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December 8, 2009

Judge Alan Hancock, Co-Chair
Washington State Supreme Court Code of
Judicial Conduct Task Force
Island County Superior Court
P.O. Box 5000
Coupeville, WA 98239-5000

Judge Joel Penoyar, Co-Chair
Washington State Supreme Court Code
of Judicial Conduct Task Force
Court of Appeals
Division II
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

Re: Proposed New Washington State Supreme Court Code
Of Judicial Conduct

Dear Judge Hancock & Judge Penoyar:

I obtained a copy of the foregoing proposed Code of Judicial Conduct and have two comments.

My comment relates to Rule 3.6 with regard to affiliation with discriminatory organizations. The comments to the rule suggest that the definition of invidious discrimination is difficult to ascertain.

A few years ago I attended the Judicial College and was involved in a group discussion which caused concern to me.

The monitor asked if it would be appropriate for a judge in the State of Washington to be a member of the Augusta National Golf Course as a result of their rule prohibiting female members. It was the strong consensus of the group that such a membership would be prohibited.

I raised the comment that Augusta National was not violating any law that I was aware of. I was assuming, if they were, somebody would have brought an action against them to terminate that

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practice. The law does not blanketly prohibit organizations or business which cater to one gender. I do not claim to be an expert in discrimination issues since I largely practice in the real estate area. However, it is my understanding that whether or not an organization can be gender specific depends largely upon the role of the organization and the extent to which it affects circumstances outside of the organization such as business associations and the like. I understand a seminal case came out of California involving Rotary International.

In the State of Washington, as an example, the State, through its university system endorses organizations which are gender specific in its support of fraternities and sororities.

However, the overall feeling of the Judicial College was that any organization which is gender specific would not be appropriate for a judge to be a member of. I then asked if that would then prohibit female judges from being members of Curves, the athletic training facility for women. The response was rather curious in that no one seemed to think I had raised a legitimate concern. It struck me that a dual standard was being applied, that an organization that prohibited women would be viewed more strictly than an organization that prohibited men.

I think the lack of clarity in this rule will continue to perpetuate these perceptions.

I would like to also comment on Rule 2.8. We are all aware that we have a significant problem with the lack of professionalism. This has been discussed and debated at great length. What has been missing from the debate, in my opinion, is the failed role of the judiciary in this process. Judges are the leaders of our profession. No one has yet dared to say in this discussion that the principal reason that some lawyers in the profession are out of control is because there are too many judges in this state who are unwilling to do anything about it. The responsibility lies squarely at the foot of judges and no one in this debate has yet to make that point.

When I attended the Judicial College, this discussion came up as to whose responsibility it was to address this issue. One of the participants expressed the opinion that judges did not have the responsibility to control lawyers, that lawyers should control themselves. This person failed to recognize that what happens if lawyers fail to do that? Fortunately, while there were a number of people in attendance who agreed with that person, there were a good many who did not.

When I first started practicing law 33 years ago in Thurston County, I had the privilege of learning to practice law in front of one of the best benches this state has ever known, including one then Superior Court Judge who is now our Chief Justice of the Washington State Supreme Court. Absolutely no inappropriate behavior was tolerated in any shape, manner, or form. The situation is now quite different. Lawyers regularly do or say things that are inappropriate both in the courtroom, in pleadings, and otherwise. Rule 2.8 does not go far enough. It needs to make it absolutely clear that the responsibility for insuring that lawyers act appropriately, lies squarely at the feet of judges. Unless we make it absolutely clear that this is a part of their judicial function, the

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problem of professionalism will continue to get worse as it has done over the years.

I do not think the language in proposed Rule 2.8 is adequate.

Thank you for allowing my comments.

Sincerely,



STEPHEN WHITEHOUSE
Attorney at Law

SW:sb

Cc: Nan Sullins, Administrative Office of the Courts