MEMORANDUM

TO: Mark I. Harrison, Chair,
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

FR: Judge J. Thomas Greene, Utah, and Judge James A. Noe, Washington
Co-Chairs, Senior Lawyers Division Judiciary Committee

RE: Response to May 11, 2004 Memorandum Seeking Comment

DATE: July 14, 2004

SUBJECT: First (Partial) Draft Proposals for Public Consideration and Comment

The Senior Lawyers Division Judiciary Committee met by conference call on June 23, 2004 and discussed your memorandum and the "Draft ProposalsD for Canons One and Two of the ABA Model Code of Judicial Conduct. In addition to the Co-Chairs, the following judges participated: Vincent McKusick (ME), Louis Condon (SC) Ruth Kleinfeld (NH), Robert Summit (Tenn), James Kerr, (TX). The Committee provides the following comments on the proposals for consideration.

With regard to your specific questions:

1. The combining of current Canons One and Two appears to be satisfactory. Maintaining the "appearance of impropriety" criteria is important and the effort to address vagueness issues is a definite improvement.

2. Rule 2.02. The last sentence of the Commentary to 2.02 should remain as a reminder to judges there is a duty to decide.

3. Rule 2.07- Demeanor and Decorum. We are quite concerned about "debriefing" a jury .What is the definition of "debriefing"? Will such a definition be in a "Terminology" section? What is the purpose? Who benefits? There is a potential that colloquy with the trial judge could provide a basis for a motion for new trial or appeal. What does "after their jury service is concluded" mean? Does it mean concluded for the trial just finished or will the juror be required to remain on the jury panel for another trial. If the later is true, the issues discussed could carry over to the next trial.

4. Rule 2.08- Ensuring the Right to be Heard. Our Committee believes that a judge who is involved in settlement discussions where evidentiary matters are discussed and factual matters are revealed should not preside at the trial. Even if the judge puts all such issues aside, the losing party may believe he or she lost because the judge knew more about the case because of the settlement discussions. Most court rules provide that offers of settlement can not be used as evidence in a trial. Engaging in settlement discussions and then presiding at the trial stretches that rule.

5. Yes, Rule 2.09 should cover the use of the internet by the judge. If it is to clarify the law, like reading a law review article, it is probably all right. Using the internet for factual research, including opinions of experts, should be covered by the ex parte rule. We were not clear on what was meant by "disqualifying interests" attributed to "consulted judges" and therefore can not comment. Also, we are unable to comment on "specialized courts".

6. Rule 2..12-Disqualification. We believe the word "might" is too vague and that the phrase should read: " ...in which the judge's impartiality would reasonably be questioned, ..." This disqualification is necessary even if it does create a difficult situation for a lawyer.

7. Rule 2.20- Immunity. This Rule should remain in the Code. It would be appropriate if such immunity would be in legislation, but much of judicial immunity is court created. It is important to give judges the support and encourage them to act without fear of reprisal or law suits.

CANON 1

Rule 2.17- Judicial Misconduct. We are assuming that the Code will have a “Terminology" section to define words used, e.g. "knowledge".

Rule 2.19- Disability and Impairment. We are concerned about the terms “Unimpaired" or "impairment". Webster's College Dictionary states that “impair" means to weaken or make worse. That seems a bit vague. We note that the ABA Standards for Judicial Retirement (2000) uses the term “incapacity" and defines that term as a "physical or mental condition that seriously interferes with the discharge of judicial duties..." If "impairs" is used, it should be further defined in a Terminology section.

CANON 2

Rule 2.05- Bias and Discrimination. Commentary 1 in the second line – the word "could" should be changed to "would". "Could" is vague and leaves too much room for speculation. It would be better to read: " A judge must refrain from speech, gestures or other conduct that would create in reasonable minds..."

Also, in Commentary 1 we have some concern about who is "…subject to the judge's direction and control." Obviously, the lawyers and parties are. Some clerks, however, are independent elected officers as are some reporters. News media?

Rule 2.09- Ex parte Communications. Commentary (1) may be in conflict with the Rule. Rule 2.09 allows ex parte communications under certain circumstances set forth. Under the Rule no notice must be given in advance; only after the ex parte communication. Commentary (1) states that "all parties or their lawyers shall be included in communications with a judge." It does say when "reasonably possible", but that does not alter the fact that the Rule says no notice is required and the Commentary says parties or lawyers "shall" be included. At the very least, the "shall" should be changed to "should."

CONCLUSION: We believe the Commission had done an excellent job in combining Canons 1 and 2 and proposing important changes and additions to the Code of Judicial Conduct. We appreciate the opportunity to comment on Canons 1 and 2 and look forward to the opportunity to review the proposals for the remaining Canons.