

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) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

Comment

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] Notwithstanding Colorado caselaw to the contrary, the steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; using plain English rather than legal jargon; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case.

[3] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel

are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[4] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

At the urging of Judge Dan Taubman and the Colorado Access to Justice Commission, the committee considered a series of amendments to the Code proposed by Chief Justice Karla Gray of the Montana Supreme Court regarding accommodations a judge may make for pro se litigants. The staff studied these proposals, and the committee engaged in lengthy debate about them.

The committee considered, on the one hand, Colorado's long history of holding that courts should treat pro se litigants no differently than their represented counterparts, and thus do not liberally construe pro se pleadings, forgive the mistakes of untrained laypersons, and so forth. On the other hand, Colorado's approach to dealing with pro se litigants is somewhat out of step with the trend of the rest of the country toward giving judges more discretion to consider a pro se litigant's status and modify some courtroom procedures accordingly. Moreover, the judge members on the committee voiced strong support for giving judges greater flexibility in dealing with pro se litigants. The judge members pointed out that the number of cases involving pro se litigants on both sides has increased substantially over recent years; these cases are resource and time intensive, and create significant challenges for the courts. The judge members agreed that greater latitude in explaining court processes and making accommodations would lead to better and more efficient resolutions in these cases.

Accordingly, the committee voted unanimously to adopt new comment 2, which was drawn from Chief Justice Gray's list of proposed amendments (the committee rejected the remainder of her proposed amendments, which were scattered throughout the Code in rules not necessarily pertaining to access to justice). The committee modified the proposed amendment to specifically reflect the fact that the comment is contrary to existing Colorado caselaw. Although the committee recognizes that such a recommendation is unusual, it is not unprecedented; the court approved commentary to the Model Rules of Professional Conduct that is contrary to Colorado caselaw. In light of the compelling interests supporting the new comment, the committee respectfully requests that the court adopt it.