



D I S T R I C T O F C O L U M B I A B A R  
*Courts, Lawyers and the Administration of Justice Section*

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BY MAIL AND E-MAIL ([valentine.cawood@dcsc.gov](mailto:valentine.cawood@dcsc.gov))

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Dear Counsel:

We write to submit the enclosed comment concerning a pending rulemaking in the court.

As you know, the Joint Committee on Judicial Administration in the District of Columbia has before it the recommendation of the Advisory Committee on Judicial Conduct to adopt the American Bar Association 2007 Model Code of Judicial Conduct, with amendments.

The Joint Committee has invited comments from the members of the District of Columbia Bar on the Advisory Committee's proposed 2011 Code of Judicial Conduct, and we are pleased to provide a statement in support of certain parts of that text we believe are especially significant.

The twenty-one sections the D.C. Bar are voluntary affiliations of D.C. Bar members that work together for improvement of practice areas and the profession. Sections are encouraged to make public statements where the views of Bar members may be helpful to others. Our section, and the two others joining in the statement, comprise about 3,400 members.

*The views expressed represent only those of the Courts, Lawyers & the Administration of Justice Section, the Criminal Law and Individual Rights Section, and the Corporation, Finance and Securities Law Section of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.*

Thank you for transmitting this letter and the enclosed statement to the Joint Committee.

Sincerely

Fritz Mulhauser  
Co-Chair

Sean Staples  
Co-Chair

Section on Courts, Lawyers & the Administration of Justice

Enclosure

D.C. BAR COURTS, LAWYERS & THE ADMINISTRATION OF JUSTICE SECTION  
STATEMENT IN SUPPORT OF THE PROPOSED 2011 CODE OF JUDICIAL CONDUCT  
SEGMENTS ON ACCOMMODATING UNREPRESENTED PARTIES

*The views expressed herein represent only those of the Courts, Lawyers & the Administration of Justice Section<sup>1</sup>, the Criminal Law and Individual Rights Section<sup>2</sup>, and the Corporation, Finance and Securities Law Section<sup>3</sup> of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.*

The Courts, Lawyers & the Administration of Justice Section, the Criminal Law and Individual Rights Section, and the Corporation, Securities and Finance Law Section support several parts of the changes to the Code of Judicial Conduct proposed by the District of Columbia Courts' Advisory Committee on Judicial Conduct.

Comment 4 to Rule 2.2 points out “[i]t is not a violation of this Rule [on Impartiality and Fairness] 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.”

Especially important is the proposed new comment 1A to Rule 2.6 on Ensuring the Right to be Heard. This provision assures judges that helping the unrepresented is acceptable, gives specific guidance on information that may be provided, and underscores that judges have an “affirmative role” in facilitating an individual’s right to be heard.

Current rules provide little guidance for judges facing *pro se* litigants, and perhaps as a result some may hesitate, concerned not to overstep the role of neutral arbiter of justice.<sup>4</sup>

The new comment 1A makes clear that judges have the capacity, and it is within their charge, to help *pro se* litigants in five ways: “(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 a case.”

*Pro se* litigants are everywhere in the D.C. Superior Court. The D.C. Access to Justice Commission reported these percentages of self-represented parties in its landmark 2008 needs study:

- Almost 45 percent of formal probate matters, 98 percent of the small estate matters and 60 percent of trust matters before the Probate Division;

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<sup>1</sup> The Steering Committee of the Section voted on October 19, 2011, without dissent, to adopt this public statement (with 2 recusals by government attorneys).

<sup>2</sup> The Steering Committee of the Criminal Law and Individual Rights Section voted on October 26, 2011, without dissent, to cosponsor this public statement (with 3 not voting and 1 recusal by a government attorney).

<sup>3</sup> The Steering Committee of the Corporation, Finance and Securities Law Section voted on October 21 and 22, 2011, unanimously, to cosponsor this public statement.

<sup>4</sup> Zoe Tillman, “Judges May Take Bigger Role Guiding Pro Se,” *The National Law Journal*, Oct. 3, 2011 (quoting Superior Court Chief Judge Lee Satterfield, “being mindful of our role as neutral arbiters, we also have to recognize that we’re responsible for fairness and justice also”).

- About 98 percent of both petitioners and respondents in the Domestic Violence Unit;
- Approximately 77 percent of plaintiffs in divorce/custody/miscellaneous cases in Family Court;
- More than 98 percent of respondents in paternity and child support cases; and
- About 97 percent of defendants who had to appear in the Landlord/Tenant Court.<sup>5</sup>

Increasing poverty, a result of the continuing economic downturn, means the number of *pro se* litigants continues to rise, as more people face legal problems and do so without the resources to afford representation by an attorney. Community resources such as legal services organizations and law firm *pro bono* volunteers, as well as court self-help centers, are all stretched thin – with the result that, for example according to Tillman’s article, half the 12,764 respondents in basic civil cases in D.C. Superior Court in 2009 were unrepresented.

Because of the enormous need behind the bare statistics, more legal help for individuals in civil cases is important, and every type of effort to support such increases is critical; however, it’s probable that here as elsewhere *pro se* litigants will continue to flood the civil divisions of the D.C. Superior Court. Those who appear before the court unrepresented are typically intimidated, ill-informed and ill-prepared for civil litigation. Those with valid claims need help to present them. Those defending bear added burdens of anxiety.

This reality underlines the importance of empowering judges to be a part of the overall efforts of the Court to ensure that *pro se* litigants can access information they need to understand proceedings and can be heard. The language of the Proposed Code of Judicial Conduct in Rules 2.2 and 2.6 is an important step in clarifying the powerful ways judges can assist in improving access to justice in their own courtrooms without fear they may be violating ethical standards.<sup>6</sup>

The three Sections named above support the adoption of the Proposed Code of Judicial Conduct, especially the new Comment 1A accompanying Rule 2.6.

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<sup>5</sup> *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community*. (Washington, D.C.: The Commission, 2008); Appendix H, Pro Se Statistics, pp. 131ff.

<sup>6</sup> The Court of Appeals has in the last year reversed several trial court decisions against *pro se* plaintiffs where it found failures to explain complicated aspects of procedure. The Court of Appeals cited in each opinion the view of the D.C. Circuit on “the importance of providing *pro se* litigants with the necessary knowledge to participate effectively in the trial process.” *Moore v. Agency for Int’l Dev.*, 994 F.2d 874, 876 (1993). See *Reade v. Saradji*, 994 A.2d 368 (D.C. 2010) (reversing dismissal of complaint of *pro se* landlord against tenant as unjustified for lack of explanation of why affidavit of service was defective or how to cure); *Padou v. District of Columbia*, 998 A.2d 286 (D.C. 2010) (reversing summary judgment for the government against *pro se* plaintiffs bringing First Amendment challenge to city agency removal of flyers posted on lampposts for lack of explanation of pleading requirements).