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March 22, 2013

John W. McConnell, Esq.
Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: 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.

Dear Mr. McConnell:

MFY Legal Services, Inc. (MFY) submits these comments to the Office of Court Administration (OCA) regarding the proposed amendment to § 100.3(B) of the New York Code of Judicial Conduct.

The Challenges Facing Unrepresented Litigants

MFY envisions a society in which no one is denied justice because he or she cannot afford an attorney. To make this vision a reality, for 50 years MFY has provided free legal assistance to residents of New York City on a wide range of civil legal issues, prioritizing services to vulnerable and under-served populations, while simultaneously working to end the root causes of inequities through impact litigation, law reform and policy advocacy. We offer advice and representation to more than 8,000 New Yorkers each year. In doing so, we have gained experience with unrepresented litigants and their difficulties navigating the court system without an attorney, particularly in consumer credit and housing cases.

Unrepresented litigants face numerous obstacles to a fair hearing, and these obstacles prevent them from fully participating in our justice system. MFY commends the OCA for addressing the barriers that unrepresented litigants face when they try to access justice.

The proposed amendment would add the following subsection to § 100.3(B) of the New York Code of Judicial Conduct:

> (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.

The amendment clarifies that a judge may take steps to reasonably assist unrepresented litigants without compromising judicial impartiality. Without mandating any particular action, the amendment explicitly provides that a judge may exercise discretion to further the court's interest in conducting an impartial adversarial proceeding and the overall goal of fairness. Although the amendment is a significant improvement, as discussed below, we support the more expansive language recommended by the American Bar Association (ABA).

Over 90% of the defendants in New York City Civil Court are unrepresented. Because we both represent clients and advise unrepresented litigants, we see how drastically different their experiences in court can be. For example, in consumer credit cases, corporations commonly change their strategy based on whether the defendant is represented. Because plaintiff corporations in consumer credit cases rarely have the documents necessary to prove a prima facie case, when we enter a notice of appearance, they often immediately discontinue the case.

In contrast, cases against the unrepresented litigants whom we advise proceed entirely differently. Unrepresented litigants generally lack the legal training to assert potentially applicable defenses, apply the rules of evidence, and communicate effectively and persuasively within a legal framework. As a result, they are usually intimidated by appearing, let alone arguing, before a judge. Opposing counsel take advantage of this inexperience and resultant fear. They often ignore discovery demands or produce inadmissible evidence. They repeatedly adjourn cases until the unrepresented defendants default or settle. This pattern occurs even when unrepresented litigants dispute the validity and ownership of the debt, because they cannot afford to continue missing work or paying for childcare.

For example, we recently advised two individuals who are unrepresented defendants in consumer credit cases brought by debt buyers. Both women have disabilities and receive income that is exempt from collection. The first, Ms. D, has served three demands for documents and received no response. The last time Ms. D went to court, opposing counsel assured her that she would receive a stipulation of discontinuance in the mail. Ms. D never received this stipulation or any other communication from opposing counsel. Ms. D is extremely intimidated by court, and her health problems make it particularly difficult for her to get there. As of now, Ms. D is contemplating default solely in order to avoid another adjournment.

In contrast, the court took a more active role in directing the case against the second individual, Ms. G, whose limited English proficiency poses an additional hurdle. After the court issued a discovery order, opposing counsel produced documents that were insufficient to establish a prima facie case. On the trial date, the court questioned opposing counsel, determined that plaintiff failed to establish a prima facie case, and dismissed the case. Ms. G's experience shows how the court's active involvement can keep a case on track and examine the strength of the claims.

The same pattern occurs in landlord-tenant disputes. In housing court, the vast majority of cases are settled pursuant to stipulations that landlords' attorneys draft on terms that are favorable to landlords and often misunderstood by unrepresented tenants. Although housing court judges generally review stipulations with unrepresented tenants, these allocutions are often cursory.

Judicial accommodations for unrepresented litigants are especially significant for people with disabilities. Unrepresented litigants with disabilities face unique barriers to accessing justice, including architectural and attitudinal barriers, court officials without knowledge of how to accommodate or work with litigants with disabilities, court procedures that are inflexible, and inadequate signage that makes it hard to obtain essential information or help completing required forms. Litigants who cannot travel to court due to a disability may be physically unable to file an answer and appear before the judge. As a result, if they are not represented, they are likely to default. Litigants with psychological disabilities may have physical access to the court, but they may face barriers that prevent them from meaningfully participating in their case.

Why We Support the Proposed Amendment

The proposed amendment helps address the challenges unrepresented litigants face by providing that judges may assist unrepresented litigants without compromising impartiality. This assistance may take the form of, among other things: (1) reviewing whether a petitioner has standing; (2) examining the admissibility of evidence proffered; (3) providing information about the applicable law; (4) refraining from using legal jargon; (5) questioning witnesses; and (6) scrutinizing the progress of a case that has been repeatedly adjourned. Applying different, more flexible rules to unrepresented litigants is not unprecedented. See Hughes v. Rowe, 449 U.S. 5, 9 (1980) ("It is settled law that the allegations of [a *pro se*] complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers . . . .'"); Stephen W. v. Christina X., 80 A.D.3d 1083, 1084, 916 N.Y.S.2d 260, 262 (App. Div. 3d Dep't 2011) (affording a liberal and broad interpretation to papers submitted by *pro se* litigants); Zelodius C. v. Danny L., 39 A.D.3d 320, 833 N.Y.S.2d 470 (App. Div. 1st Dep't 2007) (liberally construing a *pro se* petition). By permitting judges to provide the assistance they deem necessary to ensure the fair administration of justice, the proposed amendment protects an unrepresented litigant's due process rights and furthers the court's interest in determining the truth. See, e.g., People ex rel. Nelson ex rel. Perry v. Warden of Brooklyn House of Det., 185 Misc. 2d 758, 761, 716 N.Y.S.2d 273, 276 (Sup. Ct. Kings Cty. 2000) (describing the trial court's inherent authority to develop rules that enhance the search for truth); People v. Atwood, 101 Misc. 2d 291, 296, 420 N.Y.S.2d 1002, 1006 (Sup. Ct. N.Y. Cty. 1979) ("The court has inherent authority to order its processes . . . to further the goals of a fair trial[and] of a search for truth . . . .").

We also support the proposed amendment because it has the potential to help litigants with disabilities access justice. In passing the Americans with Disabilities Act (ADA), Congress emphasized that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." Title II, which applies to public entities, clearly covers courts and their administration, and the Supreme Court has held that the ADA gives people with disabilities "the right of access to the courts." See Tennessee v. Lane, 541 U.S. 509, 531 (2004) (holding that "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts"). In reaching this conclusion, the Court noted that "[t]he Due Process Clause also requires the States to afford certain civil litigants a

'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings." Id. at 523.

The proposed amendment clarifies that a judge may offer these litigants an accommodation for their disability without violating the duty to be impartial. This accommodation may take the form of an opportunity to enter a telephonic appearance or, in the case of a litigant with a psychological disability, slight procedural changes. For example, during one trial, a judge granted a litigant's request to have a psychiatrist "stand near the witness box to lend emotional support" because the litigant had a "panic disorder." See Starret City, Inc. v. Adamson, 4/12/95 N.Y.L.J. 30, col. 5 (Civ. Ct. Kings Cty.).

Suggestions for Strengthening the Proposed Amendment

Although we support the proposed amendment, we urge the OCA to adopt the more protective language of the ABA Model Rule, from which the OCA amendment is derived. The ABA Model Rule says:

> 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). Rather than merely permitting a judge to "facilitate the ability of unrepresented litigants to have their matters fairly heard," the ABA Model Rule allows judges to "ensure [them] the opportunity" to do the same. Although a subtle difference, the ABA Model Rule is more in line with § 100.3(B)(6) of the New York Code of Judicial Conduct, which already requires judges to "accord to every person who has a legal interest in a proceeding . . . the right to be heard." Anything short of permitting judges to ensure the opportunity to be heard would conflict with the duty judges already have to accord to unrepresented litigants the right to be heard.

It is important to note that the ABA Model Rule's language does not impose a mandate on judges or create new rights. Instead, the ABA Model Rule simply clarifies what has always been permissible—to ensure that unrepresented litigants have the opportunity to realize their already-existing right to have their matters fairly heard. There is no evidence that any of the 25 states that have adopted similar language have seen a rise in litigation by pro se litigants.

Adopting the ABA Model Rule would also clarify that judges are permitted to offer reasonable accommodations to litigants who have disabilities. The term "reasonable accommodations" would promote judicial fairness for all litigants and would be consistent with the court's obligations to litigants with disabilities pursuant to the ADA.

Conclusion

In order for the concept of "justice for all" to be more than a hollow promise, litigants need the opportunity to access the court and understand and meaningfully participate in judicial proceedings. The proposed amendment has the potential to help fulfill this promise by clarifying that a judge may take steps to reasonably accommodate unrepresented litigants without compromising judicial impartiality.

We appreciate your consideration of our comments.

Sincerely,

Jeanette Zelhof
Executive Director