judge chooses to make a reasonable accommodation, such accommodation shall not relieve the self-represented litigant from following the same rules of procedure and evidence that are applicable to a litigant represented by an attorney.</p>
Kentucky	Canon 3(B)(7)	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.	

State	Rule/Canon Number	Text	Comment
Louisiana	Canon 3A(4) ³	A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, and shall not permit staff, court officials or others subject to the judge's direction and control to do so. A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to the reasonable person.	Steps judges may consider in facilitating the right of self-represented litigants to be heard, and which (they might find) are consistent with these principles include, but are not limited to: (1) making referrals to any resources available to assist the litigant in preparation of the case; (2) providing brief information about the proceeding and evidentiary and foundational requirements; (3) asking neutral questions to elicit or clarify information; (4) attempting to make legal concepts understandable by minimizing use of legal jargon; and (5) explaining the basis for a ruling.
Maine	Rule 2.6 (A) and (C) ⁴	<p>A. 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.</p> <p>C. A judge may take affirmative steps, consistent with the law, as the judge deems appropriate to enable an unrepresented litigant to be heard. A judge may explain the requirements of applicable rules and statutes so that a person appearing before the judge understands the process to be employed. A judge may also inform unrepresented individuals of free or reduced cost legal or other assistance that is available in the courthouse or elsewhere.</p>	

State	Rule/Canon Number	Text	Comment
Maryland	Rule 2.2 and 2.6 ⁵	<p>Rule 2.2: A judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly.</p> <p>Rule 2.6 (a): 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.</p>	<p>Rule 2.2 Comment [4]: It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.</p> <p>Rule 2.6(a) Comment [2]: Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.</p>

State	Rule/Canon Number	Text	Comment
Massachusetts	Rule 2.2 ⁶	<p>Rule 2.2: A judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly.</p> <p>Rule 2.6 (a): 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.</p>	<p>Rule 2.2 Comment [4]: It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.</p> <p>Rule 2.6(a) Comment[1A] The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.* The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or other law.* In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard.</p>
Michigan	Canon 3	A Judge Should Perform the Duties of Office Impartially and Diligently	
Minnesota	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.

State	Rule/Canon Number	Text	Comment
Mississippi	Canon 3.7	A judge shall accord to all who are legally interested in a proceeding, or their lawyers, the right to be heard according to law.	
Missouri	Rule 2-2.2 ⁷	(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office promptly, efficiently, fairly and impartially. (B) A judge may make reasonable efforts, consistent with the law and court rules, to facilitate all litigants, including self-represented litigants, being fairly heard.	[4] A judge may make reasonable accommodations to afford litigants the opportunity to have their matters fairly heard.

State	Rule/Canon Number	Text	Comment
Montana	Rules 2.2, 2.5(A), 2.6(A) ⁸	<p>Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.</p> <p>Rule 2.5(A): A judge shall perform judicial and administrative duties competently and diligently.</p> <p>Rule 2.6(A): 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.</p>	<p>Rule 2.2 Comment [5]: A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. Steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to: liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.</p> <p>Rule 2.5 Comment [4]: ...a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.</p> <p>Rule 2.6[1]: The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. Steps judges may consider in facilitating the right to be heard include, but are not limited to: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) asking neutral questions to elicit or clarify information; (3) modifying the traditional order of taking evidence; (4) refraining from using legal jargon; (5) explaining the basis for a ruling; and (6) making referrals to any resources available to assist the litigant in the preparation of the case.</p>
Nebraska	§ 5-302.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.
Nevada	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

State	Rule/Canon Number	Text	Comment
New Hampshire	Rule 2.2 ⁹	(A) A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially. (B) 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.	[4] 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 heard.
New Jersey	Canon 3.7 ¹⁰	A judge shall accord to every person who is legally interested in a proceeding, or to that person's lawyer, the right to be heard according to law or court rule.	A judge may make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.
New Mexico	Rule 21-202	A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.	[4]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.
New York	Rule 100.3(12) ¹¹	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.	
North Carolina	Canon 3(A)(4)	A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding.	
North Dakota	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office, including administrative duties, fairly and impartially.	[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.

State	Rule/Canon Number	Text	Comment
Ohio	Rule 2.2 and 2.6(A)	<p>Rule 2.2: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.</p> <p>Rule 2.6(A): 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.</p>	<p>Rule 2.2 Comment [4]: To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law.</p> <p>Rule 2.6(A) Comment [1A]: The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.</p>
Oklahoma	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.
Oregon	Rule 3.2	Rule 3.2: A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law.	
Pennsylvania	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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 heard fairly and impartially.
Rhode Island	Canon 3(B)(8)	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.	
South Carolina	Canon 3(B)(7)	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.	

State	Rule/Canon Number	Text	Comment
South Dakota	Canon 3(B)(7)	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.	
Tennessee	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard.
Texas	Canon 3(B)(8)	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.	
Utah	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[3] 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.
Vermont	Canon 3(B)(7)	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.	
Virginia	Canon 3(B)(7)	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.	
Washington	Rule 2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.
West Virginia	Rule 2.2	A judge shall perform the duties of judicial office impartially and diligently.	[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.

State	Rule/Canon Number	Text	Comment
Wisconsin	Rule 60.04(hm) ¹²	A judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially. A judge shall also afford to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to the law. 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.	A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality. Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate consideration of the issues raised. 2. Provide information or explanation about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.
Wyoming	2.2	A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.	[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.

¹ effective December 15, 2016

² effective July 1, 2013

³ effective March 18, 2013

⁴ effective September 1, 2015

⁵ effective July 1, 2016

⁶ effective January 1, 2016

⁷ as amended July 2013

⁸ revised March 25, 2014

⁹ effective April 2017

¹⁰ effective September 1, 2016

¹¹ effective March 26, 2015

¹² effective June 1, 2014

updated 7-4-2017



Illinois Supreme Court Policy

On Assistance to Court Patrons by Circuit

Clerks, Court Staff, Law Librarians, and Court

Volunteers

Effective April, 2015

ILLINOIS SUPREME COURT POLICY ON ASSISTANCE TO COURT PATRONS
BY CIRCUIT CLERKS, COURT STAFF, LAW LIBRARIANS, AND COURT
VOLUNTEERS

(a) Purpose and Scope.

The purpose of this policy is to provide guidance to circuit clerks, court staff, law librarians, and court volunteers acting in a non-lawyer capacity as to what services may and may not be offered to assist court patrons to achieve fair and efficient resolution of their cases.

No court patron should be denied services permitted under this policy on the basis of being a self-represented litigant. Services to court patrons should be provided in a nondiscriminatory manner to all applicants without regard to race, color, religious creed, ancestry, national origin, age, sex, disability, sexual orientation or any category prohibited by federal or Illinois law.

(b) Definitions.

- (1) "Court patron" means any individual who seeks information to file, pursue or respond to a case on his or her own behalf or on the behalf of another.
- (2) "Self-represented litigant" means any individual who seeks information to file, pursue or respond to a case on his or her own behalf where a licensed attorney has not filed an appearance on behalf of that individual.
- (3) "Legal information" means general factual information about the law and the legal process. Legal information is different from legal advice, which involves giving guidance regarding an individual's legal rights and obligations in light of his or her particular facts and circumstances. Legal information is neutral.
- (4) "Approved forms" mean standardized forms and related instructions that have been approved pursuant to Supreme Court Rule 10-101; forms included in the Illinois Supreme Court Rules; and local circuit court forms adopted to facilitate local case-processing procedures.

(c) Prohibited Services. Circuit clerks, court staff, law librarians, and court volunteers—acting in a non-lawyer capacity on behalf of the court—shall not:

- (1) Recommend whether a case should be brought to court or comment on the merits of a pending case;
- (2) Give an opinion about what will happen if a case is brought to court;
- (3) Represent litigants in court;
- (4) Provide legal analysis, strategy or advice to a court patron, or perform legal research other than assistance in self-guided legal research for any court patron;

- (5) Disclose information in violation of a court order, statute, rule, case law or court directive;
- (6) Deny a self-represented litigant access to the court or any services provided to other court patrons.
- (7) Tell a litigant anything he or she would not repeat in the presence of any other party involved in the case;
- (8) Refer a litigant to a specific lawyer or law firm for fee-based representation; or
- (9) Otherwise engage in the unauthorized practice of law as prohibited by law.

(d) Permitted Services. To assist court patrons, circuit clerks, court staff, law librarians, and court volunteers—acting in a non-lawyer capacity on behalf of the court—may, as resources and expertise permit:

- (1) Provide legal information about court rules, court terminology and court procedures, but not limited to providing information regarding; requirements for service, filing, scheduling hearings and compliance with local procedure;
- (2) Inform court patrons of legal resources and referrals if available,, including but not limited to:
 - a. Pro bono legal services;
 - b. Low-cost legal services;
 - c. Limited scope legal services;
 - d. Legal aid programs and hotlines;
 - e. Law and public libraries;
 - f. Non-profit alternative dispute resolution services;
 - g. Lawyer referral services;
 - h. Internet-based resources;
 - i. Court-sponsored or -affiliated educational classes, including, but not limited to, parenting education and traffic safety classes and alternative dispute resolution services;
 - j. Units or departments of government; or
 - k. Domestic violence resources.
- (3) Encourage self-represented litigants to obtain legal advice from a lawyer;
- (4) Provide information about security protocols at the courthouse and directions around the courthouse, including, but not limited to, photocopier and telephone locations, children's waiting room locations and other courthouse offices;
- (5) Offer educational classes and informational materials;
- (6) Assist court patrons in identifying approved forms and related instructions based on the court patron's description of what he or she wants to request from the court, including but not limited to, providing approved forms for the waiver of filing fees. When necessary, explain the nature of the information required to fill out the approved forms. Where no approved form exists to accomplish the court patron's request, inform the litigant of that fact and direct him or her to other legal resources;

- (7) Record verbatim information provided by the self-represented litigant on approved forms if that person is unable to complete the forms due to disability or literacy barriers;
- (8) Review finished forms to determine whether forms are complete, including checking for signature, notarization, correct county name and case number;
- (9) Provide assistance to litigants pursuing self-guided research;
- (10) Provide docket information, including but not limited to:
 - a. Stating whether an order has been issued
 - b. Explaining how to get a copy if one was not provided
 - c. Reading the order to the individual if requested
 - d. Providing instructions about how to access such information;
- (11) Inform court patrons of the process for requesting a foreign language or sign language interpreter;
- (12) At the direction of the court, review documents for completeness prior to hearing;
- (13) Provide a court patron with access to a case file that has not been restricted by statute, rule or order, or instructions about how to obtain such access;
- (14) Provide the same services and information to all parties to an action, as requested;
- (15) Provide services based on the assumption that the information provided by the court patron is accurate and complete;
- (16) Provide other services consistent with the intent of this policy.

(e) Unauthorized Practice of Law and Privilege.

Services provided in accordance with section (d) of this policy do not constitute the unauthorized practice of law. Information exchanged in accordance with section (d) of this policy is neither confidential nor privileged, except as otherwise protected by law. Services provided in accordance with section (d) of this policy do not create an attorney-client relationship. It should be communicated through the use of signage or a direct, in-person disclosure to court patrons that information and services provided in accordance with section (d) of this policy are not confidential, privileged or create an attorney-client relationship.

(f) Rules of Professional Conduct. Circuit clerks, court staff, law librarians, and court volunteers—who are licensed attorneys, licensed law student interns and other persons working under the supervision of an attorney—must abide by all applicable Rules of Professional Conduct when providing services and information in accordance with section (d) of this policy.

(g) Copy Fees. Court patrons may be required to pay a reasonable printing or reproduction fee for forms and instructions. However, the fee may be reduced or waived for persons who are otherwise eligible to sue or defend without cost pursuant to the Code of Civil Procedure.

Canon 3: Performing the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.

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

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

(4) 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 should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice.

(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(7) A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding.

(8) 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 other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control. This subsection does not prohibit:

- (a) communications concerning uncontested administrative or uncontested procedural matters;
- (b) conferring separately with the parties and/or their lawyers in an effort to mediate or settle matters, provided, however, that the judge shall first give notice to all parties and not thereafter hear any contested matters between the parties except with the consent of all parties;

- (c) obtaining 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 the substance of the advice, and affords the parties reasonable opportunity to respond;
 - (d) consulting with other judges or with court personnel;
 - (e) considering an *ex parte* communication expressly authorized by law.
- (9) A judge should dispose of all judicial matters promptly, efficiently and fairly.
- (10) A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected. A judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section 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 section does not apply to proceedings in which the judge or judicial candidate is a litigant in a personal capacity.
- (11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

C. Administrative Responsibilities.

- (1) A judge should diligently and promptly 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.
- (2) A judge should require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
- (3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
- (4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.
- (5) A judge shall not fail to comply with Rule 12 of the Rules of Judicial Administration, knowing that the failure to comply is in violation of the rule.

D. Disciplinary Responsibilities.

(1) A judge who receives information clearly establishing that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the State Commission on Judicial Conduct or take other appropriate action.

(2) A judge who receives information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action.

Canon 4: Conducting the Judge's Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Obligations

A. Extra-Judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
- (2) interfere with the proper performance of judicial duties.

B. Activities to Improve the Law. A judge may:

- (1) speak, write, lecture, teach and participate in extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code; and,
- (2) serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He or she may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system and the administration of justice.

C. Civic or Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the profit of its members, subject to the following limitations:

- (1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly or frequently engaged in adversary proceedings in any court.
- (2) A judge shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, but may be listed as an officer, director, delegate, or trustee of such an organization, and may be a speaker or a guest of honor at an organization's fund raising events.

April 23, 2017

**Texas Supreme Court Advisory Committee
Subcommittee on Rule 16-166a
Report on on Suggested Changes
to TRCP 145**

Memo from Subcommittee
on Rules 16-166a to the Full Texas
Supreme Court Advisory Committee

Dear SCAC members:

In his letter of December 21, 2016, Chief Justice Hecht asked the subcommittee and the full SCAC to consider the following regarding Tex. R. Civ. P. 145:

Texas Rule of Civil Procedure 145. Since the 2016 amendments to Rule 145, commenters have raised the following questions: (1) Should the rule prohibit a litigant who is represented by counsel under a contingency-fee agreement from filing a Statement of Inability to Afford Payment of Court Costs? (2) Should the rule be amended to more clearly address a trial court's authority to hold a hearing and to issue an order on a declarant's ability to afford court costs after the judgment has been signed? (3) Should the rule mandate that an order requiring the declarant to pay costs state the deadline for seeking review of the decision in the court of appeals? Please draft appropriate amendments for the Court's consideration and make other suggestions to clarify and improve the rule and the form Statement.

The subcommittee followed-up on Chief Justice Hecht's letter, and also considered input on TRCP 145 from the TAJC, and other sources. The matters considered are listed below, and relevant information is attached. The text of current TRCP 145 is Attachment 1.

1. Should TRCP 145 be amended to prohibit a litigant who is represented by counsel under a contingency-fee agreement from filing a Statement of Inability to Afford Payment of Court Costs?

The issue was raised in a November 17, 2016 email from Dinah Gaines, the staff attorney for the civil district court of Bexar County, who said there had been an increase in the number of personal injury cases filed with a Statement of Inability to Pay Costs even though the plaintiff was represented by a lawyer. The subcommittee was not unanimous on this issue. Some members of the subcommittee said "yes," one said "tentatively yes" and another said "probably," and one member suggested the possibility of allowing the litigant to proceed without paying costs but reimbursing the county for court costs out of any recovery on the underlying claim. That last suggestion was expanded to all cases, including divorce, where the plaintiff recovered sufficient money or property to reimburse the county for costs.

2. Should TRCP 145 be amended to more clearly address a trial court's authority to hold a hearing and to issue an order on a declarant's ability to afford court costs after the judgment has been signed?

This issue was brought raised in a November 21, 2016 email from Denise Pacheco, Clerk of the Eight Court of Appeals in El Paso. Her question is paraphrased as follows:

The trial court rendered judgment against a pro se defendant who had not filed a statement of inability to pay costs. After losing the judgment, the pro se defendant filed a notice of appeal in the trial court which was forwarded to the Court of Appeals for filing The Notice of Appeal itself did not mention a statement of inability to pay costs on appeal, but the pro se defendant did file in the trial court a statement on the same day as the NOA. The plaintiff contested the statement of inability to pay, and the question presented is whether the trial court judge has jurisdiction to rule on the contest, or must the appellant to file something in the appellate court first?

The subcommittee is not unanimous on this suggestion. Some members thought "yes," one thought "no," and some had no recommendation.

3. Should TRCP 145 be amended to mandate that an order requiring the declarant to pay costs state the deadline for seeking review of the decision in the court of appeals?

The subcommittee divided on this issue. Some members said "yes." Some members said "no." One member indicated that TRCP145(g)(2) says that an appeal of the denial of the ability to proceed without paying costs must be appealed within ten days, and that is enough notice to the litigant. Another e member asked "what's the hurry," "why not allow 30 days?"

Lisa Hobbs, a non-member of the subcommittee supported the change to TRCP 145 and submitted two proposals:

(5) Findings and Notice of Appeal Required. An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs. The order must also state that the applicant may appeal the order by filing a motion in the court of appeals within 10 days after the trial court's order is signed.

or

The order must also state: "If you decide to challenge this order, you must file a motion in the court of appeals. The motion must be filed within 10 days from the date this order is signed, unless the court of appeals gives you more time to file. See Texas Rule of Civil Procedure 145(g)."

Trish McAllister, on behalf of the Texas Access to Justice Commission (“TAJC”) submitted a memorandum to the subcommittee, a copy of which (sans logo) is attached as Attachment 2. The following points are raised in the memorandum.

4. “It is the Commission’s request that TRCP 145 be modified to state that a person who is currently receiving public benefits or who is being represented by an attorney providing free legal services as set forth in TRCP 145(e)(2) is presumed to be unable to afford court costs. The presumption would, of course, be rebuttable. . . .”

The subcommittee expressed some interest in this suggestion. However, the ultimate decision was that the subcommittee would not express an opinion for the following reason.

Prior to the August 1, 2016 amendment, TRCP 145 defined the inability to afford costs in the following way:

“A ‘party who is unable to afford costs’ is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs.”

Under this pre-August 2016 approach, if you qualified for a poverty program you couldn’t be made to pay court costs. That definition of inability to pay was consciously omitted from the rewrite of the rule by the Supreme Court (not the SCAC) in 2016. Under the current Rule 145 scheme, a Statement of Inability to Afford Costs that contains the right information and attached proof creates a rebuttable presumption that the declarant cannot pay costs. If no contest is filed, the presumption prevails and the declarant does not have to pay costs, and therefore gets free services from the clerk, court reporter, etc. The Statement can be contested by the clerk, a party, an attorney ad litem for a parent in certain cases, the court reporter, or the court. If the Statement is contested, the Declarant has the burden of proof at a hearing to prove inability to pay. The court must rule, and if the declarant will be required to pay any or all costs, the court must include in its order detailed findings that the declarant can afford to pay costs. The declarant can appeal a rejection of a claim of indigency, but a contesting party cannot appeal a ruling allowing the declarant to proceed without paying some or all costs. The appeal is by motion to the court of appeals. The declarant is entitled to a free and expedited appellate record of the hearing on the contest. The appellate court is required to rule on the indigency question “at the earliest practicable time.”

The practical effect of the 2016 rewrite is that what was previously the definition of inability to pay has now become one of four showings that, if included in a Declaration with available evidence, will give rise to a presumption of inability to pay. The four showings that give rise to the presumption under *current* TRCP 145 are:

“TRCP 145(e) *Evidence of Inability to Afford Costs Required.*

. . . . The declarant must provide in the Statement, and, if available, in attachments to the Statement, evidence of the declarant's inability to afford costs, such as evidence that the declarant:

1. receives benefits from a government entitlement program, eligibility for which is dependent on the recipient's means;
2. is being represented in the case by an attorney who is providing free legal services to the declarant, without contingency, through:
 - (A) a provider funded by the Texas Access to Justice Foundation;
 - (B) a provider funded by the Legal Services Corporation; or
 - (C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services;
3. has applied for free legal services for the case through a provider listed in (e)(2) and was determined to be financially eligible but was declined representation; or
4. does not have funds to afford payment of costs.”

The first three grounds incorporate the test for entitlement to receive poverty aid from the Federal government or free legal services through officially recognized indigent legal services organization. The fourth ground is any other proof of inability to pay.

Note that under both the prior version and the current version of TRCP 145, a declarant could prove inability to afford costs in other ways, without regard to the standards for qualifying for poverty programs or legal aid.

The consequences of the August 31, 2016 change is that being poor under Federal guidelines or state poverty guidelines (welfare, food stamps, Legal Aid, etc.) is no longer a guarantee that the declarant can avoid paying costs. It does create a presumption but the presumption can be contested and in the hearing other evidence can be considered. Under the prior language, if you qualified for a Federal poverty program a declarant would be entitled to proceed without paying costs, even if it was known to the court or proven in court that the declarant was driving a new car or otherwise had access to money. Now, the judge is free to consider other information on inability to pay, even for those who have qualified for a poverty program.

So, in conclusion, since the Court made an intentional decision, only 9 month ago, to demote qualifying for a poverty program from being a litmus test to merely creating a presumption and constituting evidence of inability to pay, and decided that qualifying for a poverty program would not be conclusive evidence of inability to pay, the subcommittee decided to let the TAJC proposal stand on its own.

The Supreme Court's Rules Attorney Martha Newton contributed this background to explain the 2016 rule change:

To facilitate your discussions, here is some background on the Court's decision to do away with "automatic qualifiers" when it amended TRCP 145 in 2016.

You'll recall that the Committee had a spirited debate about draft revisions that TAJC prepared in September 2013. Later, OCA Director David Slayton and I met with some representatives of the Texas Association of Counties and similar groups about our plans to amend the rule. During the SCAC meeting and our subsequent meeting with the county groups, two objections were raised to the rule's including automatic qualifiers based on income, receipt of government benefits, and the like: (1) the claim that some litigants who receive government benefits nonetheless spend a significant amount of money on non-necessities like a new car or cable TV; and (2) the objection that because the cost of living differs so dramatically between urban counties and rural counties, indigence shouldn't be determined by income alone. I don't know if the Court thinks these objections are valid, but we certainly heard them during the three years that we worked on the new rule.

At the same time, the Court was of the tentative view that eliminating, or virtually eliminating, clerk contests would benefit poor litigants the most. The Court ultimately did that through the 2016 revisions but also tried to strike a balance by giving the TC more discretion. But the official comment to the 2016 amendments also makes clear that it should only be in an exceptional case that a litigant who meets the criteria of subsection (e) is required to pay court costs: "Experience indicates that almost all filers described in (e)(1)-(3), and most filers described in (e)(4), cannot in fact afford to pay costs." In addition, the requirement in (f) that an order requiring the declarant to pay costs contain detailed findings, coupled with the declarant's right to appeal such an order, should prevent a TC from arbitrarily requiring a declarant to pay costs.

In sum, we thought that in the vast majority of cases, a person who qualified as indigent under the old rule would also qualify under the new rule. My memory is less clear on why we didn't specifically include "income that is less than X% of the federal poverty guidelines" among the list of presumptive qualifiers, but I think we thought it might be unnecessarily complicated, or it may be redundant because a person who meets that criterion would probably also receive some gov't benefit. Plus, the rule has a catch-all in (4), which was intended to help those who qualify for gov't benefits but don't take them.

5. The second issue raised in the TAJC memo is the requirement in TRCP 145(a) that a Statement of Inability to Afford Costs must be sworn to before a notary or "made under the penalty of perjury" (i.e., supported by an unsworn declaration under Tex. Civ. Prac. & Rem. Code § 132.001). An unsworn declaration (used instead of an affidavit) must under TRCP

§ 132.001(c) reveal the declarant's address. When a litigant is seeking an ex parte family violence protective order, Tex. Fam. Code § 82.009 requires that the application for ex parte relief be signed under oath. After some discussion with the subcommittee about how to address this concern, TAJC suggests that the Supreme Court-approved form application for ex parte protective order, which presently includes only an unsworn declaration, be altered to include an affidavit, and the instructions to the form be modified to say that the requirement that the applicant's address be disclosed can be avoided by using an affidavit instead of an unsworn declaration.

6. The third issue raised in the TAJC memo is the short (ten day) deadline to appeal an order requiring a litigant to pay some or all costs. The TAJC would like a longer period. One member of the subcommittee suggested a thirty day period to appeal such an order.

7. This is the list of issues that the subcommittee considered regarding proposed changes to TRCP 145.

Thank you.

Richard R. Osinger
Subcommittee Chair

Attachment 1

Text of current Tex. R. Civ. P. 145:

RULE 145. PAYMENT OF COSTS NOT REQUIRED

(a) *General Rule.* A party who files a Statement of Inability to Afford Payment of Court Costs cannot be required to pay costs except by order of the court as provided by this rule. After the Statement is filed, the clerk must docket the case, issue citation, and provide any other service that is ordinarily provided to a party. The Statement must either be sworn to before a notary or made under penalty of perjury. In this rule, “declarant” means the party filing the Statement.

(b) *Supreme Court Form; Clerk to Provide.* The declarant must use the form Statement approved by the Supreme Court, or the Statement must include the information required by the Court-approved form. The clerk must make the form available to all persons without charge or request.

(c) *Costs Defined.* “Costs” mean any fee charged by the court or an officer of the court that could be taxed in a bill of costs, including, but not limited to, filing fees, fees for issuance and service of process, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record.

(d) *Defects.* The clerk may refuse to file a Statement that is not sworn to before a notary or made under penalty of perjury. No other defect is a ground for refusing to file a Statement or requiring the party to pay costs. If a defect or omission in a Statement is material, the court—on its own motion or on motion of the clerk or any party—may direct the declarant to correct or clarify the Statement.

(e) *Evidence of Inability to Afford Costs Required.* The Statement must say that the declarant cannot afford to pay costs. The declarant must provide in the Statement, and, if available, in attachments to the Statement, evidence of the declarant’s inability to afford costs, such as evidence that the declarant:

- (1) receives benefits from a government entitlement program, eligibility for which is dependent on the recipient’s means;
- (2) is being represented in the case by an attorney who is providing free legal services to the declarant, without contingency, through:
 - (A) a provider funded by the Texas Access to Justice Foundation;
 - (B) a provider funded by the Legal Services Corporation; or
 - (C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services;

- (3) has applied for free legal services for the case through a provider listed in (e)(2) and was determined to be financially eligible but was declined representation; or
- (4) does not have funds to afford payment of costs.

(f) *Requirement to Pay Costs Notwithstanding Statement.* The court may order the declarant to pay costs only as follows:

(1) *On Motion by the Clerk or a Party.* The clerk or any party may move to require the declarant to pay costs only if the motion contains sworn evidence, not merely on information or belief:

- (A) that the Statement was materially false when it was made; or
- (B) that because of changed circumstances, the Statement is no longer true in material respects.

(2) *On Motion by the Attorney Ad Litem for a Parent in Certain Cases.* An attorney ad litem appointed to represent a parent under Section 107.013, Family Code, may move to require the parent to pay costs only if the motion complies with (f)(1).

(3) *On Motion by the Court Reporter.* When the declarant requests the preparation of a reporter's record but cannot make arrangements to pay for it, the court reporter may move to require the declarant to prove the inability to afford costs.

(4) *On the Court's Own Motion.* Whenever evidence comes before the court that the declarant may be able to afford costs, or when an officer or professional must be appointed in the case, the court may require the declarant to prove the inability to afford costs.

(5) *Notice and Hearing.* The declarant may not be required to pay costs without an oral evidentiary hearing. The declarant must be given 10 days' notice of the hearing. Notice must either be in writing and served in accordance with Rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs.

(6) *Findings Required.* An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs.

(7) *Partial and Delayed Payment.* The court may order that the declarant pay the part of the costs the declarant can afford or that payment be made in installments. But the court must not delay the case if payment is made in installments.

(g) *Review of Trial Court Order.*

(1) *Only Declarant May Challenge; Motion.* Only the declarant may challenge an order issued by the trial court under this rule. The declarant may challenge the order by

motion filed in the court of appeals with jurisdiction over an appeal from the judgment in the case. The declarant is not required to pay any filing fees related to the motion in the court of appeals.

(2) *Time for Filing; Extension.* The motion must be filed within 10 days after the trial court's order is signed. The court of appeals may extend the deadline by 15 days if the declarant demonstrates good cause for the extension in writing.

(3) *Record.* After a motion is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the declarant's claim of indigence. The court may set a deadline for filing the record. The record must be provided without charge.

(4) *Court of Appeals to Rule Promptly.* The court of appeals must rule on the motion at the earliest practicable time.

(h) *Judgment.* The judgment must not require the declarant to pay costs, and a provision in the judgment purporting to do so is void, unless the court has issued an order under (f), or the declarant has obtained a monetary recovery, and the court orders the recovery to be applied toward payment of costs.

Attachment 2

To: Richard Orsinger & SCAC Subcommittee on R145

From: Trish McAllister

Date: March 30, 2017

RE: Amendments to TRCP 145

Under former TRCP 145 (a) which was effective from September 2005 - August 2016, a person who is unable to afford costs was defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Former TRCP 145 also provided that when a party was represented by attorney at no cost through an organization receiving IOLTA funds, that party's affidavit was not able to be contested. This "IOLTA certificate" provision was added in 2005 because legal aid was spending a lot of time in court defending the affidavits despite the fact that legal aid is required to do an income screen on all client before they are able to represent them.

The current rule has a general rule that anyone filing a Statement of Inability to Afford Payment of Court Costs cannot be required to pay them except as provided within the rule, and moves these two provisions under section (e), Evidence of Inability to Afford Costs Required. The receipt of public benefits is now only evidence that someone cannot afford to pay costs rather than the definition of someone who is unable to afford costs. Likewise, a legal aid client's Statement of Inability to Afford Payment of Court Costs is no longer uncontestable. It is merely evidence of inability to afford costs.

Unfortunately, we have received reports from legal aid that the changes have lead some judges to reach unintended conclusions. We know of situations where judges have determined that even though someone is receiving public benefits or is being represented by legal aid, they have the ability to afford costs.

It is the Commission's request that TRCP 145 be modified to state that a person who is currently receiving public benefits or who is being represented by an attorney providing free legal services as set forth in TRCP 145(e)(2) is presumed to be unable to afford court costs. The presumption would, of course, be rebuttable. I will send a redline version of the current rule that incorporates our proposed changes along with this memo.

Another issue involves the concern, in relation to an application for an ex parte family violence protective order, about keeping the applicant's address confidential. Under TFC Section 82.009, an application for temporary ex parte order must "signed under oath." However, TRCP&R Section 132.001 states that an unsworn declaration can be substituted for an affidavit, but the unsworn declaration must give the declarant's address. So any applicant requesting ex parte relief with an unsworn declaration will be required to reveal his/her address. Rather than modifying either Code, a simple solution is to modify the R145 form to allow the party to complete the

form as an unsworn declaration or as an affidavit. One way to do that would be to provide on the form under 8, an option A and option B, allowing the party to complete

8A as a declaration or allowing the party to complete 8B as an affidavit if s/he doesn't want to disclose his/her address. The title of the form could be changed to be Statement/Affidavit of Inability to Afford Payment of Court Costs or Appeal Bond.

I believe Martha Newton has discussed the issue of how short the deadline is to appeal a contest decision that was raised by Lisa Hobbs. We would appreciate your subcommittee considering this concern.

We have received other complaints that are a continuation of those that happened under the prior bill: clerks charging for copies of the affidavit to attach to the citation or refusing to pay for citation by publication (which is case law), etc.

Please let me know how I can be of further assistance to you.

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Re: Amendment to TRAP 24

Date: July 20, 2017

By letter dated July 5, 2017, the Texas Supreme Court referred the following matter to our subcommittee:

Supersedeas Rules for State-Actor Appellants. HB 2776, passed by the 85th Legislature, amends the Government Code to direct the Court to adopt rules providing that the right of a state actor appellant under Section 6.001(b)(1)-(3) of the Civil Practice and Remedies Code to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule of Appellate Procedure 24, except in an appeal involving a contested-case, administrative-enforcement action. Section 2 of the bill requires the rules to be adopted by May 1, 2018.

Summary of relevant authority:

HB 2776 provides that: “SECTION 1. Section 22.004, Government Code, is amended by adding Subsection (i) to read as follows: (i) The supreme court shall adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.

SECTION 2. The Texas Supreme Court shall adopt the rules required by Section 22.004(i), Government Code, as added by this Act, before May 1, 2018.

SECTION 3. This Act takes effect September 1, 2017.”

TEX. CIV. PRAC. & REM. CODE 6.001(b)(1)-(3) provides that the following entities are not required to post a bond to supersede an adverse judgment: “(1) this state; (2) a department of this state; (3) the head of a department of this state.”

TRAP 24.2(a)(3) provides that: “Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.”

In re State Board for Educator Certification, 452 S.W.3d 802 (Tex. 2014), held that the trial court has discretion under TRAP 24.3(a)(3) to deny a government entity the right to supersede a non-monetary, non-property judgment. In that case, the district court had reversed the Board’s revocation of a teaching certificate. The trial court refused supersedeas, which would keep the revocation in place. The Court recognized that the State – in seeking to depriving the respondent of his livelihood during a protracted appeal when no court had upheld its position on the merits – would be “a striking assertion of unbridled executive power.” 452 S.W.3d at 809.

Proposed amendment to TRAP 24.2(a)(3):

24.2. Amount of Bond, Deposit, or Security

(a) Type of Judgment.

(3) Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper. When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court must permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.

Comments:

SB 2766 states that counter-supersedeas is not available under TRAP 24.2(3) or any other rule. The subcommittee is unaware of any other rule that would allow counter-supersedeas, and the Supreme Court’s decision in *In re State Board for Educator Certification* was limited to TRAP 24.2(a)(3).

AN ACT

relating to the right of certain appellants to supersede a judgment or order on appeal.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 22.004, Government Code, is amended by adding Subsection (i) to read as follows:

(i) The supreme court shall adopt rules to provide that the right of an appellant under Section 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule. Counter-supersedeas shall remain available to parties in a lawsuit concerning a matter that was the basis of a contested case in an administrative enforcement action.

SECTION 2. The Texas Supreme Court shall adopt the rules required by Section 22.004(i), Government Code, as added by this Act, before May 1, 2018.

SECTION 3. This Act takes effect September 1, 2017.

President of the Senate

Speaker of the House

I certify that H.B. No. 2776 was passed by the House on May 6, 2017, by the following vote: Yeas 141, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2776 on May 24, 2017, by the following vote: Yeas 144, Nays 0, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2776 was passed by the Senate, with amendments, on May 23, 2017, by the following vote: Yeas 26, Nays 5.

Secretary of the Senate

APPROVED: _____

Date

Governor

CHAPTER 6. GOVERNMENTAL EXEMPTION FROM BOND AND SECURITY REQUIREMENTS

Sec. 6.001. STATE AND FEDERAL AGENCIES EXEMPT FROM BOND FOR COURT COSTS OR APPEAL. (a) A governmental entity or officer listed in Subsection (b) may not be required to file a bond for court costs incident to a suit filed by the entity or officer or for an appeal or writ of error taken out by the entity or officer and is not required to give a surety for the issuance of a bond to take out a writ of attachment, writ of sequestration, distress warrant, or writ of garnishment in a civil suit.

(b) The following are exempt from the bond requirements:

- (1) this state;
 - (2) a department of this state;
 - (3) the head of a department of this state;
 - (4) a county of this state;
 - (5) the Federal Housing Administration;
 - (6) the Federal National Mortgage Association;
 - (7) the Government National Mortgage Association;
 - (8) the Veterans' Administration;
 - (9) the administrator of veterans affairs;
 - (10) any national mortgage savings and loan insurance corporation created by an act of congress as a national relief organization that operates on a statewide basis; and
 - (11) the Federal Deposit Insurance Corporation in its capacity as receiver or in its corporate capacity.
- (c) Notwithstanding Subsection (a), a county or district attorney is not exempted from filing a bond to take out an extraordinary writ unless the commissioners court of the county approves the exemption in an action brought in behalf of the county or unless the attorney general approves the exemption in an action brought in behalf of the state.

Acts 1985, 69th Leg., ch. 959, Sec. 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 167, Sec. 3.03(a), eff. Sept. 1, 1987.

452 S.W.3d 802 (Mem)
Supreme Court of Texas.

In re State Board for Educator Certification, Relator

NO. 13–0537

|
Argued October 14, 2014

|
OPINION DELIVERED: December 19, 2014

Synopsis

Background: Teacher brought action seeking judicial review of decision of State Board of Educator Certification, revoking his teaching certificate. The 200th Judicial District Court, Travis County, reversed the revocation and refused to allow Board to supersede the judgment pending appeal. Board petitioned for writ of mandamus to direct District Court to supersede its judgment. The Austin Court of Appeals, 411 S.W.3d 576, denied the petition. Board petitioned Supreme Court for writ of mandamus.

[Holding:] The Supreme Court, Willett, J., held that Board was not absolutely entitled to supersede judgment, abrogating *Cascos v. Cameron Cnty. Attorney*, 319 S.W.3d 205 and *City of Fort Worth v. Johnson*, 71 S.W.3d 470.

Petition denied.

Guzman, J., filed a concurring opinion, in which Brown, J., joined.

ON PETITION FOR WRIT OF MANDAMUS

Attorneys and Law Firms

Corey Tanner, Mark W. Robinett, Brim Arnett, Robinett, Hanner & Conners, P.C., Austin, for Real Party in Interest.

Gregg W. Abbott, Attorney General, Daniel T. Hodge, First Asst. Attorney General, Jonathan F. Mitchell, Solicitor General, Douglas D. Geysler, Asst. Solicitor General, Ellen M. Sameth, Office of the Attorney General, Austin, for Relator.

Opinion

Justice Willett delivered the opinion of the Court.

This mandamus action poses one procedural question: Does a trial court have discretion to deny suspension of a non-money judgment when the State files a notice of appeal?

Here, a schoolteacher sought judicial review of the State Board for Educator Certification's revocation of his teaching certificate. The trial court reversed the revocation and refused to allow the Board to supersede the judgment pending appeal. *803 Importantly, the merits of the underlying appeal are not before us; they remain pending in the court of appeals. We deal solely with the State's request for a writ of mandamus directing the trial court to supersede its judgment.

[1] Untangling the various rules applicable to appellants generally and to government appellants specifically, we hold that a trial court has discretion to deny any party—even the State—the right to supersede a non-money, non-property judgment. Put in practical terms, a trial court has discretion to prevent the Board from re-revoking a teacher's professional license while the Board appeals, for however long, the court's rejection of the Board's initial revocation.

Government's right to supersede a judgment may be automatic, but it is not absolute. We deny relief.

I. Background

In 2011, the Board initiated administrative proceedings to revoke Erasmo Montalvo's teaching certificate over allegations of improper educator-student contact. An administrative law judge weighed the evidence and determined no discipline was warranted. The Board adopted the ALJ's findings of fact, but concluded the ALJ “failed to appropriately interpret and apply [the Board's] policies and rules.” Believing Montalvo was “unworthy to instruct or supervise the youth of this state,”¹ the Board revoked his educator certificate.

¹ See TEX. EDUC. CODE § 21.041(b)(7) (“The board shall propose rules that ... provide for disciplinary proceedings, including the ... revocation of an educator certificate....”); 19 TEX. ADMIN. CODE § 247.2(1)(J) (2010) (State Bd. for Educator Certification, Code of Ethics & Standard Practices) (“The educator shall be of good moral character and be worthy to instruct or supervise the youth of this state.”); *id.* §§ 249.15(a)(4); 249.15(b)(2) (2013) (State Bd. for Educator Certification, Disciplinary Action) (allowing the Board to “revoke ... a certificate” upon a showing of “satisfactory evidence that ... the [educator] is unworthy to instruct or to supervise the youth of this state.”).

Montalvo sued to overturn the revocation,² and the trial court agreed, concluding the Board's decision was not supported by substantial evidence and was arbitrary and capricious. The trial court issued a permanent injunction prohibiting the Board from “treating as revoked or revoking” Montalvo's certification. Montalvo posted security with the trial court, prompting the court to order, “pursuant to Rule 24.2(a)(3) of the Texas Rules of Appellate Procedure, that any appeal taken of this Judgment ... will not supersede this Judgment during the pendency of such appeal.” In other words, the Board could not revoke Montalvo's professional certification, thus depriving him of his livelihood, during the potentially years-long pendency of the appeal.

² See, e.g., TEX. GOV'T CODE § 2001.171 (“A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.”); 19 TEX. ADMIN. CODE § 249.40(c) (2011) (State Bd. for Educator Certification, Appeals) (“Appeals from a final order of the [Board] shall be under the substantial evidence standard of review and governed by the Texas Government Code, Chapter 2001; applicable case law; and this section.”).

The Board appealed the trial court's revocation reversal and separately sought mandamus relief challenging the trial court's denial of supersedeas. The court of appeals denied mandamus relief,³ and it abated the merits of the Board's appeal pending our resolution of the narrow procedural issue: whether the trial court had *804 discretion to deny suspension of its judgment.

³ 411 S.W.3d 576.

II. Discussion

The relevant rules include:

1. *Texas Rule of Appellate Procedure (TRAP) 24.1(a)*: A judgment debtor can supersede enforcement of an adverse judgment by posting security with the trial court.⁴
2. *Civil Practice and Remedies Code (CPRC) section 6.001*: Governmental entities, like the Board, are exempt from bond requirements.⁵
3. *TRAP 24.2(a)(3)*: When, as here, the judgment is not for money or property, the judgment creditor can post security that gives the trial court discretion to “decline to permit the judgment to be superseded.”⁶
4. *TRAP 25.1(h)*: Enforcement of a judgment can proceed unless the judgment is suspended under TRAP 24, or “the appellant is entitled to supersede the judgment without security by filing a notice of appeal.”⁷

⁴ TEX. R. APP. P. 24.1(a).

⁵ TEX. CIV. PRAC. & REM. CODE § 6.001. Montalvo does not dispute that the Board is a governmental entity for purposes of section 6.001.

⁶ TEX. R. APP. P. 24.2(a)(3).

⁷ *Id.* at 25.1(h)(1)–(2).

Since 1838, the State and its departments have been exempt from filing a bond to appeal an adverse judgment.⁸ Our rules have long recognized this,⁹ and CPRC section 6.001 codifies it: “A governmental entity ... may not be required to file a bond ... for an appeal ... in a civil suit.”¹⁰ In effect, the State’s notice of appeal *automatically* suspends enforcement of a judgment. But that doesn’t necessarily mean governmental entities have an *absolute* right to automatic supersedeas, which is where TRAP 24.2(a)(3)—applicable where “the judgment is for something other than money”—enters into our analysis.¹¹

⁸ *See* Act approved May 3, 1838, 2d Cong., 2d R.S., § 2, 1838 Repub. Tex. laws 2, *reprinted in* 1 H.P.N. Gammel, *The Laws of Texas 1822–97*, at 1472 (Austin, Gammel Book Co. 1898).

⁹ *See, e.g.*, former TEX. R. CIV. P. 354 (1941) (“[T]he following parties are not required to execute a cost bond when appealing in their official capacity: The State of Texas ... Any State Department ... Any County of Texas....”).

¹⁰ TEX. CIV. PRAC. & REM. CODE § 6.001(a). The text of the statute limits its definition of governmental entity to “this state”, or “a department of this state”, and a few other entities or officials. *Id.* § 6.001(b).

¹¹ *See* TEX. R. APP. P. 24.2(a)(3) (“Other Judgment. When the judgment is for something other than money or an interest in property, the trial court must set the amount and type of security that the judgment debtor must post. The security must adequately protect the judgment creditor against loss or damage that the appeal might cause. But the trial court may decline to permit the judgment to be superseded if the judgment creditor posts security ordered by the trial court in an amount and type that will secure the judgment debtor against any loss or damage caused by the relief granted the judgment creditor if an appellate court determines, on final disposition, that that relief was improper.”).

[2] How do these rules interact? Specifically, what happens to the Board’s entitlement to automatic suspension of an adverse judgment (triggered by filing its notice of appeal) if Montalvo posts security? The Board insists that CPRC section 6.001 and TRAP 25.1 control, and that TRAP 24.2 is inapplicable against governmental entities. Montalvo counters that TRAP 24.2(a)(3) tempers TRAP 25.1(h), ***805** and plainly empowers trial courts to deny suspension of non-money judgments.

This is our first opportunity to squarely address which rule trumps. Is the Board still entitled to an automatic right to supersedeas? Or does the trial court retain discretion—in effect, “superduperseas”—to deny it?

* * *

We addressed the State's right to suspend a trial-court judgment during appeal 50 years ago in *Ammex Warehouse Co. v. Archer*.¹² In that case, relators argued they were exempt from state regulation covering whiskey and other liquor sales.¹³ The trial court had permanently enjoined the Texas Liquor Control Board from enforcing or attempting to enforce state liquor laws against the relators pending appeal.¹⁴ But the court of appeals issued a writ forbidding enforcement of the trial court's order, deeming it interference with the appellate court's own jurisdiction over the case.¹⁵ We observed, “it is readily seen that the purpose of the temporary order was to prevent supersedeas and restrain enforcement” of state liquor laws pending appeal.¹⁶

¹² 381 S.W.2d 478, 480–81 (Tex.1964).

¹³ *Id.* at 479. Relators relied on a then-recent case of the United States Supreme Court, *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, which held that a state cannot regulate or control the passage of duty-free liquor for export sold to departing international airline travelers through the state's territory because such a situation does not involve the unlawful diversion or use of alcoholic beverages within the state. 377 U.S. 324, 333, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). That is, the state sought to prevent transactions authorized by Congress under its constitutional power to regulate commerce with foreign nations, which the Supreme Court held the state could not do. *Id.* at 333–34, 84 S.Ct. 1293.

¹⁴ *Ammex*, 381 S.W.2d at 479.

¹⁵ *Id.* at 480.

¹⁶ *Id.* at 479–80.

Ammex involved provisions predating CPRC section 6.001, but the case is illustrative.¹⁷ In *Ammex*, we noted the Legislature “was well within its constitutional boundaries” in exempting the State from giving bond to suspend enforcement of a trial-court judgment pending appeal.¹⁸ Specifically, we held, “The State has a valid statutory right to a supersedeas without filing a bond upon perfecting its appeal by giving proper notice. Unless a contrary intention is made known to the Court, the State's notice of appeal operates as a supersedeas.”¹⁹ *Ammex* plainly recognized the State's right to supersedeas upon filing a notice of appeal,²⁰ and that power, also reflected today in TRAP 25.1(h), is undisputed. But is it unlimited?

¹⁷ *See id.* at 480–82 (discussing the statutes—Articles 279a and 2276—that preceded CPRC section 6.001).

¹⁸ *Id.* at 482.

¹⁹ *Id.* at 485.

²⁰ Some courts of appeals have interpreted this right to be absolute. *See, e.g., Cascos v. Cameron Cnty. Attorney*, 319 S.W.3d 205, 217 (Tex.App.—Corpus Christi 2010, no pet.) (“[B]ecause the case law is clear that a governmental entity, such as a County, has the absolute right to supersede a judgment of the trial court by merely filing a notice of appeal, and because this absolute right extends to governmental officials, we conclude that the trial court did not have discretion to deny supersedeas of the judgment against appellants.”); *City of Fort Worth v. Johnson*, 71 S.W.3d 470, 473 (Tex.App.—Waco 2002, no pet.) (per curiam) (holding that the district court has no discretion to deny a government appellant supersedeas).

Since *Ammex*, we have twice indicated that trial courts have discretion to prevent the State's automatic suspension of an adverse *806 non-money judgment. First was our 1998 decision *In re Dallas Area Rapid Transit*,²¹ which examined whether, under TRAP 24.2(a)(3)'s predecessor,²² a governmental body ordered to produce information under the Public Information Act²³ was entitled to suspend the trial-court order requiring production.²⁴ We said yes,²⁵ troubled that the trial court's refusal to stay its judgment effectively denied DART any appeal whatsoever, “for once the requested information is produced, an appeal is moot”—a result “the rule does not permit.”²⁶

21 967 S.W.2d 358 (Tex.1998) (per curiam) (hereinafter *DART*).

22 The rule giving courts discretion to deny supersedeas was first codified in 1984 when we amended Texas Rule of Civil Procedure (TRCP) 364. See order of Dec. 5, 1983, eff. April 1, 1984. As amended, TRCP 364 stated in part, “[T]he court may decline to permit the judgment to be suspended on filing by the plaintiff of a bond or deposit to be fixed by the court in such an amount as will secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper.” TEX. R. CIV. P. 364(f) (1984), *repealed by* order of April 10, 1986, eff. Sept. 1, 1986. Our first and only cite to TRCP 364(f) while it was in force came in *Hill v. Fourteenth Court of Appeals*, 695 S.W.2d 554, 555 (Tex.1985) (refusing to hold that supersedeas is a matter of right in election contests and recognizing the trial court's discretion to deny supersedeas of a non-money, non-property judgment under TRCP 364(f)).

In 1986, we recodified the trial court's discretion in TRAP 47(f), which provided, “[T]he trial court may decline to permit the judgment to be suspended on filing by the judgment creditor of security to be ordered by the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by any relief granted if it is determined on final disposition that such relief was improper.” TEX. R. APP. P. 47(f) (1986) (recodified as TRAP 24.2(a)(3), eff. Sept. 1, 1997). In *Klein Independent School District v. Fourteenth Court of Appeals*, we noted that the purpose of TRAP 47(f) was “to permit a trial court to deny supersedeas of an injunction, conditioned upon the setting of a bond sufficient to protect the appealing party's interests.” 720 S.W.2d 87, 88 (Tex.1986) (citing *Hill*, 695 S.W.2d at 555). We didn't address TRAP 47(f) again until *DART*, 967 S.W.2d at 359–60 (noting that TRAP 47(f) was in effect when the case was before the trial court but that TRAP 24.2(a)(3) had since become effective by the time the case reached our Court).

Finally in 1997, we again recodified TRAP 47(f), which became TRAP 24.2(a)(3). The text of TRAP 24.2(a)(3) remains unchanged from TRAP 47(f).

23 TEX. GOV'T CODE §§ 552.001–.353.

24 *DART*, 967 S.W.2d at 359.

25 *Id.*

26 *Id.* at 360.

We observed, though, that while trial courts lack *limitless* discretion to deny the State supersedeas, they *do* have “a measure of discretion” in appropriate circumstances.²⁷ In fact, we directed the trial court to stay its judgment requiring production “unless the court determines that the *News* should be permitted to post the security required by TRAP 24.2(a)(3)”²⁸—just as Montalvo did in today's case. The Court was careful to note that whether that specific determination would be an *abuse* of discretion “is not an issue before us,”²⁹ but we were united that such discretion existed in the first place.

27 *Id.*

28 *Id.* Although TRAP 47(f) was still in effect while the case was pending in the trial court, by the time the case arrived at our door, we had completed the 1997 re-write of the rules, which renumbered TRAP 47(f) to TRAP 24.2(a)(3).

29 *Id.*

We said the same thing a year later in *In re Long*.³⁰ In *Long*, the Dallas County District Clerk sought relief from a judgment *807 of contempt for violating an injunction.³¹ While noting that the Clerk's "notice of appeal operates as a supersedeas bond,"³² we observed that the opposing party "could have sought denial of suspension of the injunction" under TRAP 24.2(a)(3).³³ But he failed to do so, unlike Montalvo in today's case.

³⁰ 984 S.W.2d 623 (Tex.1999) (per curiam).

³¹ *Id.* at 624.

³² *Id.* at 625 (citing *Ammex*, 381 S.W.2d at 485; TEX. CIV. PRAC. & REM. CODE § 6.001(b)(4)).

³³ *Id.* at 626.

Importantly, both *DART* and *Long* were per curiam opinions decided shortly after the Court adopted modern TRAP 24.2(a)(3) in 1997. And while neither case involved an appellee that had in fact posted security to thwart a government appellant's supersedeas, the Court plainly saw TRAP 24.2(a)(3) as a mechanism for avoiding automatic suspension of a non-money judgment.³⁴ Both cases accept as given that trial courts have discretion to deny supersedeas to a governmental appellant.³⁵ And this understanding, coming on the heels of the Court's adoption of TRAP 24.2(a)(3), is also the settled understanding of leading commentators on Texas civil procedure, who agree the rule confers trial-court discretion that may be used against the State.³⁶

³⁴ In the only other case raising this similar issue, the parties reached a settlement before we could address the issue. *See In re Bass*, No. 11–0245, 55 Tex. Sup.Ct. J. 568 (Apr. 16, 2012) (pet.dism'd).

³⁵ *See Long*, 984 S.W.2d at 626; *DART*, 967 S.W.2d at 360 ("However, [TRAP] 47 would have allowed the district court to determine whether [the plaintiff] could avoid supersedeas by posting security protecting *DART* from the loss or damage caused by an erroneous ruling.").

³⁶ *See, e.g.*, 10 William V. Dorsaneo, III et al., *Texas Litigation Guide* §§ 148.03–.04 (2014); Alessandra Ziek Beavers and Michol O'Connor, *O'Connor's Texas Civil Appeals* § 5.2 (2014); 4 Tex. Jur.3d, *Appellate Review* § 292 (2008).

Our holding today is also consistent with the corollary federal rules, which excuse the federal government from the bond requirement, but indicate, for trial courts, that a stay pending appeal is not automatic, and that appellate courts have near-unlimited authority to grant a stay—or not.

Federal Rule of Civil Procedure (FRCP) 62, the counterpart to our state rules, lays out the process for obtaining in the district court a stay of execution on the judgment pending appeal. Specifically, the rule allows appeals on behalf of the United States government to proceed without a supersedeas bond. FED. R. CIV. P. 62(e) ("The court must not require a bond, obligation, or other security ... when granting a stay on an appeal by the United States."). Some courts have read FRCP 62(e) in tandem with FRCP 62(d), and determined that the United States is entitled to a stay of execution without bond or other security as a matter of right. *See Hoban v. Wash. Metro. Area Transit Auth.*, 841 F.2d 1157 (D.C.Cir.1988) (per curiam) (applying FRCP 62(f), which incorporated state law entitling the governmental entity to supersedeas as a matter of right); *In re Rape*, 100 B.R. 288 (W.D.N.C.1989) (holding United States entitled to supersedeas as a matter of right). Other courts disagree, however, holding that the government still must show that a stay is appropriate. *See In re Westwood Plaza Apartments*, 150 B.R. 163, 165–68 (Bankr.E.D.Tex.1993) (holding that FRCP 62(e) is separate and independent from FRCP 62(d) and, thus, the United States is not entitled to supersedeas as a matter of right); *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 750 F.Supp. 67, 72–76 (E.D.N.Y.1990) (noting that the government was not entitled to supersedeas as a matter of right because the judgment was not stayed under any other subdivisions of FRCP 62, which is required under FRCP 62(e)). But FRCP 62(c) reveals, in any event, that a district court maintains discretion to suspend an injunction pending appeal. FED. R. CIV. P. 62(c) ("the court *may* suspend ... an injunction on terms for bond"). So, even though some federal courts disagree whether the United States government is entitled to a stay as a matter of right, FRCP 62(c) seems to plainly vest discretion in the district court when the appeal involves an injunction. Our supersedeas rules similarly discriminate between different types of judgments: money judgments, TEX. R. APP. P. 24.2(a)(1), property judgments, *id.* at 24.2(a)(2), and those

for other types of relief, *id.* at 24.2(a)(3)—*i.e.*, injunctions. This last rule is the only one of the three that expressly affords discretion to the trial court to deny supersedeas.

Federal Rule of Appellate Procedure (FRAP) 8 provides the process for obtaining a stay in the appellate courts. It notes that the initial motion to stay must ordinarily be presented to the district court, FED. R. APP. P. 8(a)(1), but if it would be impracticable or if the district court already denied the motion or failed to afford the relief requested, the party may move to stay in the appellate court, *id.* at 8(a)(2). Unfortunately, neither FRCP 62 nor FRAP 8 expressly mentions whether the United States government is entitled to a stay as a matter of right. In fact, FRAP 8 includes no mandatory language directing the appellate courts to grant a stay in any civil case, suggesting the appellate court has unlimited discretion.

***808** Today the question is squarely presented: Does TRAP 25.1(h) remove the trial court's discretion to deny supersedeas under TRAP 24.2(a)(3)? In arguing yes, the Board discusses only part of the rule. The Board relies heavily on TRAP 25.1(h)'s statement that enforcement may proceed “unless ... the appellant is entitled to supersede the judgment without security by filing a notice of appeal.” The Board insists this right to automatic suspension is absolute. But that provision cannot bear the weight the Board places on it. That language merely acknowledges what we have long known, that the State's notice of appeal automatically supersedes a final judgment. It doesn't eviscerate a trial court's discretion under TRAP 24.2(a)(3) to decline supersedeas if the judgment creditor posts security.³⁷

³⁷ We need not consider whether the trial court abused its discretion under TRAP 24.2(a)(3), because neither the Board nor Montalvo raised that argument in this Court. *See* TEX. R. APP. P. 52.3(f).

We see no merit in the Board's argument that its right to supersedeas removes a trial court's discretion to enforce its non-money judgments against the State pending appeal. CPRC section 6.001 simply restates settled law that the State may appeal without filing a bond. Neither it nor TRAP 25.1(h) confers unfettered power to force suspension of the judgment. The Board may appeal without security—this is undisputed—but it has no unqualified right to supersedeas in light of the trial court's discretion under TRAP 24.

One final point: The State's position—boundless entitlement to supersede adverse non-money judgments—would vest unchecked power in the executive branch, at considerable expense to the judicial branch, not to mention the wider public we both serve. The Texas Constitution divides governing power among three branches, and power seized by one branch necessarily means power ceded by another. Our State Constitution, like Madison's Federal handiwork,³⁸ is infused with Newtonian genius: three rival branches locked in synchronous orbit by competing interests—ambition checking ambition.³⁹ These are abstract principles, but they have real-world ripple effects on the lives of everyday Texans. This case is Exhibit A. TRAP 24.2(a)(3) gives the trial court discretion, quite sensibly, to prevent the State from re-revoking Montalvo's certification—the ultimate professional sanction ***809**—while it spends years appealing the court's reversal of the State's first revocation, something the trial court found “arbitrary and capricious.” The State—as yet unsupported by a victory on the merits in any court—wants to strip Montalvo of his livelihood while the appellate process grinds on, and if he manages to regain his professional license after having been kicked out of his profession for years—well, bygones. That's a striking assertion of unbridled executive power—to enforce administrative orders that a trial court has reversed—and TRAP 24.2(a)(3) recognizes the judiciary's authority to say no.

³⁸ James Madison, the Father of the Federal Constitution, turned 85 the day the Republic of Texas adopted its Constitution. He lived barely 100 days more, long enough to see Texas free.

³⁹ In fact, the Texas Constitution takes Madison a step further by including, unlike the Federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives. TEX. CONST. art. 2, § 1.

III. Conclusion

[3] This case does not delve into the underlying merits, which remain at the court of appeals. The issue presented is innately and exclusively procedural: Do governmental entities have an absolute, overriding right to supersedeas that nullifies trial-court discretion? We answer no. A governmental entity's notice of appeal does not deprive a trial court of discretion to refuse suspension of its judgment if the appellee posts security in accordance with TRAP 24.2(a)(3). Accordingly, we deny the Board's petition for writ of mandamus.

Justice Guzman filed a concurring opinion, in which Justice Brown joined.

Justice Guzman, joined by Justice Brown, concurring.

The State Board for Educator Certification has wisely observed that “[a] certified educator holds a unique position of public trust with almost unparalleled access to the hearts and minds of impressionable students. The conduct of an educator must be held to the highest standard.” 19 TEX. ADMIN. CODE § 249.5(b)(1). Because the Court correctly concludes that a trial court has discretion to deny suspension of a non-money judgment when the State files a notice of appeal, I join its opinion. But I also write separately today because I believe the record before us fails to affirmatively indicate that the trial court considered the potentially significant harm to schoolchildren before effectively reinstating Erasmo Montalvo's educator certificate pending the outcome of the appeal. Therefore, I respectfully concur in the Court's denial of the petition for writ of mandamus.

We review a trial court's order granting or denying an injunction under an abuse of discretion standard. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex.2002). A trial court abuses its discretion if it acts without reference to guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985). Our guiding principle for issuing injunctions is that trial courts should balance the competing equities by weighing the probable harm to the plaintiff if an injunction is erroneously denied against the probable harm to the defendant if an injunction is erroneously granted. *See In re Gamble*, 71 S.W.3d 313, 317 (Tex.2002); *Storey v. Central Hide & Rendering Co.*, 226 S.W.2d 615, 618–19 (Tex.1950). If the injury to the complainant is slight compared to the injury caused to the defendant and the public, relief will ordinarily be refused. *Storey*, 226 S.W.2d at 619. But the injunctive relief the trial court affords and its procedure for doing so are different matters. Substantively, we will uphold a trial court's injunction unless, after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable. *See Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex.1987). But procedurally, the trial court must indicate that it weighed the competing equities; if the record does not affirmatively indicate the trial court did so, then this failure is a departure from guiding ***810** principles and amounts to an abuse of discretion. *See, e.g., Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 373 (Tex.2014) (remanding for trial court to assess an omitted but relevant element for determining the amount of sanctions). In such cases, a remand is appropriate to enable the trial court to demonstrate that it weighed the competing equities. *Id.*

Here, before issuing the injunction, the trial court was required to balance the threat to the safety and welfare of Texas schoolchildren if an unfit educator is allowed to teach and the harm to the educator if he is deprived of the opportunity to earn a living as a teacher during the appeals process. Importantly, balancing these equities involves more than merely identifying two sides. Instead, “[t]hese conflicting interests call for a solution of the question by the application of the broad principles of right and justice.” *Storey*, 226 S.W.2d at 619. But here, the trial court's findings of fact and conclusions of law only addressed the potential harm to Montalvo:

Erasmo Montalvo, Plaintiff, has shown by a preponderance of the evidence, that he will be irreparably harmed if a permanent injunction is not issued prohibiting the Defendant State Board for Educator Certification from treating as revoked or revoking his educator certificate based on the facts and allegations relied on by Defendant in SOAH docket No. 70 1–II–8468.EC, until the appellate court issues its ruling in any appeal taken by Defendant.

Plaintiff has shown by a preponderance of the evidence that, based on the history of this case, the harm to him is imminent. It is probable that the Defendant will file a Notice of Appeal, claim that its Notice automatically supersedes

the injunction, and represent that Plaintiff's educator certificate is revoked during the pendency of the appeal, (which may involve an indefinite extended period of time), during which Plaintiff's ability to obtain employment consistent with his experience, training, and education, would likely be significantly adversely affected.

As the Court observes, this interest is significant and warrants full consideration.

But of at least equal import is the interest of schoolchildren in not being exposed to the harm of interaction with a teacher who fails to understand the proper bounds of the student-teacher relationship. The record before us reflects the trial court gave only cursory (if any) consideration to the safety and welfare of Texas students, declaring only that “[t]he competing equities favor granting the injunction.” But evidence undisputedly indicates that Montalvo, a high school track and field coach and an elementary school physical education coach, allowed a teenage female student—wearing only a sports bra and biker shorts—to use the jacuzzi in the master bathroom of his home while no one else was present, called that female student over 480 times over a four-month period (with over 80 calls occurring after 10:00 p.m.), gave several female athletes “rubdowns” and ice baths, and failed to follow district protocol to send an injured athlete to the trainer. The State Board for Educator Certification determined these actions exceeded the bounds of the proper educator-student relationship and violated the trusted position of authority afforded to Texas school teachers. Allowing Montalvo to continue teaching after willingly exceeding the bounds of the proper student-teacher relationship could substantially harm the safety and welfare of Texas schoolchildren. If particular considerations caused the trial court to view the harm to Montalvo as outweighing the potential harm to schoolchildren, the court should have said so.

***811** The question is not whether a trial court could fully balance the competing equities and arrive at this trial court's conclusion. That balancing is within the trial court's discretion and we will uphold that substantive decision when supported by some evidence. But process matters, and this Court has long been the creator and guardian of those processes. While we cannot arbitrarily change a trial court's result, we can ensure that trial courts abide by the time-honored process of balancing the competing equities. And the record (such as findings of fact or a hearing transcript) provides our only method of knowing that balancing occurred. The record here is simply devoid of factual support that the trial court considered the potential specific harm to schoolchildren if the educator is allowed to teach pending the outcome of the appeal.

But while the record fails to indicate the trial court balanced the competing equities, the State Board for Educator Certification, as the relator in this mandamus proceeding, has the burden of proving that the trial court clearly abused its discretion. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992). The Board limited its argument to the assertion that the trial court lacked discretion to grant an injunction during the pendency of the appeal—not that it retained discretion but abused it given these facts. While the relator here has not requested relief for the trial court's particular abuse of discretion, it is paramount that trial courts be cognizant of their obligation to fully demonstrate the calculus they typically engage in when granting injunctions. Accordingly, I concur in the Court's denial of the petition for writ of mandamus.

All Citations

452 S.W.3d 802 (Mem), 314 Ed. Law Rep. 1142, 58 Tex. Sup. Ct. J. 163

To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Re: Amendment to TRAP 11

Date: July 20, 2017

By letter dated July 5, 2017, the Texas Supreme Court referred the following matter to our subcommittee:

Texas Rule of Appellate Procedure 11. In the attached memorandum, the State Bar Court Rules Committee proposes amendments to Rule of Appellate Procedure 11.

The State Bar Court Rules Committee has proposed the following amendment to TRAP 11:

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

- (a) either be in the form of a letter or comply with the briefing rules for responding parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; and
- (d) certify that copies have been served on all parties.

The State Bar Court Rules Committee has proposed the amendment because:

The existing rule states that amicus briefs must comply with the briefing rules for the parties, which requires the amicus to include, at a minimum, a table of contents and authorities, a summary of the argument, and an argument section, as is required for an appellee's brief pursuant to TRAP 38.2. Many times, amicus briefs include additional sections, such as a statement of the issues and a statement of facts consistent with the requirements for an appellant's brief pursuant to TRAP 38.1. The current practice, however, is that many amici submit letters rather than briefs. The proposed changes make clear that (1) an amicus can submit a letter in lieu of a brief; and (2) when submitting a brief, the amicus need only comply with the requirements for responding parties' briefs.

Discussion:

The Appellate Rules Subcommittee discussed the proposed change by conference call on July 20, 2017. By a vote of 5-1, the subcommittee determined that the change, explicitly permitting submission of a letter amicus brief, would be helpful. By a vote of 6-0, the committee recommended that, if adopted, the amendment should be revised to ensure that amicus submissions, whether in letter or brief form, comply with the length limits applicable to the parties.

One member of the subcommittee, Evan Young, “advocates the additional requirement that letter briefs must be no longer than 1000 (or perhaps even 750) words, or three pages for parties not bound by word limits. In that member’s view, amicus submissions longer than that should comply with ordinary briefing requirements, including line spacing and font size, which should simultaneously encourage shorter filings and make longer filings easier for the court to read.”

Appellate Rules Subcommittee proposed modification of Court Rules Committee proposal:

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

- (a) either be in the form of a letter or comply with the briefing rules for responding parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; ~~and~~
- (d) certify that copies have been served on all parties; ~~and~~;
- (e) certify compliance with the length limits of Rule 9.4(i) applicable to a responding party at that stage of the proceeding.

February 14, 2017

Via Email

Chief Justice Nathan L. Hecht
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711
nathan.hecht@txcourts.gov

Justice Jeffrey S. Boyd
Supreme Court of Texas
PO Box 12248
Austin, Texas 78711
jeff.boyd@txcourts.gov

Dear Chief Justice Hecht and Justice Boyd:

On behalf of the State Bar of Texas Court Rules Committee, I am pleased to submit the attached proposal for amendments to Rule 11 of the Texas Rules of Appellate Procedure. Please do not hesitate to contact me if you have any questions or concerns about the proposal.

Respectfully submitted,



Kennon L. Wooten
Chair, State Bar Court Rules Committee

Encl.

CC (via email):

Martha Newton, Rules Attorney, Supreme Court of Texas – martha.newton@txcourts.gov
Giana Ortiz, Vice-Chair, State Bar Court Rules Committee – gortiz@ortizlawtx.com

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STATE BAR OF TEXAS COURT RULES COMMITTEE

PROPOSED AMENDMENT TO RULE OF APPELLATE PROCEDURE 11

I. Exact language of existing Rule: TRAP 11

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

- (a) comply with the briefing rules for parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; and
- (d) certify that copies have been served on all parties.

II. Proposed changes to existing rule:

An appellate clerk may receive, but not file, an amicus curiae brief. But the court for good cause may refuse to consider the brief and order that it be returned. An amicus curiae brief must:

- (a) **either be in the form of a letter or** comply with the briefing rules for **responding** parties;
- (b) identify the person or entity on whose behalf the brief is tendered;
- (c) disclose the source of any fee paid or to be paid for preparing the brief; and
- (d) certify that copies have been served on all parties.

III. Brief statement of reasons for requested change and advantages to be served by proposed new rule:

The existing rule states that amicus briefs must comply with the briefing rules for the parties, which requires the amicus to include, at a minimum, a table of contents and authorities, a summary of the argument, and an argument section, as is required for an appellee's brief pursuant to TRAP 38.2. Many times, amicus briefs include additional sections, such as a statement of the issues and a statement of facts consistent with the requirements for an appellant's brief pursuant to TRAP 38.1. The current practice, however, is that many amici submit letters rather than briefs. The proposed changes make clear that (1) an amicus can submit a letter in lieu of a brief; and (2) when submitting a brief, the amicus need only comply with the requirements for responding parties' briefs.