



**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”)<sup>1</sup> 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,<sup>2</sup> Texas Supreme Court Policies on Assistance to Court Patrons by Clerks,<sup>3</sup> and Texas Supreme Court Policies on Assistance to Court Patrons by Court Personnel<sup>4</sup> 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.<sup>5</sup> 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.

---

<sup>1</sup> 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.

<sup>2</sup> See Exhibit 1.

<sup>3</sup> See Exhibit 2.

<sup>4</sup> See Exhibit 3.

<sup>5</sup> 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.<sup>6</sup>

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.

---

<sup>6</sup>Presentations 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:<sup>7</sup> “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 Conduct<sup>8</sup> while nineteen states and the District of Columbia revised and expanded the provision on making reasonable accommodations for self-represented litigants.<sup>9</sup> 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.”<sup>10</sup> 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

---

<sup>7</sup> See Exhibit 5.

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

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

<sup>10</sup> See Exhibit 6.

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

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

---

<sup>11</sup> 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.”

<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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,<sup>21</sup> Maine,<sup>22</sup> Missouri,<sup>23</sup> New Hampshire,<sup>24</sup> and New York,<sup>25</sup> 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.<sup>26</sup> 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;<sup>27</sup> (2) provide information about the proceeding and evidentiary and foundational

---

<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> Colorado, Massachusetts, Montana, and Wisconsin

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

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

---

<sup>28</sup> 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).

<sup>29</sup> Colorado, Massachusetts, and Montana

<sup>30</sup> District of Columbia, Louisiana, Massachusetts, Montana, and Wisconsin

<sup>31</sup> Colorado, District of Columbia, Iowa, Massachusetts, Montana, Ohio, and Wisconsin

<sup>32</sup> Wisconsin

<sup>33</sup> Wisconsin

<sup>34</sup> District of Columbia, Iowa, Louisiana, Montana, Ohio, and Wisconsin

<sup>35</sup> Colorado, District of Columbia, Iowa, Louisiana, Massachusetts, Montana, and Ohio

<sup>36</sup> 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).

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

<sup>38</sup> 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 Volunteers<sup>39</sup> 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.

---

<sup>39</sup> See Exhibit 9