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

FROM: John W. Larson, District Judge

RE: Written Comments on Cannon 2 in the
Preliminary Report of June 30, 2005.

DATE: September 6, 2005

First I want to express my appreciation to you and the Committee for the interest and thoughtful efforts to improve the Model Code of Judicial Conduct.

I am a general jurisdiction trial judge handling the full range of civil and criminal cases in western Montana. I have been a member of the ABA for 30 years as well as the American Judicature Society and the National Council of Juvenile and Family Court Judges. I attended your Commission's presentation to the AJS in Chicago on August 5, 2005.

My comments urge the adoption of the following AJS's proposed language for pro se or self-represented litigants or similar amendments to the comments to Rule 2.04 Impartiality and Fairness which states:

> New Section [2].
> A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Responsible accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.

Trial courts have always been closely linked to the entire community in which they work. Our credibility and success can only be measured by the effectiveness of our efforts with our citizens be they represented by counsel or not. In addition, recent amendments in the Service Members Civil Relief Act now allow nominated non-lawyers to represent this special class of litigants in court. (See Section 519, 50 U.S.C. App.) Following on the ABA's recent efforts to address issues in the civil jury system, flexibility, clarity, and innovation are necessary so that judges can allow cases with self-represented litigants to proceed fairly and expeditiously.

We need to respond to the ever-growing number of self-represented litigants. Hiding behind formality and confusing procedures will only diminish the important role courts need to exercise in resolving disputes. I strongly recommend these amendments to Rules 2.05, 2.09, 2.13 and their comments stated below:

> **Rule 2.05: Bias and Discrimination**
> 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 non-prejudicial steps, consistent with the law, to promote the ability of *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 non-prejudicial 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 non-prejudicial steps, consistent with the law, as the judge deems appropriate in facilitating a *pro se* litigant's ability to be heard.

Additional Comment to Rule 2.09:

> [*] By way of illustration, among the affirmative non-prejudicial 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 evidential 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 man areas including participation in innovations designed to facilitate a self-represented litigant's ability to be heard.

Similarly, I urge flexibility in Rule 2.10(B) which states:

> "Ex Parte Communication", prohibits a judge from "independently investigat[ing] facts in a case." The Comment to the Rule states that the prohibition extends to a judge's use of electronic research methods, which include Internet research.

I have presided over a juvenile drug court since 1996. The on-going exchange of information about individuals in the drug court is done in the context of an agreed-upon team protocol which includes the judge, prosecutor, defense counsel, probation officer, treatment providers, school and police liaisons as well as other community support groups and families. There often is the need to promptly address issues arising outside the courtroom. Given the goal of a drug court and their demonstrated record of success in reducing criminal activity, I urge the Commission to exclude drug court communication between team members from this provision.

See AJS proposed Comment [10] which reads:

> The exception for ex parte communications "expressly authorized by law" includes communications specifically permitted by the special procedures adopted from problem-solving courts for judges sitting in those courts, but a judge should avoid communications that in substance, extend, or type exceed what a defendant may reasonable be considered to have consented to when agreeing to participate in the specialized court.

Again, thank you for your commitment to improve.

Sincerely,

JOHN W. LARSON
District Judge