COMMENT ON FINAL DRAFT OF MODEL JUDICIAL CODE REVISION

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I

As the commission and its staff may know, my research interests revolve around the subject of pro se litigation. I previously submitted comments to the Joint Commission by way of a draft copy of two sections of an article I was working on that dealt with the subject of judicial assistance to pro se litigants, but since it was never posted on your web site with all the other comments received I don't know if anyone even saw it.

It is a moot point now, however, in light of the very welcome inclusion in the Final Draft (but not in the Preliminary Draft) of a reference in Rule 2.06 [Impartiality and Fairness], Comment [3], where the draft adds, "It is not a violation of this Rule, however, for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." I strongly commend the Joint Commission for including this language, given the fact so many trial judges for many years have sought some authority to rely upon when assisting pro se litigants in presenting their cases, so that they would avoid an accusation of bias from opposing counsel.

Ideally, even greater specificity would be useful, as is provided for some of the other rules, such as the highly-detailed Canon 5 dealing with political activity. The question is, are there actions by judges that could be identified and considered a furtherance of the pro se litigant's right to a meaningful opportunity to be heard that do not "cross the line" into the zone of favoritism or bias? I believe there are. I am attaching another document, a draft article that addresses the Canadian experience on this issue. There, unlike U.S. law, judges have a *duty*, not a right as presently posited under Comment [3], to provide reasonable assistance to pro se litigants to ensure a fair trial. My paper breaks down Canadian case law into the categories of required, permissive, and impermissible forms of assistance. It should give the commission members some ideas about the kinds of "reasonable accommodations" that American trial judges should be able to ethically provide to pro se litigants. (I am working on another paper that does this using American case law).

As I said, I am pleased with the addition of the "reasonable accommodation" language, which will go a long way toward muting the complaints of opposing counsel who insist on American judges being the proverbial "potted plants" in the pure adversarial system that they wish courts to be. That view disregards the pro se litigants' constitutional right of self-representation, and their right to a meaningful opportunity to be heard.

II

The only other comment I have is to question why the Final Draft omits the language in Canon 1, Comment [2] of the Preliminary Draft (or was it moved?) regarding judges being "encouraged" to, *inter alia*, "promote access to justice for all." It would be a pity for this language to be deleted, if it has been, from the Final Draft. In my view, it ought to be strengthened, with language indicating it is a *duty* of all judges to promote access to justice for all. Litigants have a right to access to justice under well-established case law, so it should be the duty of judges to promote it.

Thank you for allowing me to comment on your Final Draft.