September 9, 2005

Mark Harrison, Chair
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
American Bar Association Center for Professional Responsibility
321 North Clark Street
Chicago, IL 60611

RE: Comments on Canon 2 in the Preliminary Report of June 30, 2005

Dear Mr. Harrison and Members of the ABA Joint Commission:

I write to express my concerns regarding—and recommended additions to—certain Rules and Comments under Canon 2, as contained in the Preliminary Report. I begin, however, by conveying my most sincere appreciation for the huge amount of work you and staff have put into this project to date with, as we all know, still more to come.

My comments are my own. They are not those of the Montana Supreme Court, of which I am the Chief Justice, or of any other group with which I am affiliated either formally or otherwise. Rather than take up your time—and kill trees—by setting out my *bona fides* in the access to justice arena broadly and the *pro se* assistance arena specifically, I believe it is fair to say that I have been a "toiler in the vineyards" on these matters here in Montana for many years. In recent years, I have become increasingly active on the national scene on access to justice issues. Also, please note that I have not annotated the concerns and recommendations set forth below with law review articles, studies and the like, because I believe the growing needs in the area of *pro se* assistance are sufficiently well known at this time. In addition, I am aware that you have received annotated and footnoted testimony and written comments from others earlier in your proceedings.

Mr. Harrison and Members of the Joint Commission, it is my view that momentum on *pro se* assistance efforts has grown exponentially in the recent past, and that we are on the brink of several breakthroughs regarding increased *pro se* assistance, both nationally and in the states. Without such breakthroughs, we cannot kid ourselves that we will ever achieve true "equal justice" for low-income and—increasingly—

middle-income Americans. But even assuming these breakthroughs occur, they will not be enough.

The "missing link," in my view, is the absence of any guidance to our trial judges about what is appropriate in helping *pro* se litigants without crossing the line into impropriety or the appearance of impropriety vis-a-vis impartiality. I know that, at least in Montana, most trial judges are of the view that they can do virtually nothing in the way of assisting *pro se* litigants lest they be referred to the Judicial Standards Commission for disciplinary action. I expect that many—perhaps most—trial judges across the nation hold the same view. A few of our trial judges here in Montana have become more willing to provide at least limited assistance to *pro se* litigants, but they remain concerned about ethical ramifications.

I do not share the view that impartiality requires a trial judge to take a strictly "hands off" approach with self-represented litigants. Nor, of course, do I believe trial judges properly can "run the entire show" for such litigants. There is a middle ground, in my view. If some middle ground is not reflected in any way in the new Model Code, however, my concern is that appropriate assistance by trial judges for self-represented litigants will be precluded for many years.

This middle ground approach—which might be called the "engaged neutral" approach—previously has been presented to the Commission by Richard Zorza, Esq., a nationally recognized expert on *pro se*-related issues. I generally endorse Mr. Zorza's approach which, in my view, properly distinguishes between neutral engagement, neutral passivity and non-neutral engagement/passivity. *Please refer* to Testimony of Richard Zorza, Esq., December 5, 2003, Washington DC Public Hearing.

The ability of trial judges to be "engaged neutrals" will result—in my view—in increased fairness in proceedings and an increased ability for all parties to have "the day in court" to which they are entitled, without crossing any line relating to impartiality. The ultimate result, I am convinced, will be increased public trust and confidence in the American system of justice.

How to get there? I offer for your consideration the following language additions to various Rules in Canon 2 as currently contained in the Preliminary Report, as well as additional Comment language to those Rules. I believe it is critical to add language to one or more of the Rules in Canon 2, rather than merely Comment language, because some states may adopt the new Model Code without the lengthy Comments. Moreover, so long as care is taken to be clear that *pro* se-related changes are discretionary, I do not agree with those who fear that listing examples, for illustrative purposes, of appropriate affirmative engagement reasonably will be perceived as an "entitlement" by *pro se* litigants and/or that such a list reasonably could be used offensively against judicial officers. In my view, we must simply do the right thing for the right reasons in the new Model Code.

Two more introductory comments: First, I am authorized to inform you that Chief Justices Barbara Pariente (Florida), Gerry Alexander (Washington), Christine Durham (Utah) and Leigh Saufley (Maine)--for themselves, but not for their Courts--

generally endorse the approach I offer, particularly insofar as including appropriate language in the Rules and not merely the Comments. Chief Justice Saufley's written endorsement is enclosed herewith. Also enclosed herewith are letters from three of Montana's general jurisdiction trial judges who are particularly interested in this matter.

Lastly, please be assured I do not presume in any way that the language I offer is either the "only" acceptable language or the "best" you will receive or craft. I offer it as language you might be able to work with, should you agree with the thrust of what is offered. New language is underlined.

TERMINOLOGY

Addition to alphabetical listing:

"Nonprejudicial" denotes steps taken by a judge to ensure the case is decided on the facts and the law. *See* Canon 2 and Rule 2.04, Rule 2.05 and Comment, and Rule 2.09 and Comment.

CANON 2

Rule 2.04 Impartiality and fairness

A judge shall uphold and apply the law, and decide all cases with impartiality and fairness; a judge's discretionary nonprejudicial procedural steps to provide *pro se* litigants the opportunity to have their cases fully heard do not raise a reasonable question about the judge's impartiality.

Rule 2.05: Bias and Discrimination

A. A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religious, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control do so. A judge is not precluded from taking discretionary nonprejudicial steps, consistent with the law, to enable a *pro se* litigant to be heard.

Additional Comment to Rule 2.05:

[*] When a litigant is appearing *pro se*, a judge may take affirmative, engaged and nonprejudicial steps of the type illustrated in the Comment to Rule 2.09.

Rule 2.09: Ensuring the right to be heard

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law, and may take affirmative nonprejudicial steps, consistent with the law, as the judge deems appropriate in enabling a *pro se* litigant to be heard.

Additional Comment to Rule 2.09:

[*] By way of illustration, among the affirmative nonprejudicial steps that individual judges have found helpful in advancing a *pro se* litigant's ability to be heard have been: liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; limited questioning of witnesses; modifying the traditional order of taking evidence; refraining from using legal jargon; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in the preparation of the case.

Rule 2.13: Administrative Competence and Diligence.

A judge shall discharge the judge's administrative responsibilities promptly and without bias or prejudice and maintain competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business, which may include improvements in access to justice.

Additional Comment to Rule 2.13:

[*] The rapid growth in *pro se* litigation and increasing awareness of the significance of the courts' role in promoting access to justice have led to additional flexibility by judges and other court officials in many areas, including participation in innovations designed to facilitate a self-represented litigant's ability to be heard.

In closing, it is my view that some or all of the changes set forth above—or changes of like nature—must be included in the new Model Code to provide much-needed guidance to trial judges in the *pro se* arena while providing assurances that new mandates are not being imposed. The new Model Code presents a significant opportunity to provide appropriate guidance to trial judges who deal with ever-increasing numbers of *pro se* litigants. I believe it is critical to seize this opportunity now; another chance of this magnitude simply will not present itself in the reasonably foreseeable future.

Thanking you again for your prodigious work to date, and with appreciation for your time and attention to these comments, I am,

Sincerely yours,

Karla M. Gray
Chief Justice