

JUDGES' ETHICAL DUTIES TO ENSURE FAIR TREATMENT OF INDIGENT PARTIES

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In this Essay, I will argue that the American Bar Association (ABA) Model Code of Judicial Conduct (“the Model Code”) should more squarely address the challenges faced by low-income litigants. Amendments should make clear that judges have a duty to ensure the fair treatment of the indigent in the U.S. legal system. I have written elsewhere about the legitimacy of amending ethical rules to advance specific public policy goals,¹ and due to the page limit for authors in this Colloquium, I will not address that topic again here.² I will devote the balance of my Essay to offering eight proposals

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1. See, e.g., Tom Lininger, *Sects, Lies and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1271–78 (2004) (arguing that it would be both effective and conceptually legitimate to amend the ABA Model Rules of Professional Conduct in order to limit prosecutors’ involvement in religious profiling during criminal investigations); see also Tom Lininger, *Green Ethics for Judges*, 86 GEO. WASH. L. REV. 711, 726–33 (2018) (arguing that the ABA Model Code of Judicial Conduct should address environmental protection but noting possible objections to this approach); Tom Lininger, *Green Ethics for Lawyers*, 57 B.C. L. REV. 61, 74–75 (2016) (providing a similar analysis with respect to the ABA Model Rules of Professional Conduct); cf. Tom Lininger, *No Privilege to Pollute: Expanding the Crime-Fraud Exception to the Attorney-Client Privilege*, 105 MINN. L. REV. 113, 139–53, 163–71 (2020) (discussing a similar analysis with respect to proposed revisions of privilege rules).

2. Except to say this: the critique of undue specificity in ethics rules seems particularly inapposite for proposals that would improve treatment of the low-income population. A vast number of Americans are economically vulnerable, and as the recent downturn resulting from the COVID-19 pandemic has shown, some people who usually enjoy economic security can abruptly find themselves among the destitute. In criminal cases, over 80 percent of defendants are indigent. RONALD ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 108 n.1 (3rd ed. 2020). The ethical rules for lawyers and judges already address, to some extent, the need to protect low-income people, and the ethical rules presently accord even greater protection to subparts of our society that are smaller in size than the low-income population. COMPARE MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2010) (prohibiting judges from discriminating based on various attributes, including socioeconomic

that could help to make the judicial system more responsive to the needs of low-income parties. I do not present these proposals as a comprehensive reform package but rather as small steps in the right direction.

The time seems to be ripe for a reexamination of judges' ethical duties to help the indigent. Several recent ABA initiatives suggest a growing interest in this category of reform. On March 24, 2020, the ABA Standing Committee on Ethics and Professional Responsibility issued a formal ethics opinion exhorting judges to consider more carefully the ability of low-income parties to pay court fines, fees, restitution, bail, and other categories of debt.³ On August 4, 2020, the ABA House of Delegates approved an amendment to Model Rule of Professional Conduct 1.8(e), allowing lawyers to provide financial support to indigent clients under limited circumstances.⁴ The ABA's Standing Committee on Legal Aid and Indigent Defense is celebrating its one-hundred-year anniversary in 2020 and is redoubling its efforts to improve the administration of justice for the benefit of low-income populations.⁵ These various developments may provide reason for optimism about the ABA's receptiveness to proposals consonant with their recent work to ameliorate the plight of the impecunious.

The parts that follow present draft language for proposed amendments to the ABA Model Code of Judicial Conduct. The language of the current rules appears in plain roman text and the proposed additions appear in italics. Strikethroughs indicate deletions. The explanations of the proposals will be brief due to space limitations but will offer a starting point for discussion and future scholarship.

I. GENERAL DUTY OF FAIR TREATMENT IRRESPECTIVE OF RESOURCES

Rule 2.2 of the Model Code should be amended so that it reads as follows:

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~~, *and shall ensure that court procedures subject to the judge's control are fair to all parties and witnesses irrespective of their resources, socioeconomic status or ability to secure representation by counsel.*⁶

status), *with id.* r. 3.6 (prohibiting judges from joining groups that discriminate on certain grounds but omitting socioeconomic status from those grounds).

3. ABA Comm. on Ethics & Pro. Resp., Formal Op. 490 (2020).

4. Under this amendment, a lawyer representing an indigent client either on a contingent fee basis or through a clinic on a pro bono basis would be able to pay for the client's food, rent, transportation, medicine, and other basic living expenses. For the amendment text, see AM. BAR ASS'N, ANNUAL MEETING 2020, HOUSE OF DELEGATES RESOLUTION 107 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/107.pdf> [<https://perma.cc/BK7S-6BZH>].

5. Standing Comm. on Legal Aid & Indigent Def., *A Century of SCLAID*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_aid_indigent_defense/about-us/sclaid-100 [<https://perma.cc/SZ7Q-7GG6>] (last visited Jan. 27, 2021).

6. MODEL CODE OF JUD. CONDUCT r. 2.2.

Rule 2.2 ranks among the most important rules in the Model Code. Published judicial opinions cite this rule more often than virtually any other in the ABA's template or its state counterparts.⁷ At first blush, the generality of the language in Model Rule 2.2 might seem to limit its efficacy, but because the rest of the code has few specific provisions, Model Rule 2.2 provides important guidance for judges in the interstices where there is no on-point rule.

In its current form, Model Rule 2.2 stresses three considerations: fealty to the law, impartiality, and fairness. The imperative of following the law is straightforward and requires no further explanation elsewhere in the code.⁸ The idea of impartiality is more challenging, but interpretation by the U.S. Supreme Court,⁹ along with detailed code provisions listing bases for disqualification,¹⁰ sheds light on the meaning of this concept. Model Rule 2.2's use of the term "fairly," however, raises questions that the code never answers. What does fairness entail, and how can a judge assess fairness when it is necessary to make a close call?

This Essay's proposed amendment would help to clarify what fairness necessitates. The amendment would focus the fairness inquiry on discretionary matters of procedure.¹¹ The new rule would view fairness through a Rawlsian lens.¹² Court proceedings should be fair to all, but when parties dispute the fairness of a discretionary procedure and the parties'

7. Westlaw searches on September 5, 2020, found that published opinions cited Model Rule 2.2 more frequently than all but two of the rules in Canon 2. Those two rules were 2.9 (ex parte contacts) and 2.11 (disqualification). No rule in Canon 3 or Canon 4 had as many citations in published opinions as did Model Rule 2.2. The Westlaw searches used the following Boolean terms and connectors query in order to find citations to all states' codes: "judicial conduct" and "rule ___."

8. So unremarkable is this first requirement that the ABA omitted it from the title of Model Rule 2.2.: "Impartiality and Fairness." MODEL CODE OF JUD. CONDUCT r. 2.2.

9. In *Republican Party of Minnesota v. White*, Justice Antonin Scalia's majority opinion considered several possible definitions of impartiality before settling on one that he used to determine whether Minnesota had narrowly tailored its restrictions on judicial speech in order to advance a compelling state interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–80 (2002).

10. Rule 2.11 of the Model Code includes very detailed tests for determining when a judge could have a conflict necessitating disqualification. MODEL CODE OF JUD. CONDUCT r. 2.11. These tests include a bright-line rule focusing on whether any person within the third degree of relationship from the judge or the judge's spouse has one of four enumerated statuses. *Id.* r. 2.11(A)(2).

11. The amendment insists on fairness with respect to court procedures subject to the judge's control rather than fairness in uniform rules that the judge must apply or substantive fairness, which depends largely on statutes in both civil and criminal cases. Proposals offered later in this Essay will illustrate what fairness requires in particular discretionary matters, such as judges' assistance to parties representing themselves, *see infra* Part IV, or judges' determinations of bail, *see infra* Part VI.

12. The philosopher John Rawls urged that the plight of the worst-off segment of society deserved greater attention than any other consideration in policymakers' calculus. JOHN RAWLS, A THEORY OF JUSTICE 65 (rev. ed. 1999). John Rawls presented what he called the "Difference Principle." *Id.* Any proposal that might result in unequal distribution of resources or benefits must be judged according to whether it would "improve[] the expectations of the least advantaged members of society." *Id.* Thus, the interests "of those less fortunate" have absolute priority in Rawlsian normative theory. *Id.*

arguments seem to be in equipoise, the need to protect the most vulnerable should be a tiebreaker. Parties' vulnerability could be due to limited resources, lack of economic security, or—in an increasing percentage of cases¹³—lack of legal representation.¹⁴ In assessing vulnerability, judges would look primarily to the parties, but the plight of witnesses also deserves consideration, especially that of complainants in criminal cases.¹⁵

The amended version of Model Rule 2.2 might not have a significant effect on judges' rulings in procedural or evidentiary disputes if the judges believe that other codes foreclose the approach urged by Model Rule 2.2. For this reason, similar language should appear in the preambular provisions of federal and state codes in the areas of civil procedure, criminal procedure, and evidence. Federal Rule of Civil Procedure 1 and its state counterparts should be amended to read as follows:

Rule 1: Scope and Purposes

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding, *to promote access to justice, and to ensure that court procedures are fair to all parties and witnesses, irrespective of their resources, socioeconomic status, or ability to secure representation by counsel.*¹⁶

Federal Rule of Criminal Procedure 2 and its state counterparts should be amended to read as follows:

Rule 2: Interpretation

13. Christine E. Cerniglia, *The Civil Self-Representation Crisis: The Need for More Data and Less Complacency*, 27 GEO. J. ON POVERTY L. & POL'Y 355, 357 (2020) ("The increasing number of [self-represented litigants] indicates an impending, current, or rising crisis.").

14. Comment 4 to Model Rule 2.2 presently addresses judicial assistance of pro se parties: "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." MODEL CODE OF JUD. CONDUCT r. 2.2 cmt. 4. The comment's recognition of the pro se party's vulnerability is commendable, but the comment does not eliminate the need for this Essay's proposed amendment of Model Rule 2.2. The comment is too narrow, addressing only the challenges faced by pro se litigants but not those faced by other low-income parties and witnesses. The comment is less efficacious than an amendment to the black letter rule would be. More fundamentally, the comment misconceives of the problem as one that simply relates to impartiality rather than fairness. The ABA should not only indicate that impartiality can abide judicial assistance to pro se litigants but also that fairness requires such assistance. For a relevant proposal using mandatory rather than permissive language, see *infra* Part IV.

15. I have written previously about the hardships endured by accusers during prosecutions of sexual assault and other violent crimes. See Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353 (2005). Such hardships can be especially onerous during cross-examination. See, e.g., Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1616–19 (2008) (discussing impeachment of accusers in sexual assault prosecutions who file parallel civil suits); Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 768–72 (2005) (focusing on difficulties faced by accusers in prosecutions for domestic violence).

16. FED. R. CIV. P. 1.

These rules are to be interpreted to provide for the just determination of every criminal proceeding, ~~to secure simplicity in procedure and fairness in administration, and~~ to eliminate unjustifiable expense and delay, *and to ensure the court procedures are fair to all parties and witnesses irrespective of their resources, socioeconomic status, or ability to secure representation by counsel.*¹⁷

Federal Rule of Evidence 102 and its state counterparts should be amended to read as follows:

Rule 102: Purpose

These rules should be construed *to serve the following purposes: so as to administer every proceeding fairly, to ensure that court procedures are fair to all parties and witnesses, irrespective of their resources, socioeconomic status, or ability to secure representation by counsel; eliminate unjustifiable expense and delay; and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.*¹⁸

II. DUTY TO LIMIT BIASED COMMENTS AND CONDUCT

Rule 2.3 of the Model Code should be amended so that it reads as follows:

Rule 2.3: Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias and prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, *receipt of public assistance, immigration status,* or political affiliation, and shall not permit court staff, court officials, *court security officers, pretrial services officers, probation officers,* or ~~others~~ *any other employees, agents, or law enforcement personnel* subject to the judge's direction and control to do so.

(C) A judge shall require lawyers, *parties, witnesses, and jurors* in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, *receipt of public assistance, immigration status,* or political affiliation, ~~against parties, witnesses, lawyers, or others.~~

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to ~~an~~ *a material* issue in a proceeding.¹⁹

The amendments above would expand Model Rule 2.3 by: (1) broadening the rule's substantive scope and (2) lengthening the list of people regulated

17. FED. R. CRIM. P. 2.

18. FED. R. EVID. 102.

19. MODEL CODE OF JUD. CONDUCT r. 2.3.

by the rule. First, the amendments would enlarge the scope of the subject matter that is off-limits for discussion in court. The list of impermissible topics would extend to receipt of public assistance and immigration status—two highly inflammatory matters that could give rise to prejudice in jury trials and could also undermine the legitimacy of court proceedings in general.²⁰ The amendments would delete the prepositional clause at the end of paragraph (C) because the biased language covered by this paragraph is always in effect, no matter against whom the speaker directs it. Finally, the amendment to paragraph (D) would expand the coverage of the rule by narrowing the exception for comments “relevant to an issue” at trial. In accordance with long-standing principles of evidence law, prejudicial evidence would only be admissible if it bears on a *material* issue, not simply any issue cited by the proponent.²¹

Second, the amendments would expand the list of people subject to the prohibition. The ethics rules have long recognized courts’ authority to limit prejudicial statements by lawyers,²² but there should be little doubt that courts have similar authority with respect to parties, witnesses, and jurors.²³ The regulation of pretrial services officers and probation officers is crucial because prejudice in those settings could cause great harm to the people

20. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862 (2017) (holding that jury deliberations at the end of a criminal prosecution in which one juror’s comments disparaged the defense witness as an illegal immigrant and alleged that Mexicans such as the defendant were prone to mistreating women necessitated the racial bias exception to the general rule against impeachment of jury verdicts); United States v. Hampton, No. 15-00302, 2017 WL 1954369, at *3 (E.D. Pa. May 10, 2017) (“Evidence that the Defendants participated in social welfare programs will not be admitted because it is of little, if any, probative value . . . and would also be highly prejudicial.”); Order No. 25700-A-1201 (Wash. Nov. 8, 2017) (approving a new rule of evidence forbidding reference to immigration status of party or witness unless relevant to a material issue). For an insightful discussion of the harmful effect when judges allow for-cause strikes of prospective jurors who are experiencing economic hardship, see Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. (forthcoming 2021).

21. FED. R. EVID. 401 (setting forth the principle that evidence is inadmissible unless it has probative value as to a material issue); *id.* r. 403 (establishing that evidence is subject to exclusion if the prejudicial effect substantially outweighs its value under Federal Rule of Evidence 401); Francis C. Amendola et al., 23 C.J.S. *Criminal Procedure and Rights of the Accused* § 1055 (2020) (pointing out that “immaterial evidence is inadmissible”).

22. Lawyers are officers of the court subject to judicial supervision and since 2007, Model Rule 2.3 has authorized judges to restrict harassing and biased speech by lawyers. See AM. BAR ASS’N, SIDE-BY-SIDE TEXT COMPARISON: 2007 MODEL CODE OF JUDICIAL CONDUCT WITH COMPARABLE PROVISIONS OF 1990 CODE (2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/new_old.pdf [<https://perma.cc/JAH6-23JT>].

23. Judges may control the presentation of testimony by parties and witnesses pursuant to Federal Rule of Evidence 611 and its state counterparts, and judges may exclude prejudicial evidence of any sort pursuant to Federal Rule of Evidence 403 and its state counterparts. FED. R. EVID. 611, 403. Judges may take steps to limit biased comments in the jury room by excluding jurors who exhibit prejudice in voir dire, instructing the jury to refrain from biased comments, and vacating verdicts when posttrial affidavits indicate that jurors made biased comments in deliberations. Peña-Rodriguez, 137 S. Ct. at 869–71.

subject to the officers' authority.²⁴ Prejudice among court security officers and other law enforcement personnel supervised by judges has become a more urgent concern as courthouses draw protests against systemic racism, and officers need guidance to balance First Amendment rights against security concerns.²⁵

One possible objection to the proposed amendments is that comments concerning sensitive matters are sometimes indispensable for a fair trial or hearing. This circumstance, however, should be a sufficient basis on which to apply paragraph (D)'s exception for advocacy and testimony bearing on material issues. There can be no argument that the amended Model Rule 2.3 constrains free speech any more than the original version of this rule or the recently adopted provision in the Model Rules of Professional Conduct, which applies similar prohibitions directly to lawyers.²⁶ If lawyers can put up with this restriction and forbear making prejudiced comments in the courthouse, others in the building should be able to abide by the same restriction.

III. DUTY TO PROCESS CASES EXPEDITIOUSLY

Rule 2.5 of the Model Code should be amended so that it reads as follows:

Rule 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

24. COLIN DOYLE ET AL., HARVARD CRIM. JUST. POL'Y PROGRAM, BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS 14–25 (2019) (warning that biases can have harmful effects at pretrial stages).

25. *E.g.*, Eder Campuzano et al., *100 Days of Protests in Portland*, OREGONIAN (Feb. 1, 2021), <https://www.oregonlive.com/portland/2020/09/100-days-of-protests-in-portland.html> [<https://perma.cc/LC3Q-YYRQ>] (discussing the chronology of protests near courthouses and elsewhere in Portland, Oregon, and noting that some “heavy-handed tactics” by law enforcement based inside the federal courthouse may have exacerbated problems); Adam Taylor et al., *Calm Returns to Portland as Federal Agents Withdraw*, WASH. POST. (July 31, 2020), https://www.washingtonpost.com/politics/calm-returns-to-portland-as-federal-agents-withdraw/2020/07/31/3606b35a-d364-11ea-9038-af089b63ac21_story.html [<https://perma.cc/8M6U-JT88>] (reporting that “[t]he Portland protests gained national attention because of the aggressive tactics” used by federal agents protecting the courthouse).

26. Model Rule of Professional Conduct 8.4(g), added in 2016, provides in pertinent part: It is professional misconduct for a lawyer to:

....

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2020). The last sentence of Model Rule 8.4(g) provides that “legitimate advice or advocacy” remains permissible. *Id.* First Amendment challenges to Model Rule 8.4(g) seem unlikely to succeed. *See* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 74 (2018) (concluding that Model Rule 8.4(g) does not infringe First Amendment rights).

(B) A judge shall monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

~~(B)~~ (C) A judge shall cooperate with other judges and court officials in the administration of court business.²⁷

In addition, Comment 4 to Model Rule 2.5 should be amended so that it reads as follows:

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. ~~A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.~~ A judge should ensure the expeditious processing of any criminal case involving pretrial detention or a possible sentence of incarceration, unless the defendant seeks an extension of time or an extraordinary circumstance necessitates delay. A judge should ensure the expeditious processing of any other case involving a claim of wrongful incarceration or a claim seeking government benefits, shelter, education, or medical care on behalf of a person who would otherwise be at risk of significant harm, unless the claimant seeks an extension of time or an extraordinary circumstance necessitates delay.²⁸

Currently, the Model Code's omission of a black letter rule regarding delay stands in contrast with the express treatment of this issue in other codes of ethics for judges and lawyers. The ABA's original Canons of Judicial Ethics and its first version of the Model Code stressed that judges must perform judicial duties promptly.²⁹ Two separate provisions in the ethical rules for lawyers—Model Rules 1.3 and 3.2 of the Model Rules of Professional Conduct—presently insist that lawyers must proceed diligently and refrain from dilatory tactics in litigation.³⁰ The absence of a similar rule in the ABA's current ethics code for judges is conspicuous and may say less about the urgency of the problem than about the apparent intractability of the backlog in U.S. courts.

Delay can harm all categories of litigants, but it is particularly burdensome for low-income parties. When indigent individuals bring claims to obtain benefits, housing, education, and medical care, a slow response by the court system can cause immense suffering.³¹ Delay can cause prejudice to low-income defendants in criminal proceedings, even if it does not rise to the level

27. MODEL CODE OF JUD. CONDUCT r. 2.5 (AM. BAR ASS'N 2010).

28. *Id.* r. 2.5 cmt. 4.

29. CANONS OF JUD. ETHICS ¶ 7 (AM. BAR ASS'N 1924) (providing that a judge "should be prompt in the performance of his judicial duties"); MODEL CODE OF JUD. CONDUCT Canon 3B(8) (AM. BAR ASS'N 1990) (amended 2007) ("A judge shall dispose of all judicial matters promptly . . .").

30. Rule 1.3 of the Model Rules of Professional Conduct provides as follows: "A lawyer shall act with reasonable diligence and promptness in representing a client." MODEL RULES OF PRO. CONDUCT r. 1.3. Model Rule 3.2 provides as follows: "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." *Id.* r. 3.2.

31. See Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1554 (1993) ("Justice delayed can be justice denied in a very real sense, especially for resource-poor litigants such as injured individuals.").

of requiring dismissal of the charges.³² In the context of petitions for postconviction relief, the need for immediate reversal of a wrongful conviction is so great that a recent amendment to Model Rule of Professional Conduct 3.8 directs prosecutors to act “promptly” when evidence of such an error emerges.³³ In all categories of cases, courts must make sure that well-heeled parties do not employ dilatory tactics to exploit the vulnerability of low-income parties for whom delay is uniquely onerous.³⁴

The proposed amendment to Model Rule 2.5 and its commentary could help to address the problem of delay in court proceedings. By elevating the issue from commentary to black letter law, the amendment would make clear that the prompt processing of cases is among a judge’s core duties. The amended language in the commentary prioritizing certain urgent cases involving indigent parties could provide guidance to courts about allocating scarce judicial resources to the most time sensitive cases.

Admittedly, the proposed amendment to address delay as an ethical matter would not be as efficacious as a statute setting forth precise time limits for disposition of certain civil cases. Perhaps a speedy trial clock³⁵ for a subset of civil claims involving dire health or safety risks might be appropriate. In the context of criminal cases, such legislation has hastened the processing of certain cases—at least if the case has progressed to the point at which the clock begins. The general reluctance of legislatures to import protections from criminal procedure to any civil setting³⁶ suggests that such a proposal would have little hope of success in the near term.

32. David Siegel, *Justice on the Cheap*, BOSTON BAR J., Jan./Feb. 2005, at 10, 11 (“Delay can render counsel ineffective.”); see also AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 27 (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<https://perma.cc/YŶ6Z-QR8H>] (“Aside from the potential violations of the right to a speedy trial, these delays disproportionately harm poor persons who, because they are unable to post bond, endure repeated delays while they remain locked up in jail.”).

33. Rule 3.8(g)(1) of the Model Rules of Professional Conduct, adopted in 2008, provides: “When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall . . . promptly disclose that evidence to an appropriate court or authority.” MODEL RULES OF PRO. CONDUCT r. 3.8(g)(1).

34. Book Note, Karen Jewell, Money and Justice: *Who Owns the Courts?*, 83 MICH. L. REV. 1150, 1151 (1985) (reviewing LOIS G. FORER, *MONEY AND JUSTICE* (1984)) (“Delays in hearings, court fees, and costs incurred from missed work, carfare, and child care, often force low-income individuals to forgo enforcement of their legal rights or to submit to unsatisfactory settlements.”).

35. This term refers to a mandatory timetable for disposition of criminal cases, as set forth in the federal Speedy Trial Act, 18 U.S.C. §§ 3161–3162, and its state counterparts.

36. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 761 (2015) (“[C]ivil Gideon rights have faced regular rejection by courts and legislatures.”).

IV. DUTY TO ASSIST PRO SE LITIGANTS AND ENSURE EQUAL ACCESS TO
ALTERNATIVE DISPUTE RESOLUTION

Rule 2.6 of the Model Code should be amended so that it reads as follows:

Rule 2.6: Ensuring the Right to Be Heard; *Encouraging and Facilitating the Use of Alternate Dispute Resolution*

(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. *A judge shall 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.*

(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. *A judge shall make reasonable efforts to ensure that all parties have access to opportunities for alternate dispute resolution irrespective of the parties' resources, socioeconomic status, or ability to secure representation by counsel.*³⁷

The proposed amendment to paragraph (A) recognizes the growing number of pro se litigants in both the federal and state court systems.³⁸ There has been some momentum at the state level to include a similar amendment (using the word "may" in the place of "shall") in Model Rule 2.2,³⁹ but Model Rule 2.6(A) seems to be the better place for such language. After all, Model Rule 2.6(A) is about protecting the right to be heard, and the amendment would allow the court to help make self-represented litigants heard.⁴⁰ The amendment proposed in this Essay uses mandatory rather than permissive language, recognizing that pro se litigants may need help even if judges are disinclined to provide it.

37. MODEL CODE OF JUD. CONDUCT r. 2.6 (AM. BAR ASS'N 2010).

38. See Cerniglia, *supra* note 13, at 357.

39. One important impetus for this movement was a 2012 resolution of the Conference of Chief Justices and the Conference of State Court Administrators. CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, RESOLUTION 2 IN SUPPORT OF RULE 2.2 OF THE ABA MODEL CODE OF JUDICIAL CONDUCT TO REFERENCE CASES INVOLVING SELF-REPRESENTING LITIGANTS (July 25, 2012), https://www.ncsc.org/_data/assets/pdf_file/0023/23747/07252012-support-expanding-rule-aba-model-code-judicial-conduct-self-representing-litigants.pdf [<https://perma.cc/4NXG-BGDC>]. So far eight states have amended their versions of Model Rule 2.2 to allow judicial assistance to pro se litigants. *Self-Represented Litigants and the Code of Judicial Conduct*, NAT'L CONF. OF STATE CTS. 3–7, https://www.ncsc.org/_data/assets/pdf_file/0030/15798/proselitigantsjan2016.pdf [<https://perma.cc/GZ5V-FVB8>] (last visited Jan. 27, 2021).

40. Massachusetts has adopted guidelines listing seven ways in which judges can assist pro se litigants:

(1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants.

Self-Represented Litigants and the Code of Judicial Conduct, *supra* note 39, at 5–6.

Equal access to alternative dispute resolution (ADR) is vital. Many commentators have pointed out that ADR could be particularly valuable to low-income parties,⁴¹ although some participants at a recent *Fordham Law Review* symposium cautioned against overconfidence in ADR as a guarantee of access to justice.⁴² Among other benefits, the use of ADR to address the problems of impecunious clients may reduce expense, save time, respect autonomy, and preserve relationships with defendants on whom indigent people depend, such as landlords and employees at agencies granting public assistance.⁴³ ADR can be especially valuable as a means of resolving landlord-tenant disputes, divorces, consumer litigation, tort claims, and civil rights suits.⁴⁴ Judges can help to promote equal access to ADR using at least three strategies: (1) establishing, supervising, and providing adequate funding for court-annexed mediation programs; (2) appropriating money from court controlled funds in order to pay for outside ADR professionals on an ad hoc basis; and (3) serving as mediators themselves to the extent permitted under applicable law.⁴⁵

V. DUTY TO MONITOR ATTORNEYS' COMPETENCE AND CONFLICTS AND TO HALT PROSECUTIONS DUE TO INADEQUACY OF RESOURCES

Rule 2.15 of the Model Code should be amended so that it reads as follows:

Rule 2.15: Responding to Judicial and Lawyer Misconduct

41. See, e.g., Jean-François Roberge et al., *Judicial Mediation: From Debates to Renewal*, 19 CARDOZO J. CONFLICT RESOL. 613, 613 (2018) (“Judicial mediation involving a judge acting as a mediator in a court dispute has been implemented in many jurisdictions worldwide as a way to overcome access to justice challenges.”); Larry Spain, *Alternative Dispute Resolution for the Poor: Is It an Alternative?*, 70 N.D. L. REV. 269, 271 (1994) (“ADR does have the potential of increasing access to justice for the poor by providing additional forums for the resolution of disputes, particularly when substantially increased resources enabling lawyers to represent the poor in traditional litigation do not seem probable.”).

42. See generally Jaqueline Nolan-Haley, Foreword, *Achieving Access to Justice Through ADR: Fact or Fiction?*, 88 FORDHAM L. REV. 2111 (2020) (summarizing arguments made by symposium contributors).

43. See, e.g., Lydia Nussbaum, *ADR, Dynamic (In)justice, and Achieving Access: A Foreclosure Crisis Case Study*, 88 FORDHAM L. REV. 2337, 2338–43 (2020) (discussing the ways in which ADR can achieve more appropriate outcomes for low-income people but also noting risks); Tracey S. Wiltgen, *Access to Justice Through Mediation*, HAW. BAR J., Mar. 2009, at 22, 22 (explaining the potential value of ADR to low-income litigants).

44. See, e.g., BRIAN BIERETZ ET AL., URB. INST. RSCH TO ACTION LAB, GETTING LANDLORDS AND TENANTS TO TALK: THE USE OF MEDIATION IN EVICTION 1 (2020), https://www.urban.org/sites/default/files/publication/101991/getting-landlords-and-tenants-to-talk_4.pdf [<https://perma.cc/FC4R-GXKE>] (stating that “mediation has been an important tool for empowering better outcomes” from the perspective of low-income tenants); Judith Caprez & Micki Armstrong, *A Study of Domestic Mediation Outcomes with Indigent Parents*, 39 FAM. CT. REV. 415, 419–25 (2001) (discussing study results showing that ADR can be valuable for low-income parties in family law disputes).

45. Comment 1 to Rule 3.9 of the Model Code indicates that judges may engage in mediation, either for compensation or on a volunteer basis, if permitted to do so by applicable law. MODEL CODE OF JUD. CONDUCT r. 3.9 cmt. 1 (AM. BAR ASS'N 2010).

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority. *A judge who determines that a criminal defense attorney in a pending case is incapable of performing competently or is subject to a conflict of interest for any reason, including a heavy caseload, shall not allow the prosecution to proceed until such time as the problem is remedied and the defendant can obtain adequate representation.*

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.⁴⁶

Many public defenders work in offices with crushing caseloads.⁴⁷ Such a lawyer may be unable to devote more than a small amount of time to a particular case. This constraint could prevent the lawyer from meeting the ethical duty of competence, which requires “thoroughness and preparation reasonably necessary for the representation.”⁴⁸ The heavy caseload also could create a conflict of interest if it presents a “significant risk of material limitation” on the lawyer's ability to represent a particular defendant.⁴⁹

The proposed amendment to Rule 2.15 of the Model Code would highlight the importance of the judge's role in screening attorneys' competence and conflicts at the outset of criminal prosecutions. A judge could question a criminal defense attorney at the initial appearance to assess whether any circumstances, including overall caseload, might hinder the attorney's

46. *Id.* r. 2.15.

47. See generally Irene Oritseyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1181 (2020) (discussing “frustrations about the high caseloads that increasingly burden an ever-diminishing number of public defenders”).

48. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020); see Oritseyinmi Joe, *supra* note 47, at 1202–05 (explaining that excessive caseloads can compromise “a public defender's ability to comply with the profession's duty to provide competent representation to every client”).

49. MODEL RULES OF PRO. CONDUCT r. 1.7(a) (setting forth tests for conflicts); JOHN BOURDEAU ET AL., 19A CAL. JUR. 3D *Criminal Law: Rights of the Accused* § 183 (2020) (“A conflict of interest is inevitably created when a public defender is compelled by an excessive caseload to choose between the rights of the various indigent defendants being represented.”); TRACY FARRELL ET AL., 14A FLA. JUR. 2D *Criminal Law—Procedure* § 572 (2020) (noting that courts in Florida recognize the need for disqualification due to excessive caseload); Oritseyinmi Joe, *supra* note 47, at 1202–05 (explaining how public defenders' caseloads create conflicts).

performance.⁵⁰ At this juncture, the judge would assess any limitation by applying the ethics rules, rather than the relatively low standards for effective assistance of counsel under the Sixth Amendment.⁵¹ By contrast, if the inquiry into the attorney's competence or conflicts first occurs after the defendant's conviction, the defendant faces a greater challenge to show deficient performance by counsel and the defendant would need to show that the errors actually affected the result⁵²—a difficult task necessitating speculation about counterfactual scenarios.

Under the amended version of Model Rule 2.15, disqualification of entire offices could halt prosecutions on a large scale. This strict enforcement of lawyering standards using the ethical rules prospectively—rather than applying the relatively weak constitutional standards retrospectively⁵³—could galvanize legislatures to increase funding for indigent defense.⁵⁴

VI. DUTY TO CONSIDER LITIGANTS' ABILITY TO PAY FINES, FEES, AND BAIL

Canon 2 of the Model Code should be amended to include the following new rule:

Rule 2.17: Considering Ability to Pay Fines, Fees, and Bail

(A) A judge shall undertake a meaningful inquiry into a litigant's ability to pay court fines, fees, restitution, other charges, bail, or civil debt before using incarceration as a punishment for failure to pay, as inducement to pay or appear, or as a method of purging a financial obligation whenever state or federal law so provides.

(B) A judge shall not set, impose, or collect legal financial obligations under circumstances that give the judge an improper incentive either to multiply legal financial obligations or to fail to inquire into a litigant's ability to pay.

The language of this amendment derives from ABA Formal Opinion 490, issued on March 24, 2020.⁵⁵ This well-reasoned opinion explained the hardship endured by low-income litigants, who may find it impossible to pay

50. The judge already does this to screen for possible conflicts arising from multiple representations with respect to the same case or indictment. FED. R. CRIM. P. 44(C).

51. *E.g.*, *Holloway v. Arkansas*, 435 U.S. 475, 483–91 (1978) (holding that, prior to conviction, an actual conflict is sufficient to necessitate appointment of new counsel).

52. *E.g.*, *Mickens v. Taylor*, 535 U.S. 162, 166–74 (2002) (holding that, for a claim of conflict first raised after conviction, reversal requires that an actual conflict adversely affected representation); *Cuyler v. Sullivan*, 446 U.S. 335, 348–49 (1980) (holding that when a defendant first raises a conflict issue after conviction, the defendant must demonstrate an actual conflict adversely affected the representation).

53. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1188–89 (2003) (noting that constitutional standards for effective assistance of counsel are lower than standards set forth in ethical rules).

54. I saw this occur in Oregon when underfunding of indigent defense services stopped several categories of felony prosecutions in 2003 and the legislature immediately restored funding. In Florida, by contrast, the legislature passed a law forbidding disqualification based on low funding for indigent defense. FARRELL ET AL., *supra* note 49, § 572.

55. ABA Comm. on Ethics & Pro. Resp., Formal Op. 490 (2020).

finer, fees, bail, and other charges but who are nonetheless subject to possible incarceration.⁵⁶ The opinion also discussed the unseemly spectacle that some courts and municipal governments obtain substantial revenue from the collection of fines issued under threat of incarceration.⁵⁷

While the conclusion of the opinion is commendable, the forum for this guidance is not ideal. A principle so important deserves its own ethics rule in the Model Code. States tend to adopt the black letter provisions that appear in the Model Code.⁵⁸ These provisions then become binding at the state level. By contrast, an ABA ethics opinion has no direct force at the state level and is at best persuasive authority.⁵⁹ The authors of the opinion based it on very general rules that permit many different interpretations and states have not interpreted these general rules the same way. A more specific rule in the ABA template would seem appropriate to ensure widespread adoption of the reforms discussed in Formal Opinion 490.

VII. DUTY TO CONDUCT REMOTE PROCEEDINGS FAIRLY AND EQUITABLY

Canon 2 of the Model Code should be amended to include the following new rule:

Rule 2.18: Conducting Remote Proceedings Fairly and Equitably

(A) *To the extent that a judge allows remote appearances in any proceeding, the judge shall take all reasonable measures to ensure that counsel, parties, and witnesses have access to technology enabling full and complete participation.*

(B) *A judge shall endeavor to minimize material disparities in the nature and quality of technology used by counsel, parties, and witnesses to participate in remote proceedings.*

(C) *When a represented party or witness is not in the same location as the attorney for that party or witness during a remote proceeding, the judge*

56. *Id.* (“There is evidence that judges in some jurisdictions have repeatedly failed to inquire into litigants’ ability to pay financial obligations prior to incarceration for nonpayment.”). Yale Law School’s Arthur Liman Center for Public Interest Law hosted a series of colloquia examining the great hardship that fines and fees create for low-income Americans. See *The Liman Center’s Colloquium 2018: Who Pays?: Fines, Fees, Bail, and the Cost of Courts*, YALE L. SCH. (June 1, 2008), <https://law.yale.edu/yls-today/news/liman-centers-colloquium-2018-who-pays-fines-fees-bail-and-cost-courts> [https://perma.cc/6SC2-QK8Y].

57. ABA Comm. on Ethics & Pro. Resp., Formal Op. 490, at 2, 4, 8.

58. Lawrence K. Hellman, *When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 325 (1996) (indicating that “most states’ ethics rules are derived from an ABA-promulgated document,” such as the Model Code of Judicial Conduct).

59. Lawrence K. Hellman, *A Better Way to Make State Legal Ethics Opinions*, 22 OKLA. CITY U. L. REV. 973, 988 (1997) (noting that the persuasive authority of ABA opinions is inconsistent at the state level and this fact limits the practical impact of ABA opinions); Kirsten Schimpff, *Rule 3.8, the Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1758–59 (2012) (“ABA ethics opinions do not have the force of law and are not binding upon the states in interpreting their own ethics rules.”).

will provide opportunities for attorney-client consultation, and the judge will take measures to safeguard the confidentiality of attorney-client communication.

During the COVID-19 pandemic, courts have greatly reduced the number of in-person hearings and trials. Remote proceedings are becoming common.⁶⁰ Courts are conducting hearings, and even trials, through the use of remote conferencing technology. Sometimes participants join these proceedings using videoconferencing platforms, such as Zoom, and sometimes participants join by phone.⁶¹ Commentators have suggested that remote proceedings may continue even after the COVID-19 pandemic subsides⁶² because these proceedings reduce costs, promote safety, and enable participation by witnesses who might not otherwise be able to travel for a live appearance.

Remote proceedings present risks for low-income litigants in both criminal and civil cases. Many such parties lack access to computers with stable internet connections.⁶³ If an indigent person uses conspicuously worse videoconferencing technology than other participants in a remote proceeding or if the indigent person is the only one to use a phone, this disparity could cause prejudice in the eyes of the fact finder.⁶⁴ The low-income litigant using inferior technology might also be at a disadvantage perceiving visual cues and discerning what others are saying.⁶⁵ In a criminal case, an indigent pretrial detainee will not likely be in the same room as the defense attorney during remote appearances, and the difficulty of communicating with counsel during the proceeding could diminish the effectiveness of representation.

60. SLS L. & Pol'y Lab, *COVID-19 and the Effect of Video Technology on Indigent Defense Services (807U)*, STANFORD L. SCH., <https://law.stanford.edu/education/only-at-sls/law-policy-lab/practicums-2020-2021/covid-19-and-the-effect-of-video-technology-on-indigent-defense-services-807u> [<https://perma.cc/9DT6-BPNA>] (last visited Jan. 27, 2021) (“As a result of COVID-19, most jurisdictions in the country rapidly moved court and court-related communications from in-person to audio- and video-conferencing.”).

61. *Id.*

62. *E.g.*, Lauren Gibbons, *Virtual Court Hearings Could Continue Past Pandemic, but Questions of Constitutionality Arise*, MLIVE MICH. (July 14, 2020), <https://www.mlive.com/public-interest/2020/07/virtual-court-hearings-could-continue-past-pandemic-but-questions-of-connectivity-constitution-arise.html> [<https://perma.cc/2YUR-Y2PQ>] (quoting statements by Chief Justice Bridget McCormack of the Michigan Supreme Court).

63. SLS L. & Pol'y Lab, *supra* note 60 (“Providers of indigent defense services have identified concerns associated with . . . the ability of clients to access reliable technology.”).

64. Lauren Kirchner, *How Fair Is Zoom Justice?*, THE MARKUP (June 9, 2020, 10:00 AM), <https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice> [<https://perma.cc/UC4K-KNUJ>] (discussing the dehumanizing effect of technology used for remote appearances, especially to the extent that “[p]eople seem less like people” to the fact finder); *see, e.g.*, MacArthur Just. Ctr., *Video Bond Hearings: Cook County Ends Unconstitutional TV Bond Hearings*, NW. PRITZKER SCH. OF L. (Nov. 17, 2006), <https://www.law.northwestern.edu/legalclinic/macarthur/projects/indigent/videobond.html> [<https://perma.cc/3NHC-CSK5>] (reporting results of a study showing that video bond hearings produced harsh results by comparison to in-person hearings).

65. Kirchner, *supra* note 64 (“Of course, people can always call into video conferences with a regular telephone line, but not being able to see what’s going on puts them at a significant disadvantage, compared with others who have the full audiovisual experience.”).

The proposed amendment to the Model Code would create an ethical duty for the judge to level the playing field as much as possible in remote proceedings. The judge would need to make sure that all counsel, parties, and witnesses have the means to participate. The court system could facilitate such access by setting up private videoconferencing rooms at locations near communities where few people have access to videoconferencing technology (examples of appropriate locations for these rooms might include a public library near low-income housing or a medical clinic serving a Native American community). Court administrators should also purchase basic computers, tablets, or comparable devices that would be available to lend as needed.⁶⁶ When it is not possible to ensure that all participants in a remote proceeding have access to the same level of technology, a judge might decide that the lowest common denominator (e.g., phone conferencing) would be the best means of communication. In any event, the judge would need to provide ample opportunities for consultation between attorney and client when the two cannot be in the same location during a remote proceeding.

VIII. DUTY TO AVOID MEMBERSHIP IN ORGANIZATIONS THAT DISCRIMINATE BASED ON SOCIOECONOMIC STATUS

Rule 3.6 of the Model Code should be amended so that it reads as follows:

Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on ~~the basis of~~ any basis, including race, sex, gender, religion, national origin, ethnicity, ~~or~~ sexual orientation, or socioeconomic status.

(B) As used in paragraph (A), the term “invidious discrimination” applies not only to discrimination in selecting the organization’s members but also to discrimination in conducting the organization’s activities and in pursuing the organization’s goals.

~~(B)~~ (C) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge’s attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge’s

66. Purchasing this technology would indeed be a significant undertaking but it would not be unprecedented: schools have been acquiring such technology in bulk to facilitate remote learning during the pandemic. See David Rauf, *Coronavirus Squeezes Supply of Chromebooks, iPads, and Other Digital Learning Devices*, EDUC. WK. (Apr. 1, 2020), <https://www.edweek.org/education-industry/coronavirus-squeezes-supply-of-chromebooks-ipads-and-other-digital-learning-devices/2020/04> [https://perma.cc/ZB5R-3PP2] (reporting that school districts nationwide scrambled to acquire tablets and laptops for remote instruction during the COVID-19 pandemic). There is a risk that borrowers may attempt to abscond with the devices, but that risk should not be exaggerated. Court officials will have detailed information about the borrowers, which should help to deter theft. The devices can also be traced via GPS.

attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.⁶⁷

The current version of Model Rule 3.6(A) is too short. In listing the categories of organizational discrimination that are off-limits for a judge, Model Rule 3.6(A) deviates significantly from the list that appears in Model Rule 2.3 (governing judges' official statements and conduct).⁶⁸ This mismatch has been a problem for three decades. Beginning in 1990, the Model Code prohibited judges from expressing bias in an official capacity concerning socioeconomic status,⁶⁹ but the code has never forbidden judges from joining organizations that discriminate invidiously on the basis of socioeconomic status.⁷⁰ A better approach would be to harmonize the lists in Model Rules 2.3 and 3.6 so that judges operate within approximately the same boundaries at all times. To put it differently, a judge who indulges bias from 5:00 p.m. to 9:00 a.m. will have difficulty eschewing bias from 9:00 a.m. to 5:00 p.m.

The ABA has previously recognized the danger caused by asymmetry between the lists in Model Rules 2.3 and 3.6. Indeed, the ABA previously decided to close this gap in the context of discrimination based on sexual orientation. The 1990 version of the Model Code forbade official statements evincing bias with respect to sexual orientation but allowed judges to hold membership in organizations that discriminate invidiously on the basis of sexual orientation.⁷¹ The ABA decided in 2007 to forbid judges' involvement in discrimination based on sexual orientation at any time—whether in connection with official duties or in connection with membership in private organizations.⁷² The apparent reason for the 2007 amendment was the ABA's realization that a judge's official statements of tolerance seem disingenuous when they are inconsistent with the judge's off-the-bench activities.⁷³ The time has come to extend the same principled and consistent approach to discrimination based on socioeconomic status.

67. MODEL CODE OF JUD. CONDUCT r. 3.6 (AM. BAR ASS'N 2010).

68. *Id.* r. 2.3.

69. Canon 3B(5) in the 1990 Model Code provided, in pertinent part, as follows: "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status . . ." MODEL CODE OF JUD. CONDUCT Canon 3B(5) (AM. BAR ASS'N 1990) (amended 2007).

70. Canon 2C of the 1990 Model Code provided as follows: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." *Id.* Canon 1C. Perhaps one could argue that membership in discriminatory groups not covered by Canon 2C would violate more general provisions exhorting judges to avoid conduct unbefitting their stations, but under the time-honored maxim of *expressio unius est exclusio alterius*, a list that prohibits some specific things seems to permit those alternatives not listed.

71. *Id.* Canon 3B(5).

72. Since 2007, Model Rule 3.6(A) has explicitly listed sexual orientation as an impermissible ground for discrimination. For a side-by-side comparison of the relevant language in the 1990 Model Code and the 2007 Model Code, see AM. BAR ASS'N, *supra* note 22.

73. See MODEL CODE OF JUD. CONDUCT r. 3.6 cmt. 1 ("A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety

The proposed amendment to Model Rule 3.6 would expand its coverage in many ways beyond merely lengthening the list of impermissible bases for discrimination. The amendment includes language prohibiting *any* invidious discrimination, so that the enumerated grounds are illustrative rather than exhaustive. The amendment classifies an organization's discrimination as "invidious" based not only on membership restrictions (the primary criterion mentioned in the current rule's commentary) but also based on the organization's activities and goals. After all, an organization open to all that pursues discriminatory objectives is every bit as invidious in the public's eyes as is an organization that merely discriminates in admitting members.

The ABA's enlightened approach to sexual orientation in 2007 drew objections based on judges' associational freedoms, and such objections would foreseeably arise in response to this Essay's proposal as well. Several responses are possible. First, the amendment proposed in this Essay would only apply to organizational discrimination that is invidious, and the Supreme Court's jurisprudence accords scant protection to invidious discrimination.⁷⁴ Second, it is worth noting that three states have added the term "socioeconomic status" to their versions of Model Rule 3.6 and have not thereby violated any federal or state constitutional provisions.⁷⁵ Third, the notion of a "right" to join a group that discriminates against the impecunious seems even less compelling than the objections raised by opponents of the 2007 amendment concerning sexual orientation. At least the critics in 2007 could cite concerns about their association with churches and the military, but neither type of organization systematically discriminates against low-income people (indeed, they seem to show more interest in people with limited means than Model Rule 3.6 presently does). Finally, the best way to address concerns about the overbreadth of the term "socioeconomic status" in the amended version of Model Rule 3.6 would be

and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired."); *cf.* AM. BAR ASS'N JOINT COMM'N TO EVALUATE THE MODEL CODE OF JUD. CONDUCT, REPORT NOVEMBER 2006 (2006), <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/aba-joint-comm-report-nov-2006.pdf> [<https://perma.cc/L9FR-TME2>] (explaining generally the rationale for the ABA's revision of Model Rule 3.6 in 2007).

74. *E.g.*, N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13–14 (1988) (upholding, over challenges based on First Amendment associational freedoms, a New York City ordinance prohibiting invidious discrimination by private clubs).

75. HAW. CODE OF JUD. CONDUCT R. 3.6 ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, gender identity, gender expression, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or personal characteristics."); N.M. CODE OF JUD. CONDUCT R. 21-306 ("A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, religion, color, national origin, ethnicity, ancestry, sex, sexual orientation, gender identity, marital status, spousal affiliation, socioeconomic status, political affiliation, age, physical or mental handicap, or serious medical condition."); VT. CODE OF JUD. CONDUCT Canon 2(C) ("A judge shall not hold membership in any organization that, in the selection of members, practices invidious discrimination on the basis of race, color, sex, sexual orientation, religion, or national origin.").

to discuss exemptions in the commentary,⁷⁶ just as the authors of the 2007 amendment did when they added commentary specifying that affiliation with churches or the military would not be problematic.⁷⁷

Some examples might help to illustrate the scope of the proposed amendment. A judge would be able to live in a neighborhood that is unaffordable for low-income families, but a judge would not be able to join an organization that lobbies for new zoning regulations forbidding low-income housing in neighborhoods with an average home value exceeding \$300,000. A judge would be able to join a country club that admits any applicant capable of paying the \$10,000 annual membership fee, but a judge would not be able to join a social club that excludes applicants raised in single-parent households. A judge could join a homeowners' association, but a judge could not join an organization that excludes homeless people and that endeavors to drive homeless people out of the local area.

CONCLUSION

There is no panacea for the legal challenges facing low-income Americans. These challenges result from a confluence of factors, including structural poverty and unfair laws. From time to time, impecunious people encounter problems for which the legal system provides a remedy, but even then, the odds are stacked against the potential claimants. Surveys consistently show that low-income individuals do not have legal assistance in approximately 80 percent of the cases in which they could potentially raise a civil claim.⁷⁸ In the context of criminal prosecutions, the indigent have a right to an attorney when charged with a felony,⁷⁹ but the caseloads carried by appointed counsel are so great that this representation is not always effective.⁸⁰ In sum, the legal system offers little hope to the low-income litigant.

A judge is in a unique position to help. Judges have discretion to adapt procedural and evidentiary rules as necessary to achieve fairness. Rules of judicial ethics guide the use of that discretion. This Essay has proposed eight amendments to the Model Code that might make a small difference in promoting fairness for low-income litigants. Significant progress must await

76. The commentary could mention that discriminatory groups might be exempt from the prohibition to the extent that they are private, small in scale, and engage in constitutionally protected activities in which a judge would be entitled to participate but for the new language of Model Rule 3.6. The commentary could provide a few examples of such clubs and contrast them with clubs that are probably subject to the prohibition in the new version of Model Rule 3.6.

77. MODEL CODE OF JUD. CONDUCT r. 3.6 cmts. 4–5 (clarifying that judges' affiliations with churches and the military remains permissible, notwithstanding the 2007 amendment).

78. Professor Deborah Rhode of Stanford Law School reported on the aggregate data: "For decades, bar studies have consistently estimated that more than four-fifths of the individual legal needs of the poor and a majority of the needs of middle-income Americans remain unmet." Deborah Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 531 (2013).

79. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (extending the Sixth Amendment right to counsel to any state noncapital felony prosecution).

80. See *supra* notes 47–49.

monumental reforms, such as a “civil *Gideon*” or major increases in funding for indigent defense services in criminal cases. Until that time, however, any proposal for incremental reform deserves consideration. If we cannot provide low-income litigants with the resources they need to have equal footing in court, we should at least update the Model Code so that judges are more attentive to these litigants’ unique hardships.⁸¹

81. As several commentators pointed out during this Colloquium, another important step that requires near-term attention is the collection of data regarding the experience of low-income litigants in judicial proceedings, especially pro se litigants. The most valuable data for present purposes would contrast the experiences of litigants in jurisdictions that have reformed judicial ethics to those that have retained the traditional approach.