

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

Comments on Proposed Amendment of New York’s Code of Judicial Conduct (22 NYCRR §100.3(B)(12)), relating to a judge’s role in facilitating the ability of unrepresented litigants to have their matters fairly heard

The New York City Bar Association<sup>1</sup> applauds the initiative of the Administrative Board in proposing the above rule. We believe a rule of this kind is essential. We are very mindful that over two million litigants appear in New York courts each year without a lawyer, and that this has become a daunting challenge for judges and the courts alike. For example, in family and housing courts, large numbers of unrepresented, low-income litigants seek justice to secure the essentials of life. Similarly, there has been an explosion of consumer debt cases, many having enormous consequences, and the overwhelming majority of debtors have no legal assistance. Our members have witnessed first-hand the discrepancy in the experience of litigants with matters before judges who take extra care to ensure that the process is fair for unrepresented litigants and those who appear before other judges, who do not facilitate the process. Our observation is that injustice results when judges do not feel authorized to facilitate the process for unrepresented litigants.

Because of the documented shortage in free and low-cost legal services, the only effective assistance for some unrepresented litigants who are opposed by represented litigants is the judge presiding over the matter. Judges should be encouraged to be as helpful as possible to unrepresented litigants, consistent with the other provisions in the Code of Judicial Conduct. We know many judges already are working to make the court system work fairly for all parties (e.g., granting adjournments with instructions to unrepresented litigants to bring in necessary evidence). We believe adoption of this proposed rule would improve the administration of justice by making it clear to all judges that such assistance is fully appropriate. We believe there is little risk of any adverse effect of such reasonable measures on represented litigants, as judges are still bound to adjudicate fairly and impartially and are also subject to all other provisions of the Code, and represented litigants have their own attorney who can object if they believe a judge oversteps.

---

<sup>1</sup> This comment reflects the deliberations and contributions of the Association’s Civil Courts and Pro Bono and Legal Services Committees and its Council on Judicial Administration.

We recognize there has been debate over the specific terminology of the proposed rule. We have some thoughts to share in that regard, but preface them by stressing that the choice of wording the Administrative Board makes is not as important than putting in place a rule which makes clear to judges that they can exercise their discretion to assist litigants, and we urge the Board to adopt language that most effectively encourages judges who want to provide the assistance so desperately needed, consistent with the rest of the Code.

The precise terminology has provoked spirited debate within and among the committees of the Association that reviewed the proposed rule. We see the advantage in utilizing the rule adopted by the ABA (ABA Model Judicial Code Rule 2.2) and with little change by 25 states. The ABA rule provides that:

It is not a violation of this Rule for a judge to make reasonable accommodations to ensure unrepresented litigants the opportunity to have their matters fairly heard. (Emphasis added.)

There is some concern that the Administrative Board's use of the word "facilitate" instead of "ensure" might weaken the potential impact of the proposed rule, conveying the sense that judges should utilize less discretion when assisting unrepresented litigants than in other states. On the other hand, we understand the concern that judges believe the word "ensure" could be seen as creating a mandate for how a judge should act. We question whether that is the appropriate interpretation, as the proposed rule is clearly designed as a "safe harbor" rather than an instruction to judges. Perhaps if the words "at the judge's discretion" were added to the proposed rule, there would be less concern about using the word "ensure." That being said, if the concern remains we would understand the Administrative Board's use of alternative terminology. With regard to the other significant difference in terminology, members had varying perspectives and strong views on whether "reasonable accommodations" or "efforts" is the better term to use. Ultimately, the position of the City Bar is that the use of either term could advance the purpose of the rule so long as the policy of encouraging judges to provide effective assistance to unrepresented litigants is emphasized.

With that in mind, we agree with the Task Force to Expand Access to Civil Legal Services that guidelines should be put in place to guide judges in implementing the rule. We believe the Office of Court Administration should stress in the guidelines the importance of judges recognizing the needs of, and assisting, unrepresented litigants. We also believe the

guidelines should not impose overly specific boundaries which could render the rule less effective; judges should be allowed to tailor their responses to the needs of the unrepresented litigants appearing before them.

We also note that, through the guidelines or other appropriate mechanism, non-judicial personnel should be permitted and encouraged to assist unrepresented litigants. Our members have witnessed court personnel give meaningful help to unrepresented litigants while being appropriately careful about the boundaries between such assistance and providing legal advice. However, on other occasions they have observed that extreme wariness about providing legal advice leaves unrepresented litigants without meaningful access to necessary information and available options and remedies. This is an opportune moment to make sure non-judicial personnel receive the message we would like to see conveyed to judges of the importance of providing appropriate assistance to unrepresented litigants in our courts.

We appreciate the opportunity to submit these comments and would be pleased to work with the appropriate authorities to fashion guidelines to implement this proposed rule.

March, 2013