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May 13, 2010

Justice Charles Johnson  
Washington State Supreme Court  
P.O. Box 40929  
Olympia, WA

Dear Justice Johnson,

RE: Proposed new Code of Judicial Conduct

As president of the Superior Court Judges' Association (SCJA) please accept this letter on the new Code of Judicial Conduct proposal.

The SCJA Judicial Ethics Committee has shown commitment and dedication combing through the proposal. As a result, the committee has carefully constructed comments on behalf of the Association. The comments are included in the enclosed letter dated May 10, 2010. The SCJA firmly stands behind the recommendations of the Judicial Ethics committee and compliments our colleagues on their work.

Please include this letter, and the enclosed letter from Judge John Erlick, in the materials for the Supreme Court Rules Committee meeting on May 24, 2010.

Sincerely,

Stephen Warning  
SCJA President Judge

cc: Board of Trustees  
Camilla Faulk  
Nan Sullins  
Judge John Erlick

## SUPERIOR COURT JUDGES' ASSOCIATION JUDICIAL ETHICS COMMITTEE

May 10, 2010

Honorable Stephen M. Warning, President-Judge  
Superior Court Judges' Association  
Cowlitz County Superior Court  
312 SW 1<sup>st</sup> Avenue, 2d Floor  
Kelso, WA 98626-1739

Dear Judge Warning:

The SCJA Judicial Ethics Committee has been engaged in a systematic review of the proposed new Code of Judicial Conduct over the past several months. The committee met twice at our spring conference to discuss issues raised during that review. The concerns and recommendations highlighted by our committee are:

1. The Committee *unanimously* recommends the "appearance of impropriety" standard be retained in Rule 1.2 of the proposed new Code of Judicial Conduct. The rule as proposed by the Code of Judicial Conduct Task Force is different from the ABA model rule and thereby deviates from the 2007 Conference of Chief Justices' Resolution wherein there is support for adopting uniform Code provisions throughout the country. Under the structure of the new ABA Model Code of Judicial Conduct the standard is contained in both Canon 1, which is an aspirational standard, as well as in Rule 1.2, which is the discipline standard. The task force, on a split vote of 5 to 4, voted to deviate from the ABA model rule without citing a rationale for deviating from the Model Code by deleting the standard. See the final report of the Code of Judicial Conduct Task Force at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Co>

de%20of%20Judicial%20Conduct%20Task%20Force%20Committee/Final%20CJC%20%20Task%20Force%20Report%20Sept%202009.pdf for a full discussion of the rationale for retaining the ABA model rule. **Committee Recommendation Adopt Rule 1.2 and Comment [5] Below:**  
**Rule 1.2:** *Promoting Confidence in the Judiciary* A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impartiality and the appearance of impartiality.  
**New Model ABA Comment [5]** Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

The concerns expressed by our Committee on the proposed deletion of the appearance of impropriety standard were multifold. First, it was noted that this has been the standard since 1924. It has always been the standard in this state and there is considerable case law in both Washington state and nationally defining the standard. Removing the standard from the rule will create confusion and an internal inconsistency between the canon and the rule. Secondly, the proponents of the change have provided no rationale for the removal of the standard nor have they cited any case law justifying the change. Finally, the removal of the standard from the rule lowers the ethical rules for judges and would further public skepticism and undermine confidence in our State judiciary.

2. The Committee notes that Rule 2.1 (The duties of judicial office; as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.) may result in the unintended consequences of making judges reluctant to participate in activities involving judicial administration either individually or through judicial associations or other law related organizations.
3. The Committee notes that Comment [4] to Rule 2.2 (It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.) does not provide sufficient guidance to judicial officers as to the scope and type of accommodation a judicial officer may grant a pro se litigant.
4. The Committee notes Comment [4] (A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative responsibilities.) to Rule 2.5 could have unintended fiscal

impact if judges interpret this comment to require all judges to contact state and local government for funding and could potentially curtail the authority of presiding judges under GR 29. **Committee Recommendation Clarifying Amendment to Rule 2.5 Comment [4] as Follows:** In accordance with GR 29, A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative responsibilities.

5. The Committee is opposed to the mandatory reporting requirements of Rule 2.15. Mandatory reporting was rejected by the Supreme Court when the current Code was adopted in 1995 and it will certainly discourage judges from assuming the role of presiding judge. The corresponding RPC 8.3—Reporting Professional Misconduct does not require attorneys to report the misconduct of judges and attorneys but rather uses “should”. The disciplinary requirements for judges and attorneys should be parallel. **Committee Recommendation of Substantive Change in Rule 2.15 and the Comments as Follows:**

Rule 2.15—Responding to Judicial and Lawyer Misconduct

- (A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding a judge’s honesty, trustworthiness, or fitness as a judge in other respects ~~shall~~ should inform the appropriate authority.
- (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects ~~shall~~ should inform the appropriate authority.
- (C) A judge who receives credible information indicating a substantial likelihood that another judge has committed a violation of this Code ~~shall~~ should take appropriate action.
- (D) A judge who receives credible information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct ~~shall~~ should take appropriate action.

#### COMMENTS

[1] Judges are not required to report the misconduct of other judges or lawyers. Self regulation of the legal and judicial professions, however, creates an aspiration that judicial officers report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Code of Judicial Conduct or the Rules of Professional Responsibility. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary violation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

- [2] While judges are not obliged to report every violation of the Code of Judicial Conduct or the Rules of Professional Conduct, the failure to report may undermine the public confidence in legal profession and the judiciary. A measure of judgment is, therefore, required in deciding whether to report a violation. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the judge is aware. A report should be made when a judge or lawyer's conduct raises a serious question as to the honesty, trustworthiness or fitness as a judge or lawyer.
- [3] Appropriate action under sections (C) and (D) may include communicating directly with the judge or lawyer who may have violated the Code of Judicial Conduct or the Rules of Professional Conduct, communicating with a supervising judge or reporting the suspected violation to the appropriate authority or other authority or other agency or body.
- [4] Information about a judge's or lawyer's conduct may be received by a judge in the course of that judge's participation in an approved lawyers or judges assistance program. In that circumstance there is no requirement or aspiration of reporting (APR 19(b) and DRJ 14(e)).

Alternatively, if the Board of Trustees does not support the recommendations that the reporting requirements not be mandatory, then the Committee recommends that both Rule 2.15(A) and (B) be amended to provide that "actual" knowledge be required to activate any requirement for reporting. Both sections would read: A judge having actual knowledge . . . ."

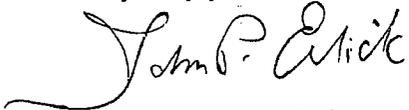
6. The committee notes the conflict between proposed Rule 3.7(B) and EAC Opinion 06-07.  
[http://www.courts.wa.gov/programs/orgs/pos\\_ethics/?fa=pos\\_ethics.dispo pin&mode=0607](http://www.courts.wa.gov/programs/orgs/pos_ethics/?fa=pos_ethics.dispo pin&mode=0607) If the Board of Trustees believes that the "friends" exception embodied in the opinion should be included in Rule 3.7(B) it should suggest it to the Supreme Court.
7. The Committee notes the expansion of the new Code (CJC Rule 4.1(A)(3) and (5), which specifically permits judges to participate in a precinct caucus to select the delegates to a nominating convention for the office of President of the United States. Concerns were expressed about balancing a judge's right to enfranchisement and exercising that right with the identification of a judge with a political organization because judges are non-partisan elected officials.

8. The Committee notes the redundancy in Comments [5] and [7] to Rule 3.7. The Board of Trustees may want to recommend the deletion of Comment [7], with that comment reserved.

It is my understanding that the Supreme Court Rules Committee is scheduled to review the proposed new Code of Judicial Conduct at its May 24, 2010 meeting. It is the hope of the SCJA Judicial Ethics Committee that the Board of Trustees will be able to consider our comments and make whatever recommendations it deems appropriate to the Rules Committee in sufficient time for them to be considered at the May 24<sup>th</sup> meeting.

I am enclosing drafts of the minutes of our April 26<sup>th</sup> and 27<sup>th</sup> Committee meetings in case they may be of use to the Board as it considers this letter. I also am ready to confer with you and/or the Board of Trustees to the extent it would be helpful to you in considering these comments.

Very truly yours,



John P. Erlick, Chair  
SCJA Judicial Ethics Committee

Enclosures

cc: Judicial Ethics Committee Members w/enclosures