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AMERICAN BAR ASSOCIATION

MODEL CODE OF JUDICIAL CONDUCT HEARING

February 6, 2004

9:00 a.m.

Hyatt Regency Hotel, Live Oak Room

San Antonio, Texas

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1 APPEARANCES:

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3 MARK HARRISON, Commission Chair;

4 EILEEN GALLAGHER;

5 HON. ELLEN ROSENBLUM;

6 HON. JAMES WYNN;

7 HON. PETE BOWIE;

8 HON. MARGARET McKEOWN;

9 HON. CAROL AMON;

10 HON. CARA LEE NEVILLE;

11 HON. HARRIET TURNEY;

12 HON. WALLACE JEFFERSON;

13 THOMAS FITZPATRICK;

14 ROBERT CUMMINS;

15 EILEEN LIBBY;

16 ROBERT TEMBECKJIAN;

17 GEORGE KUHLMAN;

18 JAN BARAN;

19 LORETTA ARGRETT;

20 CHARLES GEYH;

21 JEANNE GRAY;

22 PETER MOSER;

23 JAMES ALFINI;

24 NANCY SLONIM;

25 MARVIN KARP;

1 DIANNE CLEAVER;
2 DUDLEY OLDHAM;
3 SETH ROSNER;
4 LANCE ROGERS;
5
6 SPEAKERS:
7 DEBBIE SEGAL;
8 SUSAN B. LINDENAUER;
9 HON. JOHN CLARK;
10 HON. SHEILA MURPHY;
11 HON. ROBERT SEERDEN;
12 JON ROLAND;
13 HON. MONICA GONZALEZ;
14 SEANA WILLING;
15 GUY HARRISON;
16 HON. WENDALL GRIFFEN;
17 HON. LAMAR McCORKLE;
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1 MR. HARRISON: I'd like to get started. We
2 have a number of people who have appeared to favor us with
3 some comments today. And before we do that, I'd like to
4 welcome everybody, members, advisory group members, guests,
5 speakers. My name is Mark Harrison. I am currently the
6 chair of the Commission. And before we start to hear from
7 people, I'd like to go around the table and have members of
8 the Commission and advisory group identify themselves
9 briefly, ten minutes or less tell where they're from. So
10 let's start on my right.

11 MR. GEYH: I'm Charlie Geyh. I'm on the
12 faculty of Indiana University of Bloomington and I am
13 reporter to the Commission.

14 MR. KARP: I'm Marv Karp, Cleveland, Ohio,
15 care of San Antonio.

16 MS. CLEAVER: I am Dianne Cleaver from
17 Kansas City. I am the lay member.

18 MR. HARRISON: Public, we call them public.

19 MS. CLEAVER: All right. Public member. My
20 profession is with the school district.

21 MR. ALFINI: I am Jim Alfini. I'm the dean
22 at the South Texas College of Law in Houston and I am a
23 member of the Commission.

24 MR. MOSER: I'm Peter Moser. I practice law
25 in Baltimore and I am an advisor to the Commission.

1 MR. ROSNER: Seth Rosner, from New York where
2 two weeks ago it was 31 below zero on the thermometer. I'm
3 Chair of the Coordinating Council in the Center for
4 Professional Responsibility.

5 MS. NEVILLE: I am Cara Lee Neville from
6 Minneapolis, Minnesota, a trial court judge and also chair
7 of the Coalition for Justice. And I am not going to try to
8 compete with 31 below, we were at 26 below last week.

9 MS. AMON: I'm Carol Amon, I'm an advisor.
10 And I am with the United States District Court in the
11 Eastern District of New York, Brooklyn, New York. And I was
12 formerly the Chair of Codes of Conduct for the Judicial
13 Conference.

14 MR. BOWIE: And I'm Pete Bowie, Bankruptcy
15 Judge from the other end of the country, sunny San Diego.
16 And I've spent eight years on the Codes of Conduct of the
17 Judicial Conference of the United States and I am also an
18 advisor.

19 MR. CUMMINS: Bob Cummins, I'm a trial lawyer
20 from Chicago and I'm the advisor on behalf of AJS and
21 formerly Chair of the Judicial Inquiry Board for eight years
22 and taught ethics to new judges in Illinois for about ten
23 years.

24 MR. TEMBECKJIAN: I'm Bob Tembeckjian and I'm
25 the Administrator and Counsel to the New York State

1 Commission on Judicial Conduct. And I am on the Board of
2 the Association of Judicial Disciplinary Council which is my
3 Association with the Commission here.

4 MS. TURNEY: I'm Harriet Turney. I'm an
5 Administrative Law Judge from Phoenix. Was formerly Chief
6 Bar Counsel for the State Bar of Arizona, did some judicial
7 discipline as well. And I'm also on the board of the
8 National Association of Administrative Law Judges.

9 MR. FITZPATRICK: I'm Tom Fitzpatrick from
10 Seattle, Washington. I am the Assistant Chief of the Civil
11 Division of the Prosecuting Attorney's Office for Sonomish
12 County which is the major suburban county to Seattle. And I
13 am a member of the Ethics Committee and I'm a former member
14 of the committee that wrote the Model Rules of Judicial
15 Discipline.

16 MR. BARAN: I'm Jan Baran. I am in private
17 practice in Washington, D.C. and I am the former chair of
18 the Standing Committee on Ethics.

19 MS. ARGRETT: I'm Loretta Argrett. I am a
20 lawyer and a district resident in Washington, D.C. I'm a
21 former member of the Standing Committee on Ethics.

22 MR. WYNN: I'm Jim Wynn, Courty Court of
23 Appeals. I am chair of the Appellate Judges Conference and
24 Standard Committee on the Judiciary.

25 MR. KUHLMAN: I'm George Kuhlman. ABA's

1 counsel.

2 MR. HARRISON: And I probably ought to give
3 you a minute or two. I am in private practice in Phoenix
4 and just changed law firms about two weeks ago. So if I
5 appear discombobulated, that's the explanation. I've been
6 in private practice 42 years and for the past 20 my
7 practice has focused increasingly on professional ethics,
8 judicial ethics, professional liability. Like Loretta and
9 others around the table, I've been on the Standing Committee
10 on Ethics and chaired the Standing Committee on Professional
11 Discipline. And that's sort of my background in general
12 terms.

13 Also with us are other staff people who are
14 very actively involved in this, Eileen Gallagher in the back
15 of the room, Ruby Dearman. I don't know if Jeanne is here
16 yet but she will be here. And I think we're ready to start.

17 Now, we have a number of guests who have
18 expressed an interest in speaking. I would appreciate it if
19 even though you are probably listed on everybody's agenda, I
20 would appreciate it if you would identify yourself for the
21 record. I think this is being transcribed.

22 MR. TEMBECKJIAN: Here's the reporter.

23 MR. HARRISON: So it will make the transcript
24 a lot -- it will help the reporter and help us with the
25 transcript if you identify yourself and also state the

1 organization for which you are appearing if you have an
2 affiliation. So the first person identified as a speaker
3 this morning is Debbie Siegel. Is Debbie here?

4 MS. SEGAL: Here. Good morning, everybody.
5 My name is Debbie Segal and I am here in my capacity as
6 Chair of the ABA Standing Committee on Pro Bono and Public
7 Service. On my day job, I am the full-time pro bono partner
8 at Kilpatrick, a 450-person law firm. And before that, I
9 was the executive director for 13 years of the Atlanta
10 Volunteer Lawyers Foundation which is a free-standing pro
11 bono program.

12 Thank you for permitting me to come and talk
13 to you and testify to you. We have submitted a prior memo
14 to you outlining some of the issues that I will speak about
15 today and will submit further written testimony. So what I
16 would like to do today is just hit on the some of the
17 highlights for you.

18 Despite the greatest efforts of lawyers in
19 the community and citizens, and despite the enormous effort
20 of the ABA and support of the ABA, legal services programs
21 still are only able to meet about 20 percent of the low
22 income and moderate income need for lawyers. And there are
23 all sort of reasons for that. Some of it is that planning
24 has stagnated over the law few decades, but the same number,
25 we are only meeting 20 percent persists.

1 So setting aside all kinds of other reasons
2 why lawyers ought to or should do pro bono work or might do
3 pro bono work, meeting that unmet legal need is really
4 critical for our society and critical so that people get
5 access to the court systems as they deserve. So I think
6 that we can probably all agree that because judges are
7 viewed by the legal profession with great respect and
8 because judges have great power, both in decision making and
9 otherwise, lawyers want to be in judges' good graces.

10 And that is precisely why judges hold this
11 unique position and ability to help and encourage lawyers to
12 help meet that unmet legal need by encouraging and raising a
13 profile of lawyers doing pro bono work for the less
14 fortunate. Canon Four recognizes this. The commentary, as
15 you all know, 2, 4, B says that judges are in a unique
16 position to contribute to the improvement of law, the legal
17 system and the administration of justice.

18 I think that includes within it that
19 lawyer -- that doing pro bono encouraging lawyers to do pro
20 bono is exactly activities towards the improvement of law,
21 the legal system and the administrator of justice, but we
22 are told by judges around the country anecdotally that as
23 much as they would like to help, they fear that they are
24 prohibited at the far end of the spectrum or they fear of
25 crossing the line because it's not clear what they can do or

1 they cannot do, and that they choose not to get involved not
2 because they don't want to but because they don't know where
3 the lines are drawn and don't want to be facing sanctions.

4 So, how can judges be valuable to the effort
5 to encourage pro bono work within the confines of Canon
6 Four? They could send out recruitment letters. They could
7 send thank-you notes to lawyers who have provided pro bono
8 legal services in their courtrooms. They could publicly
9 thank volunteer lawyers in the courtroom.

10 And a small anecdote, one of the associates
11 in my law firm took on a pro bono guardian ad litem case
12 where she was representing the best interest of a low income
13 child whose parents were fighting over custody. She spent
14 about 100 hours investigating the case, she wrote a 50-page
15 report, and she testified and was cross-examined in the
16 courtroom. And she was pretty burned out by the end. It
17 took an emotional toll on her. But the Judge turned to her
18 at the end of her testimony and said, "I just want to tell
19 you how valuable the work that you have done is to both the
20 families and to me. You made my decision easy because you
21 provided me the information I need, and I really appreciate
22 it."

23 She was a first year associate. She came
24 back to the office and said, "Okay, when do I take my next
25 one?" And that just shows that merely saying thank you

1 publicly is something that can really encourage pro bono
2 work. Some judges don't feel that they can do that.

3 Other examples are writing articles
4 encouraging lawyers to do pro bono work, teaching CLE
5 programs as some of the judges in New York State do. They
6 then create programs that address issues of poverty law and
7 teach them. And you know what? It was a well-attended CLE
8 programs. Judges could lend their names to pro bono
9 programs. They could attend Bar functions and be the people
10 who give out the awards.

11 Some judges give preference on calendar calls
12 to pro bono lawyers recognizing that they are giving of
13 their time and bumping them to the top of the list so that
14 they don't spend the day in the courtroom. Judges could
15 sponsor judicial resolutions.

16 And I list all of these examples for you
17 because, first of all, I do believe and you will be the
18 ultimate determinant, that these are already permitted by
19 Canon Four, but I also list them because these are precisely
20 the examples that judges give us of things they don't think
21 they can do. And we really think it's important that there
22 be some clarification.

23 Now, we understand very, very clearly that
24 there is a spectrum. On one hand, writing a recruiting
25 letter to all of the lawyers in the Bar Association saying,

1 "Please volunteer for this organization, we really need your
2 help," that's on the one hand. On the other hand at the far
3 end of the spectrum, a judge calling up an individual lawyer
4 to say, "Please handle this individual case," might be
5 perceived as being coercive because not very many people
6 would feel comfortable saying no to that judge. And
7 Maryland has made that clear in their advisory opinion.

8 On the one hand again, one thing is to
9 present awards at a Bar Association luncheon since the judge
10 is present whose hand you shake, and quite another to be the
11 person presenting them at a fund raiser where people feel
12 obligated to attend and contribute money.

13 So it is precisely because judges are so
14 important in our society, that they can inspire voluntary
15 pro bono work, and they can be the role models without being
16 coercive, the far end of the spectrum. And that is why we
17 would like to let them know precisely what they can do
18 without crossing the line.

19 The Standing Committee on Pro Bono is working
20 on some language that we would love your permission to
21 submit. It may be as simple as including a parenthetical
22 next to the language of improving justice by saying -- by
23 encouraging involvement in pro bono activities for people
24 who cannot afford lawyers in the black letter, and then
25 maybe include some examples in the commentary that give

1 judges the idea of what is on the right side of the line and
2 what is not on the right side of the line.

3 So I thank you very much for letting me speak
4 with you today. I'm happy to answer any questions and we
5 will seek your permission to submit some language for your
6 consideration.

7 MR. HARRISON: First of all, thank you very
8 much. We very much appreciate your submission of those
9 languages. As a matter of fact, it is going to become part
10 of our mantra that we want people who have suggestions to
11 actually submit proposed language rather than to say, "We
12 think you ought to cover this subject in the Code."

13 I want to go around the table and see if
14 members of the Commission or the Advisory group have
15 questions for Ms. Segal. Tom.

16 MR. FITZPATRICK: In your proposed language
17 are you thinking about rule language or putting something in
18 the commentary to make clear that pro bono is certainly an
19 acceptable area for judges and for them --

20 MS. SEGAL: I think our goal would be to use
21 very short language, maybe a parenthetical in the rules and
22 then give some of the examples I have cited for the
23 commentary, if that would be acceptable.

24 MR. ALFINI: Debbie, as a former legal
25 services lawyer, I'm very sympathetic to this good idea.

1 In your drafting, I might make a suggestion that on the one
2 hand there is a concern over coercion. It might also be
3 sensitive to concerns over compromising impartiality by
4 doing certain things. So you might want to build something
5 into the language.

6 MS. SEGAL: Okay. Thank you.

7 MR. HARRISON: Bob.

8 MR. TEMBECKJIAN: There certainly doesn't
9 appear to be anything in Canon Four now or in the record of
10 judicial discipline around the country that would prohibit a
11 judge from thanking an attorney for having made a pro bono
12 representation or an effort or to do most, if not all, of
13 the things that you suggest in your comments. So I'm
14 wondering if you have any insights as to where the
15 reluctance is, what's the source of the reluctance for
16 judges to do these relatively simple and nondisciplinary
17 things such as thanking a lawyer for a good effort?

18 MS. SEGAL: Isn't that amazing. And I agree
19 with you. And I think there is nothing in the rules that
20 prohibits it. In fact, I really think in my mind encourages
21 it. But for whatever reason, whatever climate the different
22 judges -- and we hear this all over -- they are just so
23 fearful of doing something that might be perceived in their
24 community, I don't know if it's political but they really
25 feel constrained. And since I don't think anybody disagrees

1 that this would be a good thing to do, that's why we would
2 like to just make it a little more clear and free these
3 people to make a difference.

4 MR. HARRISON: Seth.

5 MR. ROSNER: I just add the following
6 comments. I suggest if you look at it, at least, the
7 current format of the code, the black letter is posed in
8 terms of conduct that is required or prohibited. It doesn't
9 consider whether or not language might better go in the
10 Commentary since really what you're proposing is
11 explanatory, in other words, that this is something that
12 does not --

13 MS. SEGAL: Thank you.

14 MR. HARRISON: I was struck by the fact that
15 you express concern about a judge calling the lawyer because
16 it might be deemed coercive. I've never found any judges
17 too inhibited to call me to ask me to take cases. And, in
18 fact, the Rules of Professional Conduct would suggest that
19 lawyers should respond to those calls.

20 MS. SEGAL: Absolutely.

21 MR. HARRISON: There might be some trust,
22 even though we don't cite things in provisions of other
23 rules and so forth and comments, but you might want to look
24 at the relevant provision of the Rules of Professional
25 Conduct when you're thinking about the language.

1 MS. SEGAL: Thank you.

2 MR. HARRISON: Because it might pick up on
3 the obligation that lawyers have to respond positively to
4 those kinds of requests.

5 MS. SEGAL: Good. But I will respond to you
6 and say that Michigan has explicitly prohibited that. And
7 I'm not sure whether it's a black letter rule or an advisory
8 thing.

9 MR. HARRISON: Prohibited judges?

10 MS. SEGAL: Prohibited judges from
11 specifically. So they have taken the position that it is
12 extreme. And in my role as a pro bono partner in the firm
13 and having gotten those phone calls from the judges, you
14 know you can't say no. So we don't want to suggest that
15 this be a coercive activity but that this inspire rather
16 than coerce.

17 MR. HARRISON: Sure. It may not be unusual
18 to find that federal judges are less inhibited than state
19 judges.

20 MR. ROSNER: You want to inspire something
21 other than fear.

22 MS. SEGAL: That's right, exactly right.

23 MR. HARRISON: George.

24 MR. KUHLMAN: Debbie, I'm certainly hopeful
25 that we will be able to accommodate this concern that you

1 have expressed, but there is one thing that I was thinking I
2 would probably be bringing up later after you left. And it
3 maybe better to give you an opportunity to help me see my
4 way through it and maybe I won't even be bringing it up as a
5 possible objection.

6 Now, you talked about the judge who thanks
7 the pro bono lawyer in court. I find myself thinking, gee,
8 that's great, it makes me feel good, too, but I wonder what
9 the impact of that, if any, might be on the parties and the
10 other lawyer and on the parties who are present in the
11 courtroom and might perhaps perceive that somehow this
12 special effort on behalf of a lawyer which was worthy of --
13 able to evoke a specific accolade from the judge might not
14 be in the wrong circumstance misunderstood.

15 MS. SEGAL: I think you raise a good point.
16 In this particular circumstance, the pro bono lawyer was
17 acting as an officer of the Court and representing the best
18 interest of the child. So I think was not - would not have
19 been a great a concern there. I think you raise a good
20 point. When I have seen it done, and judges do do this
21 routinely, they generally thank all of the lawyers for their
22 work, and then particularly thank this person for giving
23 them their time. I've seen it done very well but you raise
24 a good point. Again, it's a spectrum issue.

25 MR. KUHLMAN: Thank you.

1 MR. HARRISON: Other questions? Yes, Jim.

2 MR. WYNN: I serve on the -- Board for
3 North Carolina and maybe it's interesting to discover not
4 everybody is in favor of pro bono from a legal services
5 stance. There are a number of entities and businesses and
6 others in banks that feel that they have been unfairly
7 attacked by them. In drafting your language, I would
8 suggest that you try to attach something or words to suggest
9 some kind of cautionary language or language to be more
10 inclusive of the other entities that might be involved in
11 the process.

12 MS. SEGAL: Okay. Thank you.

13 MR. HARRISON: Any other comments,
14 questions? Debbie, thank you very much. We appreciate your
15 time in coming here today. And, obviously, you have given
16 us something to think about.

17 MS. SEGAL: Thank you very much.

18 MR. HARRISON: The next presenter is Susan
19 Lindenauer from the New York County Lawyers' Association.

20 MS. LINDENAUER: I'm here. Good morning.
21 As Mark has said, I am here on behalf of the New York County
22 Lawyers' Association. I serve as a board member and
23 co-chair of the Task Force on Judicial Selection, and in my
24 day job I am general counsel of the Legal Aid Society in
25 New York City.

1 On behalf of the New York County Lawyers'
2 Association, I thank you for this opportunity to address the
3 Joint Commission. The New York County Lawyers' Association,
4 or "NYCLA" as we refer to it, is a voluntarily bar
5 association who was founded almost 100 years ago. And from
6 its earliest history, it has been open to all lawyers
7 without regard to gender, race, religion, ethnicity, age,
8 sexual orientation or disability. It has had a long
9 commitment and continuing commitment to diversity in the
10 profession, to the public interest, to expansion and access
11 to the justice system, and to maintaining and protecting the
12 integrity and independence of the judiciary.

13 What I'm going to do today is set briefly
14 context which I have outlined in my written comments about
15 our decision to appear before you today. I will follow that
16 with some brief comments on two issues of interest to the
17 Commission: Judicial statements and the Appearance of
18 Impropriety. There are some other issues that we ask the
19 Commission for to let us reserve our right to comment on.
20 The two that are of most interest to us are the
21 problem-solving courts and the issue of the pro se litigant.

22 New York County as a part of New York City
23 has an extraord -- a plethora of problem-solving courts and
24 an enormous number of pro se litigants, many, many of whom
25 are indigent because as the previous speaker stated, less

1 than 20 percent of those are unable to afford private
2 counsel, are able to secure representation in the courts in
3 New York City either through the legal services community
4 with civil legal problems, we're talking about now, or with
5 pro bono counsel. So those issues are ones that are concern
6 to us and we certainly expect to provide additional
7 comments. But today I am focusing on two issues, and those
8 two issues came to the fore for us because of how our Task
9 Force came into being.

10 In December of 2002, our Chief Judge, Judith
11 Kaye, Chief Judge of the State of New York, formed a
12 Commission to promote public confidence in judicial
13 elections, what we call the New York Commission, to respond
14 to a perceived erosion of public confidence in the judiciary
15 in New York State. Thus far, the New York Commission has
16 focused on four primary areas; judicial candidate selection,
17 campaign activity, campaign financing and voter education.

18 After the Commission began its efforts, which
19 were prompted by a number of things that were happening in
20 New York which I suspect were not unique to New York but
21 involving the judiciary, which created a media of flurry and
22 large measure prompted the creation of the New York
23 Commission, there were a number of decisions of which --
24 some of which you are certain well aware, namely the
25 Republican Party of Minnesota case, but in New York there

1 was two decisions, In re Raab and In re Watson which came
2 from our highest court in which that court found as a
3 matter of law that maintaining an impartial judiciary was a
4 compelling state interest, which is something that was
5 important to have articulated by our highest court post
6 White, and then another decision, Spargo v. The New York
7 State Commission on Judicial Conduct, which a federal
8 district court judge declared certain provisions of the
9 New York State Code of Judicial Conduct facially
10 unconstitutional on First Amendment grounds. That decision
11 was later vacated by the Second Circuit which held that the
12 district court should have abstained in favor of State's
13 proceedings.

14 At the same time that this New York
15 Commission was created or shortly thereafter, the President
16 of NYCLA, Michael Miller formed the task force on judicial
17 selection that I co-chair. Our mission was not only to
18 study and assess and make recommendations with respect to
19 the New York Commission's Interim Report, but also
20 considered taking a broader look at issues involved in
21 judicial selection and judicial conduct.

22 And that led to our focusing in the first
23 instance on the issues of Judicial Statements and Appearance
24 of Impropriety, in part because we were responding to the
25 Interim Report that was issued by the New York Commission.

1 As to Judicial Statements, as you all know,
2 in 1990, ABA amended the Model Code of Judicial Conduct
3 because it believed that the prohibition on public comment
4 on pending or impending proceedings was overbroad and
5 unenforceable. The Model Code altered the provisions
6 against public comment by limiting the prohibition to any
7 public comment that may reasonably be expected to affect the
8 outcome of the proceedings or impair its fairness, or any
9 nonpublic comment that might substantially interfere with a
10 fair trial or hearing.

11 New York going its own way, as it does on
12 many things, rejected this modification of the prohibition
13 on public comment on the ground that it -- New York felt it
14 was not seemly for judges to comment on pending or impending
15 cases, since such comments are likely to have a negative
16 impact on the public's perception of judicial partiality.
17 And that's a threat that runs through our comments to you
18 today and, generally speaking, the issue of public
19 perception.

20 There are a number of other jurisdictions
21 which also rejected the liberalization adopted by the ABA,
22 including California, Delaware, Massachusetts, Maine,
23 Minnesota and Missouri. And that liberalization is also
24 rejected in the Code of Judicial Conduct adopted by the
25 federal judiciary.

1 And we at our Task Force believe that the
2 approach adopted by New York represents the wiser course
3 simply because the public perception of judicial bias or
4 lack of impartiality is far too prevalent to warrant the
5 lifting of the prohibition. I think it is something that
6 reasonable people might differ about and do but we are
7 really concerned about public perception.

8 However, we believe that the restrictions on
9 judicial speech in the educational forums such as those
10 currently formed in New York are unduly restrictive and
11 serve no legitimate public interest. We believe that the
12 approach that had been adopted by the ABA on non-public
13 comments was really far more appropriate. But we also urge
14 that it is important to clarify through commentary related
15 to the nonpublic arena that private educational settings
16 include colleges, law schools and bar associations, where
17 the course or speech is intended for students of the
18 educational institution or members of the bar association.

19 Our further comment on the outgrowth of White
20 really focuses not dealing with the issue of appearances of
21 impropriety is really directed to the fact that the New York
22 Commission and I believe the ABA code looks to both judges
23 who are sitting and judges facing election or people running
24 for judicial office. We believe that one further step
25 should be taken by the New York Commission and the Joint

1 Commission. Both should propose amendments to make it clear
2 that these provisions are applicable to candidates appointed
3 to judicial office as well. There should be no distinction
4 in our view between restrictions placed on elected and
5 appointed candidates for judicial office because of our
6 concern about the issue of public perception.

7 As to the issue of Appearances of
8 Impropriety, the concerns that have arisen as a result of
9 the Supreme Court decision in White which struck down the
10 Minnesota Code prohibiting candidates from announcing views
11 on disputed legal or political issues have created, we
12 believe, unnecessary complications about the issue of
13 appearances of impropriety. The White court did not hold
14 that a provision of a Code of Judicial Conduct, that
15 prescribes both actual misconduct and the appearance of
16 misconduct is unconstitutionally vague. To the contrary,
17 the Court repeatedly refers to standards that bar actual
18 impropriety, as well as the appearance of impropriety
19 without comment -- without criticism. And I note several
20 instances in the opinion in my written testimony.

21 At one point, the Court even suggests that
22 furthering the state interest of judicial impartiality and
23 the appearances of it are desirable.

24 Accordingly, and I know this is something
25 that is contrary to the action taken by ABA last summer, but

1 nonetheless we are coming out and saying what we probably
2 should have testified about last summer, the Task Force
3 recommends to both the Joint Commission and the New York
4 Commission that the bar on conduct that appears to be a
5 judicial pledge, promise or commitment be restored. We
6 believe that such a prescription does not create an
7 unconstitutionally vague category of restrictive speech.
8 Any diminution of a judge's or judicial candidate's
9 obligation to avoid the appearance of impropriety is
10 dramatically at odds with addressing the concern that all of
11 us have about the public's poor perception of the judicial
12 system.

13 I thank you for this opportunity to appear
14 before you. And as I said, I want to reserve the right to
15 submit additional comments about a number of other issues,
16 and most particularly about problem-solving courts and the
17 pro se litigant.

18 MR. HARRISON: Thank you very much,
19 Ms. Lindenauer. Are there questions from members of the
20 Commission or the Advisory Group? Judge Amon.

21 MS. AMON: Well, I just have one question
22 about the section for educational purposes. Now, when you
23 talk about bar associations, that seems to be
24 quintessentially making public comment before that group, so
25 I wondered why you would put bar association speeches within

1 your exception because it seems to me to be a very different
2 thing from like teaching a law school class or teaching a
3 college.

4 MS. LINDENAUER: Well, I would limit the bar
5 association speech to that which is involved in the CLE type
6 of program.

7 MS. AMON: Where you were talking on a topic?

8 MS. LINDENAUER: Yes, continuing legal
9 education. There, I would think, it should be permitted
10 because that to me, particularly, I think many states,
11 including New York now, has requirements as mandatory
12 continuing legal education, and I think it is unfortunate
13 for the bar, for judges to be limited in their ability to
14 participate in such programs. So I would agree that, you
15 know, major addresses which would be far more likely to
16 attract outsiders might be inappropriate, but participating
17 in mandatory or other continuing legal education programs
18 still need to be consistent.

19 MR. HARRISON: Okay. James.

20 MR. ALFINI: Ms. Lindenauer, just a point of
21 clarification, I don't think so what the ABA did last summer
22 dropped any restrictions that they had before other than the
23 appear to commit language. Is that what you're referring
24 to?

25 MS. LINDENAUER: Yes. My concern is that

1 appearing to commit is part of appearances of impropriety.
2 And as I said, I think we should have testified beforehand.
3 I wasn't named to be the co-chair of this Task Force at that
4 point. And if I had been part of that endeavor, I certainly
5 would have raised that issue at that time.

6 MR. ALFINI: Thank you. Tom.

7 MR. FITZPATRICK: Well, setting aside whether
8 this language is constitutional or unconstitutional and up
9 there, but what has been the experience in New York with an
10 elected judiciary with these ethical prohibitions that
11 frustrate the public's ability to get to know judges,
12 because isn't it true that in judicial elections with the
13 code provisions as we have, judicial candidates are
14 basically neutered. They can't say what they think, the
15 public wants to know about them, they want to know what
16 their views are, and that there is equally a compelling
17 interest of the public's ability to make a proper judicial
18 selection in the political process as well as an appearance
19 of impartiality of the judicial?

20 Have you just totally rejected the
21 proposition of the need for the public to know who these
22 people are who seek to be their judges?

23 MS. LINDENAUER: I don't think that I have
24 rejected it. I think that the issue that is before us is
25 not one which prohibits a judge or candidate of the

1 judiciary from speaking generally but making a commitment or
2 appearing to make a commitment or making a pledge or promise
3 is, in my view, something that is dangerous in terms of
4 furthering the public view as to judicial impartiality. So
5 I think that the elective process complicates the issue but
6 the appointive process can do so as well, and I fail to see
7 the difference.

8 MR. HARRISON: Judge Wynn.

9 MR. WYNN: I tend to agree with you that the
10 holding in White applies equally to appointed and elected
11 judges, but in reality when you fashion out a code there are
12 certain things that perhaps an elected judge would be
13 allowed to do that an appointed judge would not find a need
14 to such as in fund raising and that sort of thing. Now, if
15 your statement was that there should be no distinction
16 between the two, could you elaborate some more on that.

17 MS. LINDENAUER: Well, in the context of fund
18 raising, which is not part of what I have addressed because
19 I didn't see it as squarely within the topic of judicial
20 statements or appearance of impartiality, in New York, and
21 you may not know it, but we have a decidedly mixed system of
22 appointed and elected judges. And what we have seen is that
23 many appointed judges, except to the highest court where it
24 is clearly appointed, have commissions -- excuse me --
25 committees because those that are appointed often are

1 looking to seek election at some point.

2 So we have very little in the way of pure
3 appointive versus elective except in our highest court, I'm
4 talking with within our state court system, are people who
5 are appointed to the criminal court, for example, in
6 New York City are often looking to at a later point be
7 elected to the Supreme Court, which is our highest court
8 of -- it is our first court of general jurisdiction, and
9 that exists in other parts of the state with the courts
10 having slightly different names as well.

11 Looking at it from the perspective of purely
12 appointive system, there would be no need to have a
13 committee. But when that's mixed, we find that many of the
14 appointed judges have committees. So then the same sort of
15 issues arise notwithstanding the fact that their appointed
16 if they have the committee.

17 MR. HARRISON: Bob.

18 MR. TEMBECKJIAN: You refer to New York's
19 blanket prohibition on a judge making public comment on any
20 case pending in any jurisdiction in the United States and
21 which is different than the ABA Model Code provision.

22 MS. LINDENAUER: Yeah.

23 MR. TEMBECKJIAN: Certainly, a blanket
24 prohibition like that is easier to understand and enforce
25 than one which requires the judge or a disciplinary body to

1 try to determine if the judge's candidates substantially
2 interfered with the fair trial or hearing. But apart from
3 that issue, should we be concerned that a judge in New York,
4 for example, speaking in an educational forum to a class or
5 to a CLE program about a case pending in another state whose
6 comments are not likely to affect the fair trial in that
7 other state might still be perceived as making comments that
8 would in an election context, for example, signal the
9 judge's views in a way that the judge couldn't do if
10 speaking specifically to a campaign pledge or promise?

11 MS. LINDENAUER: You know, I suppose one
12 could say that a classroom could be used as a platform for
13 candidacy, but I really think that that is a bit remote.
14 I mean, and that's essentially what you're saying using a
15 classroom and then recruiting your students to go out and be
16 your committee, I think that's a bit farfetched. I mean, I
17 really do. I think that a classroom context I see very,
18 very differently.

19 MR. HARRISON: Further questions, comments,
20 reactions? Thank you very much for taking the time and
21 trouble to come and visit with us. And feel free to reserve
22 your right to add additional comments, feel free to add
23 additional comments or additional issues that are of
24 interest to you.

25 MS. LINDENAUER: Thank you.

1 MR. HARRISON: You bet. Next we have Judge
2 Sheila Murphy and John Clark. And, John, would you and
3 Judge Murphy please identify yourself for the record and
4 tell us what your current --

5 MR. CLARK: Yes, thank you very much. My
6 name is John Clark. I am a member of the Bar Association
7 Commission on Lawyers Assistance Programs. With me today I
8 have judge Sheila Murphy, also a members of the Commission
9 and a former justice and judge on a number of drug courts in
10 Illinois. And I have Judge Seardon who is a former member
11 of the Court of Appeals in Texas, who has been very active
12 in Texas's program dealing with the problems of judges in
13 recovery from these issues. And also as a consultant to us,
14 I suppose, and a member of our ABA Commission is Ann Foster
15 who is the Director or of State Bar of Texas' Lawyer
16 Assistance Program to answer any technical questions that
17 the three of us may not be able to answer precisely.

18 MR. HARRISON: I think it was prudent that
19 you got three people to help you do that.

20 MR. CLARK: Well, I assure that I know --

21 MR. HARRISON: Would you spell your name for
22 the record.

23 MR. SEERDEN: My Robert Seerden,
24 S-E-E-R-D-E-N.

25 MR. HARRISON: Well, Robert I can handle but

1 I wasn't sure of the --

2 MR. SEERDEN: That's fine.

3 MR. CLARK: We understand that we have
4 approximately ten minutes and to stand by after that for any
5 questions that may be presented to us if that's what my --

6 MR. HARRISON: That's about right.

7 MR. CLARK: Before we arrived here today, we
8 have been in touch with your consultant and we have provided
9 a specific language that we ask that you include in any
10 revisions to the Model Code of Judicial Conduct. I'll read
11 the language that the Commission has proposed for your
12 consideration that addresses the issue of impairment of
13 judges and lawyers in the -- as far as the Code is
14 concerned.

15 It says, and it's short, "Whenever a judge
16 has reliable information that the performance of a lawyer or
17 of another judge may be impaired by drugs or alcohol or
18 other mental, emotional or physical condition, the judge
19 shall take or initiate directive action which may include a
20 confidential referral to an appropriate lawyer or judicial
21 assistance program."

22 That's the specific language that we have
23 already offered to your group, and I understand that each of
24 you already have that language in front of you. I begin my
25 presentation by saying that we are very pleased to be here

1 today. Normally, our Commission doesn't take public
2 positions on a lot of subjects. We consider ourselves to be
3 more of the firemen than the policemen. We are more
4 concerned about the health and the problems of the judges
5 and the lawyers and the law students and the people involved
6 in our system than we are about the specific language in
7 drug policy and so on and so forth around the country, but
8 we are here today because of your interest in this subject
9 and our interest in it.

10 Before I go any further, I want to tell you
11 that all three of us are judges. I have been a substitute
12 judge since 1983, and other two have been judges, real
13 judges for a lot longer than that, and all three of us are
14 in recovery. All three of us are recovering alcoholics and
15 are familiar with some of the issues that we are here to
16 talk to you about. And we didn't have any problem
17 acknowledging our recovery here in this group.

18 There is no doubt that judges as well as
19 lawyers and judges' families as well as the lawyers'
20 families have problems with drugs and alcohol in their
21 personal lives. It affects the integrity of the court, it
22 affects their health, it affects the administration of
23 justice, it affects the image of the profession and the
24 image of the court. We are concerned about all of those
25 things.

1 And the language we are suggesting is
2 language that has been used for a number of years by our
3 Commission when we talk about what we would hope because
4 judicial conduct would include when it addresses the problem
5 of judges. We have spent a lot of time talking about some
6 of the judges that -- some of the problems that many judges
7 have, and that is you don't want to call, you're very
8 concerned about -- the judges are very concerned about the
9 confidentiality about not calling a lawyer or the Lawyers
10 Assistance Program for help. A lot of judges are elected
11 and they are concerned about their opportunity to be
12 re-elected.

13 A lot of judges don't want -- they see -- we
14 perceive that a lot of judges think that to interfere with
15 the lawyer or his life is just that, it is interference.
16 And they don't see it really as an opportunity to help that
17 lawyer and to bring some degree of sanity back to that
18 person's life. I know that at least one of the three of us
19 had that very experience in the middle of a trial. He was
20 called aside and told that he was acting in an incoherent
21 manner, and the trial judge sent him to a hospital, and then
22 four years later had a great impact upon his he election and
23 selection to serve on the Court of Appeals here in Texas.

24 So we can tell you that the intervention and
25 efforts of lawyers and judges to help their brothers and

1 sisters at the bar and also on the bench is something that
2 we hope that you consider in your amendment. I really don't
3 have anything particular to add as far as the specific
4 language and questions. I just want to give you one
5 anecdote and then I'm going to be quiet. When I say I'm a
6 judge, I qualify for all the discounts that judges get, and
7 I remember the judicial division --

8 MR. HARRISON: Does that raise an appearance
9 of impropriety?

10 MR. CLARK: But I am a substitute municipal
11 court judge and a magistrate because I live across the
12 street from where our little, small suburban courthouse is
13 located. And when they can't find a regular judge, they
14 call me to arraign prisoners and sometimes to do other
15 things. But I have to go to a judicial conference every
16 year and take the same programs all the other judges have to
17 take, too.

18 And one year about three years ago, and they
19 regularly do make a presentation, the Judicial Commission on
20 Judicial Conduct made a presentation to give examples of
21 misconduct that caused judges to have problems. And he made
22 an hour-long presentation and I listened to the examples one
23 after another. And then when he concluded I asked him, I
24 said privately, I said, "Why in your example of all this,
25 can you give me any estimation of what percentage of the

1 time these judges problems arise directly or indirectly as a
2 result of some problem with drugs or alcohol or some problem
3 with mental health?"

4 And he said, "Gee," he said, "60 percent of
5 the time." I said, "Why don't you address that in your
6 presentation to the judges. Why don't you acknowledge that
7 and address that directly."

8 And he looked at me and he said, "John, I
9 grew up in a family where my father was an alcoholic, and he
10 said, "I certainly know about it firsthand because I grew up
11 around it," and he said, "and I can't tell you why." But he
12 said, "I promise you 60 percent of the time." That
13 misconduct that you read about here in Texas, our Texas Bar
14 Journal publishes a synopsis of the cases they have decided
15 involving judges sometimes, I guess, I'm sure they're
16 private reprimands or whatever that equivalent is, but the
17 public ones and the fondling, the other issues like that,
18 the inappropriate comments and the things that happen are
19 frequently attributable to a judge's addiction, either
20 alcohol or drugs, or to some problem with depression that
21 he's involved with at that time.

22 So that's my anecdote to you and we have
23 specific language. And Judge Murphy is here and Judge
24 Seerden is here to answer particular questions about how the
25 program operates in Texas or how it functions around the

1 country. Judge Murphy is a member of our Commission that's
2 particularly charged with our efforts to bring judicial
3 programs up to a little by higher level around the country.
4 So if you have any questions, we're happy to take them.

5 MR. HARRISON: Harriet.

6 MS. TURNEY: Hi, John.

7 MR. CLARK: Hi, Harriet.

8 MS. TURNEY: How are you? I was on the
9 Commission on Lawyers Assistance Program, so I know a little
10 bit about the program. Here's, I think, the concern that I
11 have and I've never really been able to sort it out in my
12 mind. In the Lawyer Code we make it mandatory reporting to
13 the disciplinary or regulatory agency. In the COLAP
14 proposal, reporting would be satisfied by reporting to the
15 LAP or if there is a Judicial Assistance Program. It is a
16 different standard or a different requirement.

17 If you have programs like you have in Texas
18 or some of the really good LAPs, you know something is going
19 to happen. If you have reporting to some of the other LAPs,
20 for example, Arizona right now where there is no LAP
21 director, they really have no real framework right now.
22 What you're doing is you're reporting, the judge now says,
23 okay, I've met my obligation but you have absolutely no
24 assurance that if there's a real problem, that the public is
25 protected.

1 So my concern with the COLAP proposal is that
2 it gets the judge off the hook by reporting to an entity
3 that has no additional reporting requirement and absolutely
4 nothing may happen with a judge or a lawyer who is
5 exhibiting a problem. And I'm sure that COLAP has thought
6 about that and I'm just wondering why they have recommended
7 the alternative reporting with those kind of problems
8 inherent.

9 MR. CLARK: The language was picked back
10 really during that period of time, I believe, that you were
11 serving on the Commission. And you're probably more
12 familiar with why this language was adopted than I am.

13 MS. TURNEY: Thank you, John.

14 MR. CLARK: But it's true that not all Lawyer
15 Assistance Programs are as effective as some of the others.
16 In some of the states, and I'd really rather not say which
17 states but sometimes I like to say which states, there is
18 really no effective program at all. And that is some
19 embarrassing or should be embarrassing to those states, but
20 in most states now the Lawyers Assistance Programs are run
21 professionally, they have like in Texas full-time
22 professional staff, know what they're doing, and that
23 includes most of the major states and the smaller states
24 down to Nevada and Maine have adopted programs that are now
25 really effective programs.

1 And the Lawyer Assistance Programs weren't
2 even commenced until 1988, so they're a relatively new thing
3 anyway but the Judges Assistance Programs in some states
4 they are run separately, in some states the state statute or
5 Supreme Court rules sets those up, combines them into one.
6 It varies. And in some states there is no Judges Assistance
7 Program as such. And so the alternative was given as to who
8 it should be referred to because in each state it's going to
9 be somewhat different. And a Model Code we thought it was
10 appropriate, I suppose since I wasn't there, to provide that
11 alternative since there are no Judges Assistance Programs in
12 many states.

13 But you're right. The concern is that it is
14 not effective but nevertheless it's a step better than
15 making -- putting no responsibility on the judge. When the
16 judge frequently -- with respect to the trial lawyers, at
17 least, when it's 2:00 on Wednesday afternoon and the Court
18 resumes for the afternoon and the trial judge sees the
19 lawyer drunk in front of him, that judge is frequently the
20 person the person that makes the phone call in many states
21 confidentially to the Lawyers Assistance Program. And the
22 same can be true if there is true confidentiality for judges
23 to call.

24 The judge doesn't have to make -- the problem
25 is, as I see it, is that many times the judges think they're

1 interfering, but it's a question of education from our
2 perspective to let the judges know they're not interfering,
3 they're helping. They're bringing about an improvement in
4 the judicial conduct, they're bringing about an improvement
5 in the judge's life. And it's one step, one day at a time,
6 and this is a move toward where maybe utopia is going to be
7 some day. That's my best answer.

8 MS. TURNEY: Thank you, John.

9 MR. HARRISON: Loretta.

10 MS. ARGRETT: To pick up, to continue along
11 -- oh, I'm sorry.

12 MR. HARRISON: I'm sorry, Judge Seerden.

13 MR. SEERDEN: I just wanted to make a comment
14 about that. And thank you, John, for disguising the fact
15 that it was me that got thrown out of court and referred by
16 the judge, but that was me. And I think that this situation
17 is the type of thing that it will always be impossible to
18 put a hard and fast rule of conduct. I think it's
19 something, and whether you could put it in the language or
20 not I don't know, but it is a personal, in my view, a
21 personal responsibility of the judges to make this kind of a
22 discretionary evaluation.

23 You don't always know whether somebody is
24 just having a bad day or whether they're drunk or whether
25 they're under the influence of drugs or suffering from a

1 depression or whatever, and that's the first threshold. And
2 I don't know that you ever get language that can decide when
3 that is.

4 In my case, it wasn't any problem. I was a
5 public drunk for a long, long time. One of my best friends
6 was a district judge who had been a contemporary of mine.
7 At a time in my life when it was just about over with, he
8 called me into his office on the fourth day of a trial and
9 said, "Bob, I don't know what's wrong with you, I don't know
10 whether you're drinking too much or whether you're sick or
11 what, but you haven't been making any sense. And I'm going
12 to declare a mistrial and I'm going to call your brother and
13 have him take you to the hospital."

14 And that was the end of the life for me and
15 the change to a different life. Almost five years later, he
16 was the judge who had a whole lot to do with me being
17 appointed to the Appellate Court in Texas, of which I served
18 for 18 years, was elected, people knowing that I had been a
19 public drunk. I didn't go out and advertise it but I've
20 never -- I couldn't hide it because it was a fact.

21 I served for, I think, eight years as a Chief
22 Justice of that court in the most political area, I believe,
23 in the State of Texas. It was because a judge had -- and
24 he's dead now, Judge Clarence Stephenson, it's because he
25 had the courage and the integrity to do that. And I don't

1 know that you can put that into language, but this is a
2 step. And I've seen so many other people, so many other
3 judges and lawyers blow their brains out. I've seen members
4 of families that have had the same thing happen. I don't
5 need to make a speech on that. You all know about those
6 kind of things, I assume. If you don't, well, okay.

7 But if I were on this Commission, if I had
8 anything to do with this, I wouldn't worry that we're not
9 going to catch and cover everybody with this because I don't
10 think you can do that, but this is a step of progress.

11 MR. CLARK: We're not asking that the judges
12 evaluate whether or not the other judge or the attorney is
13 an alcoholic or has some problem, clinically depressed. We
14 are asking that he report that to some appropriate agency
15 and let them make the evaluation professionally.

16 MR. HARRISON: Loretta.

17 MS. ARGRETT: Thank you so much for your
18 input on what is a very difficult and I think delicate
19 problem. One of the questions I'd like your reaction to is
20 that in the Model rules there is a provision that would
21 require a lawyer, when the lawyer's physical or mental
22 condition materially impair that lawyer's ability to
23 represent a client. And I have been always struck by there
24 is no -- there is not a similar provision in the Model
25 Judicial Code. And I just wonder, what would be your

1 reaction to a similar provision in the Model Judicial Code?

2 MR. CLARK: I thought that's what we were
3 proposing.

4 MS. MURPHY: Thank you for asking the
5 question. That's exactly the direction we're going. And we
6 also thank you, Harriet, for bringing the question which
7 you've brought. We're going to bring that to the attention
8 of the Chief Judges Conference so that they will understand
9 the ramification sof their failure to have a Lawyers
10 Assistance Program, but this is exactly what we're talking
11 about to bring the judicial in line with the attorneys.

12 MS. ARGRETT: I didn't quite understand it.

13 MS. MURPHY: No, you hit it right on the
14 head.

15 MS. ARGRETT: Because I didn't understand
16 what you read to be quite the same thing.

17 MS. TURNEY: It's not.

18 MS. MURPHY: Right. But ours also have, I
19 think, a terrific impact, will have a terrific impact
20 because it's not the blind leading the blind. It was the
21 blind leading the blind, we'd all fall into a ditch. But at
22 least we're giving it the judicial the idea -- the judiciary
23 the idea to refer this to the Layers Assistance Program or
24 to the Judicial Assistance Program or, at least, to some
25 competent body.

1 MS. ARGRETT: Excuse me. May I pick up on
2 this? I don't think I was very clear.

3 MR. CLARK: Well, I don't think we answered
4 your question either.

5 MS. ARGRETT: Right.

6 MR. HARRISON: Let her rephrase her question.

7 MS. ARGRETT: In the Model Rules of
8 Professional Responsibility, the lawyer has an obligation to
9 withdraw or not to commence representation in such
10 circumstances. And my question is, what is your reaction to
11 a similar obligation on the part of a judge not to serve or
12 act in their judicial role if they were in that particular
13 situation?

14 MR. CLARK: You're talking about just the
15 general obligation of the attorney not to undertake the
16 representation of a client if he's not capable?

17 MS. ARGRETT: That's exactly right.

18 MR. HARRISON: Yeah. 1.16 I assume.

19 MS. ARGRETT: Right. That's exactly what
20 I'm talking about.

21 MR. KUHLMAN: If he knows in sincerity.

22 MS. ARGRETT: Right.

23 MR. HARRISON: Lawyer's physical or mental
24 condition materially impairs.

25 MR. CLARK: Well, I would tell you, I would

1 suggest that we have not discussed that specifically, but it
2 is doubtful that many lawyers would do that. The denial is
3 so important to the addiction that I don't think that that
4 calls more than a wife scolding you or your partner scolding
5 you, is going to get you to admit that you're an addict or
6 that you're depressed. That self declaration and removal
7 from the bench or removal, I don't know that would be
8 effective like that. I think that you're almost going to
9 have to have something more dramatic than that than your own
10 decision that you are addicted. That's very unusual for
11 people to get up one morning and say, "Hey, I'm an addict,
12 I'm going to withdraw from all my cases."

13 MR. HARRISON: Tom and then Bob and then Bob.

14 MR. FITZPATRICK: Well, I wanted to follow up
15 on that because a provision like that can trigger
16 discipline. So in light of that, should there be a
17 provision in the Judicial Code? You're saying go to the
18 experts, and I understand that position, but there is a
19 disciplinary book there for a similar provision for the
20 Lawyer Code.

21 MR. CLARK: If it's appropriate that there is
22 discipline, we think there should be discipline. If the
23 lawyer is guilty of misconduct, we're not trying to excuse
24 that. But at least as it exists in Texas, you can fulfill
25 your responsibility back and report the disciplinary problem

1 and the addiction problem to the Lawyers Assistance Program
2 and they then will report as necessary to the disciplinary
3 authorities, or you can report directly to the disciplinary
4 authorities.

5 MR. SEERDEN: The Lawyers Assistance Program
6 and the Judges Assistance Program is separate from the
7 disciplinary program and is confidential with the lawyers
8 and the judges if it goes through the LAP or JAP, so that if
9 a judge or lawyer contacts or someone on their behalf
10 contacts the LAP or the JAP, that's confidential and there
11 is no enforcement.

12 If there is something that if he gets there
13 through the enforcement provision, the enforcement goes on
14 and it doesn't have anything to do with the -- it's not
15 necessarily a diversionary program unless the enforcement
16 program chooses to do that, which sometimes happens.

17 MR. HARRISON: Bob Cummings and then Bob
18 Tembeckjian.

19 MR. CUMMINS: I was just -- in response to
20 Harriet's observation, I think the efficacy of this language
21 is that it's not limited simply to a referral to the Lawyers
22 Assistance Program. It may, in fact, depending upon the
23 circumstance, also result in other ramifications, including
24 the potential at some point indictment of the judge, but
25 that's not what this is directed to. This is directed to

1 giving somebody an opportunity to save their life whether or
2 not they continue to function in a judicial capacity
3 ultimately. So that's, I think, the efficacy of it.

4 And if we take a look at the provisions of
5 the Rules of Professional Conduct, there are options there.
6 And the one thing that's clear about our system of
7 discipline is that we have for so many years given too
8 little credence to these kinds of impairments and how
9 important it is that we encourage intervention which may
10 save some lives as evidenced by at least four people that
11 are sitting at the end of this table.

12 MR. HARRISON: The other Bob.

13 MR. TEMBECKJIAN: Excuse me. Assuming an
14 effective functioning Judicial Assistance Program, do we --
15 and in a situation where a judge refers another judge to it
16 and the referee is actually getting some help, do we need to
17 be concerned about the fact or even the perception that the
18 judge was getting help? Perhaps we might have a mentor or
19 in some other way have someone who is assisting in their day
20 to day, that the independence of that judge's discharge of
21 judicial responsibilities is somehow going to be implicated?

22 Is there going to be some concern that the
23 judge is not the one who is actually making the decisions
24 because he or she is in an assistance program that is
25 helping him get through on a day-to-day basis? And I'm not

1 sure that a rule can cover that, but it's kind of an
2 underlying concern that I think we might need to address
3 once the program is actually effectuated.

4 MS. MURPHY: No. That's in a word.

5 MR. HARRISON: I'm not sure -- are there
6 other questions that occurred to me which is likely to come
7 up when we discuss the possibility of implementing this rule
8 as part of the revised code. And I base my experience on
9 experience with the Rules of Professional Conduct and the
10 obligation to report under those rules which are, at least,
11 theoretically supposed to be the basis for independent
12 discipline. The failure to report when you know or should
13 know that somebody has committed a violation that raises a
14 substantial question about the lawyer's competence.

15 So the question I put to you is, to what
16 extent do you think, assuming we were to adopt this, to what
17 extent will other judges be inhibited or affected by the
18 possibility of discipline if they don't report somebody?
19 I'm not sure my question --

20 MR. CLARK: I have an anecdotal answer only.
21 I have asked the question about the same problem with
22 lawyers. If you have a duty to report and fail to do so,
23 can you be charged with some violation yourself? And it's
24 my understanding that there has not yet been any effort
25 undertaken anywhere in this country to discipline a lawyer

1 for failure to make a report that he should have made.

2 One of the issues that our Commission is very
3 concerned about is dealing that we work very easily and the
4 LAPs around the country work very well with the marginal
5 lawyer, the solo, the recently divorced, the disbarred, so
6 on, so forth. So we have a much tougher time getting into
7 the big firms and then into the -- through the impregnable
8 walls of the big firm to get their attention and to get
9 their reporting done and things like that, but it happens.

10 The confidential phone calls come in daily to
11 Austin and we get them actually in Chicago at the ABA
12 headquarters daily, lawyers calling about their wives
13 calling, children calling, lawyers, partners calling asking
14 where do we go to get help. But I don't know of any
15 instance where a lawyer has been charged independently for
16 his failure. That's anecdotally. I don't have any
17 specifics.

18 MR. HARRISON: So you think that there has
19 been so little activity on the lawyer front with regard to
20 disciplining lawyers failing to report that nobody will be
21 inhibited? Is that the kind of business?

22 MR. CLARK: Well, first of all, the report is
23 confidential so no one -- if you were to pick up the phone
24 and call to report Judge Clark, no one would know you did it
25 anyway. So, I mean, I don't know how anyone is going to

1 know whether or not you made that report because your duty
2 when you make that report to the Lawyers Assistance Program
3 or to the Judges Assistance Program, the report is going to
4 be confidential. And the disciplinary authorities don't
5 know about it, no one knows about it.

6 And, in fact, in Texas not only is there --
7 and in most states, not only is there confidentiality but
8 there is also immunity. So you're immune from any
9 litigation that may arise as a result of the actual
10 reporting.

11 MR. HARRISON: Any other questions or
12 comments or reactions for this group of nice people?

13 MR. WYNN: I had one reaction and I was
14 thinking, we ought to be self-policing for something like
15 the Rules of Judicial Conduct. We make the rules and we
16 enforce the rules. And I'm concerned somewhat about the
17 question of whether the lawyer or the judge who fails to
18 report should not be disciplined if it is obvious that he's
19 allowing it to go on. I think it's a concern on whether it
20 has been an active lawyer or not, but particularly in the
21 judiciary area where judges who see this conduct and fail to
22 report, even if it's obvious. It's not the question whether
23 it's confidentiality, it's a question someone else knows, he
24 knew it was there but he failed to do it.

25 And I think that's a problem in self-policing

1 when you are entrusted by the public because after all the
2 -- have mostly from the legislature who delegates it to us
3 or constitutionally. We don't have to have it, someone else
4 could do it. So I think that's something that we need to --

5 MR. CLARK: I think I can speak for the
6 Commission and say we would encourage you to do that, we
7 would be very pleased if you do that.

8 MS. MURPHY: Thank you.

9 MR. HARRISON: Thank you all very much. We
10 appreciate you taking the time. And I know this is a
11 subject that we are going to spend some time talking about.
12 I would like to take a break.

13 (Break was had at 10:20-10:30 a.m.)

14 MR. HARRISON: I really would appreciate it
15 if the Commission members would get back to the table and so
16 we can resume our meeting.

17 MR. ALFINI: Wish was a good word.

18 MR. HARRISON: Yeah, wish. I don't have any
19 illusions. I really don't want you to start till we have
20 something more approaching a quorum. We had a slight mix up
21 in the schedule and Judge Griffen will appear later. And we
22 are pleased to have Jon Roland who is President of the
23 Constitution Society here. He has reduced his testimony to
24 written form. I don't know whether you're going to read
25 this or give us the extemporaneous version of what you have

1 of your original testimony. But I do want to wait until our
2 Reporter gets back. Charlie. I think we've got a
3 respectable quorum.

4 MR. ROLAND: We could fill in a few here on
5 this side. Whenever you're ready, Mr. Chairman.

6 MR. HARRISON: Now is fine.

7 MR. ROLAND: All right. Ladies and gentlemen
8 of the Commission, my name is Jon Roland. I am President
9 of the Constitution Society with a web site at
10 www.Constitution.org. Since 1995, this site has had an
11 estimated 42 million hits on its pages, so it represents a
12 fairly strong influence on education on constitutional
13 matters. By profession and by education, I am a
14 mathematician and computer scientist. I have made myself a
15 historian on constitutional law and my work can be found on
16 my web site.

17 I come to you today to discuss several areas
18 of reform in connection with the Code of Conduct which need
19 to be addressed. And the remarks we have heard so far,
20 there's been a great deal of attention paid to the
21 appearance of misconduct, but having an organization like
22 the Constitutional Society and the web site that we have, we
23 tend to get a steady stream of pleadings from desperate
24 people who have been the victims or have witnessed the
25 victims of judicial misconduct. The real thing, not the

1 appearance of it.

2 We have investigated enough of these such
3 that on their face they appear to be valid concerns. And it
4 paints a very grim picture of the state of judicial
5 integrity in this country today. And more than that, it
6 paints a picture of a worsening problem, not an improving
7 one. And one of the things I'd like you to consider in all
8 this is that one of the difficulties that many people have
9 in trying to reform corruption and abuse of power is that
10 locally it tends to become entrenched and it becomes very,
11 very difficult for people in that jurisdiction to address
12 the issue.

13 And I'd like you to consider setting up
14 roving Task Forces that would move in to areas where there
15 is serious judicial corruption and abuse and assist local
16 people in solving these problems. In too many cases, it
17 takes the intervention of an outsider. I can provide an
18 example of that from my personal experience.

19 Since we are met here in Bexar County, Texas,
20 that's also, by the way, where I began to practice law as a
21 pro se litigant. My first major case was a case of legal
22 malpractice. My lawyer committed it, everyone who observed
23 the matter agreed that it was indeed gross legal
24 malpractice. But when I went to try to find a lawyer,
25 including my own regular law firm which was one of the most

1 powerful in the city, they all refused to take the case
2 because, as they explained, if we were to sue another lawyer
3 for malpractice in this jurisdiction, we would never win
4 another case for our clients. There would be systematic
5 discrimination against us and our clients thereafter. We'd
6 have to move out of town.

7 Now, I found this a rather remarkable
8 revelation. In fact, it was suggested that there were
9 lawyers in other cities that could be brought in, of course,
10 at considerable expense to handle the case. But this was
11 clear testimony of entrenched judicial corruption, and not
12 the kind of corruption that is really addressed adequately
13 in the present Canons because it is kind of, let us say,
14 emergent behavior, call it a constructive conspiracy, if you
15 will.

16 As it happens, I handled that case pro se and
17 won. And ultimately, the way that happened is an
18 interesting story in itself which if we ever meet together
19 for some beers, you might enjoy having me tell it to you.
20 Another such case involved a decision by a judge in a case
21 of mine that cost me about \$1 million. Everyone agreed,
22 even the opposition, that it was -- the decision was clearly
23 contrary to law, but as the bailiff revealed to us, the
24 judge made the remark, "Well, Jon Roland is a smart guy, I
25 have no sympathy for him."

1 It turns out he also had a previous business
2 relationship with the opposing counsel. That judge was
3 later voted the worse judge in Bexar County. In order to
4 get him out of Bexar County, the lawyers of Bexar County
5 agreed to support him for election to the Texas Supreme
6 Court which they were successful in doing and he served for
7 several years.

8 In the course of the traveling around the
9 country, however, and corresponding with people elsewhere,
10 it appears that this is hardly a problem that's limited to
11 Bexar County or to Texas. There are variations on the kind
12 of the corruption one finds in each area. In one area, for
13 example, we will find a case of the judiciary seeming to
14 conspire to deprive land owners of their property under
15 color of law and so that they can be bought up by developers
16 or, as we are now beginning to suspect, to establish
17 corridors, safe corridors along which drug traffickers may
18 move their merchandise with little fear of interference by
19 local police or citizenry.

20 And it appears that drugs and drug money are
21 a major corrupting influence behind much of what we see, one
22 that does not affect only drug cases or those involved in
23 the drug trafficking but which infects almost every area of
24 judicial practice. And I also comment on a case which I
25 have studied with some detail that also occurred here in

1 Bexar County, the 1994 Davidian case, which if you were ever
2 teaching the subject of prosecutorial and judicial
3 misconduct, it provides an excellent example because almost
4 every way in which prosecutorial or judicial misconduct can
5 be done was done in that case.

6 So what I am suggesting besides, of course,
7 the roving Task Force is that the ABA begin to seriously
8 address not just the appearance of misconduct but the
9 substance of it because, believe me, when this misconduct
10 occurs in the age of Internet, the whole world will know it.
11 You can no longer conceal it in a local jurisdiction. The
12 local jurisdiction may not do anything about it, but the
13 world will know about it. And we are having the emergence
14 of an increasingly well-informed public who are not only
15 doubtful of the integrity of the courts but well informed as
16 to exactly how they lack integrity.

17 In my testimony I address some of the
18 measures which need to be instituted as reforms. Some of
19 them are not strictly speaking within the realm of Canons of
20 Ethics because they require some other kind of enforcement
21 mechanism. But I ask you to consider them as part of a
22 general program of reform in this area because if these
23 matters are not addressed, I see serious trouble ahead.

24 Now, as it turns out, many of these reforms,
25 although these may be called reforms today, are based upon

1 reforms which are founded. I have studied the history of
2 that period in some depth, I have read old court cases such
3 as they are in the record, newspaper accounts, surviving
4 pleadings and so forth. And a picture emerges of a standard
5 of due process from which we have made serious and not at
6 all favorable departures.

7 It may be argued that we live today in more
8 complex times requiring more complex and more modern methods
9 and to some extent that's true. Part of the reason why
10 things were done the way they were in the early Republic was
11 because they had, of course, no recording devices, no
12 Stenographers as we know them today. The Court records were
13 often conducted by newspaper reporters and survive only as
14 newspaper reports, but these limitations also illustrate one
15 of the strengths of these early practices.

16 One of the most important in the early
17 Republic, all issues of law were argued in the presence of
18 the jury. There was no such thing as asking the litigants
19 to prepare motions and pleadings in writing to be decided by
20 the presiding officer of the court en camera. It was
21 recognized then as part of the common-law tradition that a
22 jury could not reach a just verdict unless it had evidence
23 not only of the facts but of the law because of the
24 constitutional Republic, the law is the matter of fact.

25 In a monarchy, whenever the monarch or his

1 official is oathed is, in effect, authoritative because of
2 who they are. Their authority does not rest upon consent.
3 But in the constitutional Republic it does, and it is very
4 much an issue whether the action is taken by some official
5 or authorized by the Constitution, or by constitutional
6 statute, or by regulations. And if the jury is not allowed
7 to hear argument on whether there is such authority, if he
8 must -- if they must rely solely upon a judge who is likely
9 to be biased in favor of the government or is perceived to
10 be so, then just verdicts will not occur.

11 So I am recommending and have recommended for
12 some time that all issues of law be argued in the presence
13 of the jury, that they receive copies of all motions, all
14 pleadings, including amicus pleadings, that all instructions
15 be argued in their presence, that they get all of the
16 proposed alternative instructions, that they have the use of
17 an adequate law library, adequate meaning that they can look
18 up all of the citations and all of the legal pleadings that
19 are before them, and that we not merely try to relegate the
20 jury as Lord Mansfield led us to do to a mere perfunctory
21 role, a mere rubber stamp.

22 This is a major area of reform but it is not
23 the only one. Because if the judicial officer, and you will
24 notice in my written testimony I use the term judicial
25 officer and not judge, because there are other kinds of

1 judicial officials and judges in many jurisdictions, for
2 example, court clerks exercise a very large influence over
3 the way judicial decisions are made and many of the Canons
4 of Ethics have to apply to them as well.

5 So when we examine the ways that things can
6 go wrong, the ways that abuses of discretion can occur, we
7 are left with the realization that ordinary remedies are
8 often denied the victims of these abuses. The doctrine of
9 judicial immunity could be much abused. There is a limited
10 role for it, but as in the famous case in Texas in which a
11 judge ordered a bailiff to beat up a litigant and was held
12 to be protected by judicial immunity in doing so, we can see
13 that the doctrine can not be extended to the extent that it
14 has been in current practice. Judges must be held
15 accountable for the corruption and abuse of power. If the
16 litigants cannot do it, then there must be other remedies.

17 We have seen how sometimes complaints of
18 judicial misconduct are not acted upon but are filed away,
19 and then the enforcers when they had a case before them in
20 which they want to exercise undue influence of the judge,
21 will dust off some of these complaints and say, look, we
22 have all these complaints against you, we might need to
23 bring them forward and act upon them. And what is the
24 likely result of that? Of course, the judge is likely to be
25 unduly influenced in favor of the government's position.

1 MR. HARRISON: I don't want to intrude too
2 much but you've got about two minutes left.

3 MR. ROLAND: All right. Another area in
4 which action is needed is to remove obstructions to private
5 criminal prosecutions. We should always remember that
6 public prosecutors are a relative innovation. They did not
7 really appear on the scene until about the late 19th
8 century. Before that time, criminal prosecutions were, in
9 general, conducted by private attorneys or even by lay
10 persons.

11 One of the results of the emergence of public
12 prosecutors has been that they have tended to gain undue
13 influence over grand juries. Grand juries must be kept
14 independent or made so if they are not because they are one
15 of the first bulwarks of protection of liberties, and they
16 must be accessible to the public in ways they are not now.

17 In Texas, if a member of the public wants to
18 take a complaint to the grand jury, they are inhibited from
19 finding out how to contact them. They are only told how to
20 send a letter through the prosecutor or through the court to
21 the foreman who is likely never to see it. And this clearly
22 defeats one of the major functions that the grand jury is
23 supposed to perform. For some of the other proposals I
24 leave you to read my written testimony, but I'd like to open
25 the floor to questions.

1 MR. HARRISON: Thank you, Mr. Roland. I
2 think you acknowledged earlier in your comments that a lot
3 of the things you are talking about are structural reforms,
4 about fundamental changes in the whole system and about
5 things that relate primarily to enforcement. And with all
6 due respect, Mr. Roland, that's well beyond our portfolio.
7 Our portfolio is quite limited. We are limited to reviewing
8 and evaluating the Code of Judicial Conduct. And most of
9 what you had to say, while very interesting, isn't something
10 we can do much about. If there are questions, I'd be happy
11 to have the group put them to you.

12 Thank you, sir, very much for your appearance
13 and for your written testimony.

14 MR. ROLAND: Thank you.

15 MR. HARRISON: The next guests on our list
16 are Judge Gonzalez and Seana Willing from the Texas Judicial
17 Conduct Commission. Nice to see both of you. I need to ask
18 you to tell us your names and your -- even though it's a
19 little repetitious but I'd rather hear it from you than from
20 me.

21 MS. GONZALEZ: Good morning. I am Judge
22 Gonzalez. I'm a Municipal Court Judge here in San Antonio,
23 and I am the Municipal Court representative with the State
24 Commission on Judicial Conduct.

25 MS. WILLING: And I'm Seana Willing. And I

1 am the Executive Director for the Texas Commission on
2 Judicial Conduct, and we're located in Austin. We
3 appreciate your having us here.

4 MS. GONZALEZ: Very much so.

5 MR. HARRISON: Go ahead.

6 MS. GONZALEZ: I think the one issue that we
7 did want to discuss and bring up -- and we'll be a tag team
8 here -- is on the program that we have called Amicus Curiae
9 which means friends of the court.

10 MR. HARRISON: I'm sorry?

11 MS. GONZALEZ: Amicus Curiae, and it means
12 friends of the court. And, basically, that is the program
13 here that deals with judges who have either had a complaint
14 filed against them and the Commission has a suspicion that
15 maybe it was related to some sort of drug or drug abuse,
16 mental disorder, alcohol problems, I think that was raised
17 earlier by one of the speakers, or it can be a self-referral
18 program where a judge contacts the Commission. It's a
19 voluntary program.

20 The other possibility of being in the program
21 is where there has not been a complaint yet filed, yet
22 there's been some information provided to the Commission
23 where maybe a judge was exhibiting particular behavior that
24 may lead one to think this judge was having particular
25 problems. So, again, this is a confidential program and it

1 is voluntary.

2 If it is raised to the level of a judicial
3 misconduct, if a complaint has already been filed,
4 basically, if the judge volunteers to go into this program,
5 the complaint is put aside until the completion of the
6 program and then the complaint can be taken up at the end of
7 that period. It's a program that has been funded by the
8 Texas Legislature since 2001, and there are certain
9 conditions in participating. Basically, the judge would be
10 responsible for paying for any of the services, so it is a
11 referral program and there is a board compromised of three
12 people that overlook and monitor these situations.

13 There can be a mentor involved with these
14 judges or would be a mentor involved, and then a report back
15 to the Commission as far as if there has been a complaint
16 filed, the report would be provide back to the Commission
17 and then just decisions could be made at that point.

18 MS. WILLING: Just to add to that, as you
19 know, the Commission here in Texas is the enforcer against
20 the judges for violations of the Code of Judicial Conduct in
21 the Texas Constitution. I've been with the Commission for
22 close to five years and before that I was with the State Bar
23 prosecuting attorneys. And I'd like to believe that the
24 situation and the picture in Texas is not that grim. We get
25 about 1,000 complaints a year against the judges. There are

1 about 3,600 judges over whom we have jurisdiction, and
2 pretty consistently about five to seven percent of the cases
3 that we get result in some form of discipline, which means
4 that 95 percent are dismissed, some out of hand simply
5 because they don't raise allegations of misconduct.

6 One of the things that I know that the
7 Commission and the judges in the State of Texas do not want
8 is a Commission that is a super appellate body that reviews
9 judges' decisions to see if they comply with the law.
10 That's what the appellate courts are there for. We have
11 plenty of business with just ethical violations that I think
12 we should stick to and continue to focus on and let the
13 appellate courts look at issues of discretionary abuses with
14 some limited exceptions to that.

15 The Texas Code does deviate to some degree
16 from the Model Code that the ABA has. Our Canons are not
17 quite as, in some cases, mandatory, they're a lot more
18 aspirational provisions, and I don't necessarily see a need
19 to change that. The issues that we see, and these come from
20 judges, are with the Minnesota v. White decision. All of a
21 sudden what was black and white became gray. And that's
22 what we do, we deal in grays at the Commission. Judges know
23 what's right and they know what's wrong for the most part.
24 There was this gray area that was dealt with, and then
25 Minnesota v. White came and the gray area expanded.

1 So I know that there are a lot of judges,
2 especially this year, it's an election year, it's a big
3 election because of presidential election, judges are dying
4 to know what to do and what they can say. So I know that in
5 Texas they're looking at changing the Code to try to reflect
6 what the judges in the state are looking for, what judicial
7 candidates are looking for, what they can and cannot say.
8 I don't have any recommendations in that area. We just
9 enforce what's in writing, whatever everyone comes up with.

10 Impairment though -- let me backtrack because
11 the Commission's mission is very important to this next
12 issue. Obviously, we are there to protect the public.
13 That's our main concern and we do that by disciplining
14 judges that violate the Canons, and in some cases removing
15 them from the bench, if that's what needed to protect the
16 public. We also try very hard to promote the public's
17 confidence and the integrity, the independence and the
18 impartiality of the judiciary, and we also assist the judges
19 in maintaining high standards of conduct.

20 We take our role as assisting the judges in
21 maintaining high standards of conduct very seriously, and we
22 are this year and, hopefully, this is my first year as
23 executive director, we really want to promote that side of
24 what we do and educate the judges and assisting the judges.
25 We want to give them mentors, especially if there are a lot

1 of new judges being appointed to the bench, very young
2 judges in some cases, and giving them a mentor that's
3 someone who has been on the bench for a while is critical, I
4 think, in helping them become very good jurists.

5 Education, assistance through the Amicus
6 program that we talked about, judges are not any different
7 than anyone else in this country. There are hundreds and
8 hundreds of judges in this state who I know are suffering
9 from impairment. And whether it manifests itself on the
10 bench, if that remains to be seen, because as elected
11 officials they're very reluctant to come forward to get
12 assistance. Lawyers practicing in their court, staff who
13 are seeing the judges day in and day out are very afraid to
14 come forward and report a judge because it could affect
15 whether or not they will stay on the bench.

16 We recognize this and that's why we have the
17 program. And we strive to make sure we can ensure
18 confidentiality within the program. Judges aren't going to
19 go to the local AA chapter and then talk about their problem
20 with the folks in the community.

21 So we are trying to find other avenues to get
22 the assistance to them, and we are trying to do it outside
23 of the disciplinary part of what we do with self-referrals
24 and self-help. And that brings me to the last point on this
25 list about the subject of judges' impairments being

1 addressed in the Code because in our Texas Code it's not
2 addressed. And I do see an opportunity there, it's just how
3 it would look in terms of self-reporting, having some
4 requirement that judges self-report, whether it be for an
5 impairment or some type of criminal activity which I know
6 there are some states that do have that Canon. But we do
7 have Canons that require judges to report other judges and
8 other attorneys who have engaged in misconduct. And I think
9 that may be an area to strengthen and give more teeth to and
10 include in there issues of impairment and substance abuse.

11 I want to also recognize in the audience
12 Justice Seerden, Robert Seerden is one our board members on
13 Amicus, and I know he has probably already provided you some
14 information but he's an excellent resource if you have any
15 questions about that program and about this issue. And both
16 Judge Gonzalez and I will be available for any questions and
17 also to be a resource to you all in this process. And I
18 appreciate your time.

19 MS. GONZALEZ: I also would just like to say
20 that I appreciate Justice Seerden's candid comments about
21 his previous history. And I think that's a prime example
22 there, that if there is some sort of assistance and help,
23 you can have a great judge. And I think it's important to
24 incorporate this and for it to be available and for the
25 privacy issue to be there.

1 MR. HARRISON: Marvin.

2 MR. KARP: This is a matter of the impaired
3 judge that has come before this Commission before this
4 morning, and it was a matter of some concern. I think there
5 is a general sense that something ought to be said about
6 this in the Code. My question to you is there was a
7 specific proposal made to the Commission by speakers before
8 you. I don't know if you would have an opportunity to
9 review it or consider it, but my question is how do you feel
10 about that type of language going into the Code as a way of
11 dealing with this situation and providing some advice or
12 structure, if you would, to a judge as to how he deals with
13 this situation when he encounters it?

14 MS. GONZALEZ: So specifically you are
15 talking about a judge being required to report? Is that
16 what you're referring to?

17 MR. KARP: Well, whenever I was trying to jot
18 it down as Mr. Clark was speaking of whenever a judge has a
19 reasonable information that a lawyer or a judge is impaired,
20 the judge will take appropriate action which includes
21 et cetera, et cetera, et cetera. And that's what I mean.

22 MS. GONZALEZ: Versus, shall versus may take
23 appropriate action. And that's the big question.

24 MR. HARRISON: The proposed language -- I'm
25 not going to read it all -- it says the judge shall take or

1 initiate corrective action which may include a confidential
2 referral to an appropriate Lawyer or Judicial Assistance
3 Program.

4 MS. GONZALEZ: I think my feeling about it is
5 what is the overall purpose. If the overall purpose is to
6 try and bring some assistance to that judge and it is going
7 to be private, I'm not sure at what point someone who is
8 reporting another judge or bringing this information to the
9 Commission would be able to say, I am sure that this person
10 is -- you know, I think there is too much of a gray area
11 there. I think it would be very difficult to say, well, I
12 am sure that this person has a problem, so I am required and
13 shall report them. And then it kicks that judge into this
14 new level of dealing with the problem.

15 So, you know, how does the reporting judge
16 determine that it is enough information there to where they
17 shall be required to do that? And that's my only concern.

18 MS. WILLING: We also have to look at the
19 program that's currently in existence and it's a voluntary
20 program. So we could make judges report their fellow judges
21 to the Commission on these issues, but not all impairment
22 issues are ethical violations. So the Commission will only
23 look at it if there is a violation of the Code of Judicial
24 Conduct, but that doesn't help the judge who hasn't violated
25 the Code who needs help who has been reported to the

1 Commission and we have a program that's voluntary. We can
2 contact that judge and suggest that they get involved in our
3 program and submit to evaluations to see if that's even
4 appropriate for them.

5 And so I guess everyone could fulfill the
6 letter and even the spirit of that kind of provision, and
7 then it falls upon the Commission at that point to enforce,
8 if that's appropriate, the misconduct if that's the level
9 that the impairment has reached, or it just ends there if
10 the judge doesn't voluntarily submit to an evaluation, or is
11 evaluated and is not an appropriate candidate for the
12 program.

13 MR. HARRISON: Jim and then Seth.

14 MR. ALFINI: Seana, there is a provision in
15 what would be the Model Code and I think in the Texas Code
16 as well that requires a judge to cooperate with the
17 Commission. Should there be more specific language along
18 these lines? Could you give us a sense of your experience
19 with judges who have been brought before the Commission and
20 the Commission is suggesting a referral to Amicus? Is that
21 generally successful, sometimes successful, could it be more
22 successful if there was a specific rule that requires them
23 to cooperate?

24 MS. WILLING: We have actually not in our
25 Code of Judicial Conduct but in the Government Code

