THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENTS TO CODE FOR JUDICIAL CONDUCT CANON 2, RULE 2.2—IMPARTIALITY AND FAIRNESS AND RULE 2.6—ENSURING THE RIGHT TO BE HEARD	)	**O R D E R** NO. 25700-A-1399

The Superior Court Judges' Association, having recommended the suggested amendments to Code for Judicial Conduct Canon 2, Rule 2.2—Impartiality and Fairness and Rule 2.6—Ensuring the Right to Be Heard, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached hereto are to be published for comment in the Washington Reports, Washington Register, Washington State Bar Association and Administrative Office of the Court's websites in January 2022.

(b) The purpose statement as required by GR 9(e), is published solely for the information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S. Mail or Internet E-Mail by no later than April 30, 2022. Comments may be sent to the following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500 words.

DATED at Olympia, Washington this 6th day of December, 2021.

For the Court

González, C.J.

GR 9 COVER SHEET

Suggested Amendments to the

Code of Judicial Conduct Canon 2 Comments, Rules 2.2 and 2.6

Submitted by the Superior Court Judges' Association

A. **Name of Proponent:** Superior Court Judges' Association

B. **Spokesperson:** Judge Jennifer Forbes, President-Elect
Superior Court Judges' Association

C. **Purpose:**

The Superior Court Judges' Association (SCJA) proposes amendments to the comments of the Code of Judicial Conduct Canon 2, Rule 2.2 and Rule 2.6, to help judges discern what constitutes "reasonable accommodation" of unrepresented litigants in court. This amendment is needed to ensure that unrepresented litigants are fairly heard and access to justice is available to those without representation.

Unrepresented litigants make up a significant and growing number of participants appearing in Washington courts. This is a national phenomenon. The National Center for State Courts, *Civil Justice Report*, 2015, shows a decline in defendant/respondent representation in civil litigation in general jurisdiction state courts from 97% in 1992 to 46% in 2015. Increased poverty and relatively few legal resources for those with limited financial means are factors contributing to the increase in unrepresented litigants appearing in court.[1]

This decrease in legal representation contributes to access to justice challenges faced by those with limited financial means. In a legal system that is generally described as adversarial and lawyer-centric, unrepresented litigants are disadvantaged.[2] A 2015 survey conducted by the Washington State University's Social and Economic Sciences Research Center (WSU-SESRC) found 70% of adults living in households at or below 200% of the federal poverty level reported

[1] Cerniglia, Christine, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, Georgetown Journal on Poverty Law and Policy, Vol. XXVII, Spring 2020

[2] National Center for State Courts, *The Landscape of Civil Litigation in State Courts,* 2015. The NCSC survey data shows correlation between representation and case dispositions. For example, cases disposed by summary judgment also had the highest attorney representation, likely reflecting unrepresented litigants lack of knowledge about summary judgments.

legal problems for which they received inadequate or no legal help.[3] The divide between legal needs and legal assistance fuels the perception of a "justice gap" that disproportionately impacts low-income households, women, seniors, veterans, people with disabilities, and communities of color.[4]

Judges are challenged when unrepresented litigants appear in court, and must balance their obligation to *"perform all duties of judicial office fairly and impartially*" (CJC 2.2) with the need to ensure that unrepresented litigants are adequately "*heard according to the law*" (CJC 2.6(A)). In recognition of this judicial challenge, in 2007 the American Bar Association added a new comment to the Model Code of Judicial Conduct, Rule 2.2, which provides "*a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially*." The new comment (4) adds, "*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*." As of 2018, thirty-four states, including Washington, and the District of Columbia, have added comment 4 or a version of comment 4 to their Code of Judicial Conduct.[5]

Unfortunately, what constitutes "reasonable accommodation" is often difficult for judges to discern. In 2012, in a joint resolution regarding Rule 2.2, the Conference of Chief Justices and the Conference of State Court Administrators (CCJ/COSCA) urged states to "*modify 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*", explaining that the resolution affirmed "*the importance of access to justice for all*" and emphasized that "*access to courts extends both to lawyer-represented and self-represented litigants*."[6]

In 2018 the California Judges' Association, Judicial Ethics Committee, issued a legal opinion further explaining the legal principles behind their examples of reasonable accommodation:

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[3] The SESRC findings are described in a report by the Washington Supreme Court's Civil Legal Needs Study Update Committee, October 2015, Link: https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

[4] American Academy of Arts & Sciences, *Civil Justice for All*, 2020

[5] Gray, Cynthia, *Balls, Strikes, and Self-Represented Litigants*, Judicial Ethics and Discipline Blog, Center for Judicial Ethics of the National Center for State Courts, March 19, 2019

[6] Conference of Chief Justices – Conferences of State Court Administrators Resolution in Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Representing Litigants, 2012, Link: https://ccj.ncsc.org/__data/assets/pdf_file/0023/23747/07252012-support-expanding-rule-aba-model-code-judicial-conduct-self-representing-litigants.pdf

"Reasonable procedural accommodations for self-represented litigants do not change the facts, the law, or the burden of proof, nor do they ensure a victory for the unrepresented. Such accommodations simply mean that both sides will have a fair opportunity to tell their stories."[7]

At least nine states and the District of Columbia have followed the CCJ/COSCA resolution and have listed examples of reasonable accommodation in their Code of Judicial Conduct.[8]

At the 2019 Long Range Planning Meeting, the SCJA identified the need to improve self-represented litigant resources and access to courts as a top priority. In February 2020, SCJA hosted the inaugural meeting of the Unrepresented Litigant Ad-Hoc Workgroup (Workgroup), a multi-disciplinary group of justice system partners[9] with the goal of improving processes, advancing access to justice, and ensuring that unrepresented litigants are heard fairly in court. The group members reported disparate state-wide practices and widespread uncertainty regarding the reasonable accommodation of unrepresented litigants in court. Recognizing that judges and court staff are critical to addressing the justice gap that face unrepresented litigants, the Workgroup made education one of its top priorities.

The Workgroup quickly concluded that training initiatives alone, however, will not provide the support needed to ensure the reasonable accommodation of unrepresented litigants. Judicial education is not universally accessed nor always readily available. Training subject matter varies by year and presenter, and may be forgotten by the individual taking the training. After a careful review of the national literature and other states' judicial ethics rules and canons, the Workgroup concluded that additional clarity and support was needed in Washington's judicial canons as to the reasonable accommodation of

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[7] California Judges Association Advisory Opinion 76, 2018. Link: https://www.caljudges.org/docs/Ethics%20Opinions/Op%2076%20Final.pdf

[8] Gray, Cynthia, *Pro Se Litigants in the Code of Judicial Conduct*, 36 No. 3 Judicial Conduct Reporter, Fall 2014

[9] The SCJA Unrepresented Litigant Work Group includes representatives from the following organizations and committees: Office of Civil Legal Aid, Washington State Office of Administrative Hearings, Washington State Supreme Court Minority and Justice Commission, Washington Law Help, Washington Board for Judicial Administration, Northwest Justice Project, Washington State Supreme Court Gender and Justice Commission, District and Municipal Court Judges' Association, Association of Washington Superior Court Administrators, SCJA Ethics Committee, Access to Justice Board, Washington State Law Library, Washington State Supreme Court Pattern Forms Committee, Washington State Association of County Clerks, King County Superior Court Family Law Facilitator Program, Access to Justice Board, Washington State Coalition Against Domestic Violence, and a Limited License Legal Technician (LLLT).

unrepresented litigants. The Workgroup concurred with the CCJ/COSCA recommendation that expanded comments to the judicial canons, that include "specific actions" of reasonable accommodation, would not only clarify existing canon rules, but provide important ethical guidance, and create a lasting, accessible resource for judges.

The Workgroup drafted comment amendments to Washington's judicial canons from the ABA model code, adding examples of reasonable accommodation as per the CCJ/COSCA recommendation. The suggested comment amendments were circulated for extensive review through the Workgroup membership as well as the following external stakeholder groups: Family Law Executive Committee of the Family Law section of the Washington State Bar Association (FLEC), SCJA Family and Juvenile Law Committee (FJLC), the Access to Justice Rule Committee, Washington Commission on Judicial Conduct, and SCJA Ethics Committee. The suggested comment changes provided to the Supreme Court reflect the direct feedback of these external stakeholders and the support of each of the Workgroup's member organizations and the SCJA Board. Suggested changes were carefully crafted to only impact the comments to Canon 2, Rule 2.2 and 2.6, in the acknowledgement that the judicial canons must uphold strict standards even when incorporating improved practices for the ethical conduct of judges.

In summary, the SCJA concurs with both the ABA model code and the CCJ/COSCA joint resolution that judges need further guidance regarding what constitutes "reasonable accommodation" of unrepresented litigants, and that the Washington Code of Judicial Conduct should be revised accordingly. SCJA's suggested Canon 2 amendments to comments to Rule 2.2 and Rule 2.6 will assist judicial officers discern what accommodative actions are permissible under the Canon, and in so doing help unrepresented litigants to be fairly heard, ensuring access to justice for all people using the Washington courts.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is not requested.

Code for Judicial Conduct
Canon 2

Rule 2.2 – Impartiality and Fairness. 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 the Rule for a judge to make reasonable accommodations to ensure pro se litigant the opportunity to have their matters fairly heard.~~ At times, judges have before them unrepresented 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 and uphold and apply the law does not preclude the judge from making reasonable accommodations to ensure an unrepresented litigant's right to be heard, so long as those accommodations do not give the unrepresented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.

Rule 2.6 – 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.
(B) Consistent with controlling court rules, a judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces any party into settlement.

[4] Judges should endeavor to ensure unrepresented litigants have a fair opportunity to participate in proceedings. While not required, judges may find the following non-exhaustive list of steps consistent with these principles, and helpful in facilitating the right of unrepresented litigants to be heard:

1. Identifying and providing resource information to assist unrepresented litigants. Judges should endeavor to identify resources early in the case so as to reduce the potential for delay.

2. Informing litigants with limited-English proficiency of available interpreter services.

3. Providing brief information about the proceeding and evidentiary and foundational requirements.

4. Using available courtroom technology to assist unrepresented individuals to access and understand the proceedings (e.g. remote appearances, use of video displays to share court rules, statutes, and exhibits).

5. Asking neutral questions to elicit or clarify information.

6. Attempting to make legal concepts understandable by minimizing use of legal jargon.

7. Starting the hearing with a quick summary of the case history and of the issues that will be addressed.

8. Explaining at the beginning of the hearing that you may be asking questions and that this will not indicate any view on your part. It will merely mean that you need to get the information to decide the case

9. Working through issues one by one and move clearly back and forth between the two sides during the exploration of each issue

10. Inviting questions about what has occurred or is to occur.

11. Permitting narrative testimony.

12. Allowing parties to adopt their written statements and pleadings as their sworn testimony. This provision would not limit opportunities for cross-examination nor be permitted in a manner that would prejudice the other party in the presentation of his/her/their case.

13. Asking questions to establish the foundation of evidence, when uncertain

14. Clarifying with the parties whether they have presented all of their evidence and explaining that no additional testimony or evidence will be permitted once the evidentiary portion of the case is completed.

15. Prior to announcing the decision of the Court reminding the parties that they have presented all of their evidence and that they will be given an opportunity to ask questions once the Court has issued its ruling and that they should not interrupt the Court.

16. If unable to do what a litigant asks because of neutrality concerns, explaining the reasons in those terms.

17. Announcing the decision, if possible, from the bench, taking the opportunity to encourage the litigants to explain any problems they might have complying.

18. Explaining the decision and considering acknowledging the positions and strengths of both sides.

19. Making sure, by questioning, that the litigants understand the decision and what is expected of them, while making sure that they know you expect compliance with the ultimate decision.

20. Where relevant, informing the litigants of what will be happening next in the case and what is expected of them.

21. Making sure, if practicable, that the decision is given in written or printed form to the litigants.

22. Informing the parties of resources that are available to assist with drafting documents, as well as compliance or enforcement of the order. Examples include but are not limited to courthouse facilitator programs, advocates, lists of treatment providers, and child support enforcement.

23. Thanking the parties for their participation and acknowledging their efforts.