Steven A. Reisler, PLLC
Attorney at Law
Springbrook Professional Center
4500 Sand Point Way N.E., Suite 250
Seattle, WA 98105-3941

email: sar@SarPllc.com
web: www.SarPllc.com

tel: 206 522-7081
fax: 206 522-4271

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Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Comments Regarding Proposed Changes to the Code of Judicial Conduct

Dear Clerk and Justices of the Washington Supreme Court:

Over the years it has been my habit to casually peruse the proposed changes to rules and procedures that appear in the Supreme Court's Advance Sheets. Recently, I happened to notice that certain changes have been proposed for the Washington Code of Judicial Conduct.

At first glance, I saw nothing remarkable. Then I saw what I initially thought was an error. What caught my attention were the proposed versions of Canons 1 and 2 and the new "rules" that apply to them. I particularly noticed that the "appearance of impropriety" as set forth in Canon 2 of the current Code has been reduced in the proposed version from an obligation to an exhortation.

In the current Code of Judicial Conduct, the Canons stand alone, although interpreted by commentary. The Canons themselves, however, are enforceable. In the proposed Code, the Canons have become statements of "overarching principles of judicial ethics" [Scope, para. 2] which provide "guidance." In the proposed Code, by contrast with the existing Code, "[a] judge may be disciplined *only for violating a Rule*." [id., emphasis added].

I have no problem with a structure that creates separate Canons and Rules where the Canons are "moral" and the Rules are mandatory. What struck me as odd was that the proposed Code lifted out the existing Canon 2 (A) requirement that judges "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." This removed language then appeared, essentially, in *the non-enforceable, ethical admonition* of Canon 1 to "avoid impropriety and the appearance of impropriety."

The proposed rules for Canon 1 make no mention of the appearance of impropriety. The proposed commentary makes it clear that "[t]he statement in Canon 1 that a judge shall avoid the appearance of impropriety is *aspirational*" (italics added). Thus the requirement that judges avoid the appearance of impropriety has been degraded from a

commandment to an aspiration. The proposed change differs significantly from the language and intent of the Model Code adopted by the ABA. To me, the proposed change is so remarkable it is as though one of the Ten Commandments, *Thou Shalt Not Kill,* had been remade invertebrate as in *Thou Ought Not Kill, Maybe.*

I know a little bit about judicial ethics. I have practiced law since I was admitted to the Washington Bar in 1979. After serving on the Washington State Bar Association's Board of Governors, I was assigned to the Commission of Judicial Conduct. I have acted as the Commission's Chair and, many years after I retired from that body, I have been called upon from time to time to serve as disciplinary counsel with respect to allegations of judicial misconduct. I have acted as disciplinary counsel in matters involving judges at all levels of the Washington judiciary from municipal court to the Supreme Court. From time to time, I have also been on the "defense side" representing attorneys in disciplinary actions brought by the WSBA.

It was never my ambition to become involved in judicial ethics. Indeed, it was the practice of the WSBA Board of Governors back when I served on it that "retiring" Governors would be "placed" into quiet, backwater task forces and committees where they could gently ease themselves out of the rock 'n roll of bar politics. I was scheduled to "retire" from the Board of Governors at the end of the summer 1988, and I was duly appointed to the Commission on Judicial Conduct.

Very soon after I was appointed, and before I had attended a single meeting or met any members or staff of the Commission, Superior Court Judge Gary Little shot himself to death in chambers on the eve of the publication of an expose in the *Seattle Post-Intelligencer* about Judge Little taking sexual advantage of minors in the juvenile court system.

I was literally baptized in the Code of Judicial Conduct in the flames of a media event the likes of which the Washington judiciary has never since experienced. The intensity of the public uproar in 1988 directly led to the constitutional amendment that defines the structure and work of the current Commission on Judicial Conduct. By public referendum, the Commission was re-constituted with a majority of lay member representatives and the power to privately admonish judges was stripped away. The public outcry reemphasized the need for judges to be held to the highest standards of conduct, and reemphasized that the Commission itself be held to the highest standards of

transparency and impartiality in the enforcement of judicial ethics.

The heat eventually died down and I served out my time on the Commission. Since then, in my many years of interacting as a lawyer with the public, I have noticed the high esteem in which ordinary people hold this state's judiciary. I have also, noticed, however, that this esteem has begun to erode, as has the esteem formerly enjoyed by all institutions, leaders and professionals. This no fault of the Washington judiciary or the Washington bar but, most likely, is due to macro socio-economic stresses beyond our local borders. Regardless who or what is at fault, however, I believe that the times call for steadfastness in the standards of judicial ethics, not aspirational ambivalence.

The judiciary has no inherent power except that which derives from the public's perception.

Like all persons in positions of moral and ethical leadership, judges have power because people *believe* that they are exalted by judicial office. So long as ordinary citizens believe that judges are different, more knowledgeable, more insightful, more ethical, *more fair* than the ordinary man or woman on the street, businessperson, politician, banker... or lawyer; so long as they believe that judges are truly held to a higher standard of conduct, then the judiciary will continue to have the power to *do* justice.

I am mindful of the reality that judges really are just "people," and we are all, to varying degrees, the products of our accumulated wisdom, knowledge, ignorance, experience, folly, ego, good intentions, bad intentions, biases, vices, clumsiness and mistakes. The judicial process is designed so that substantive errors will be caught and corrected in the appellate process.

Yet even when good judges make bad decisions, the credibility of our judicial system depends on a process that has *appeared fair and impartial*, because most people can accept "defeat" if their cause appears to have been fairly and impartially adjudicated. For that reason, the appearance of fairness and impartiality is equally important as the reality of fairness and impartiality.

The standard of conduct for the judiciary must be higher than for everyone else if they will be esteemed higher than everyone else; for there is no other power of judicial office than the necessary illusion that judges are held to a higher standard than everyone else.

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What the French say about sex, I say about the judiciary: *Vive la différence!*

The system as designed allows the human element in the body of citizens comprising the Commission on Judicial Conduct to weigh whether one behavior or another sinks to the level of jeopardizing the necessary appearance of fairness. Moreover, should the Commission err, on appeal from the Commission's decisions to reprimand, censure or recommend removal of a judge, the rules allow the Supreme Court itself to have the final word. I recognize that this means there are no hard and fast rules for what does or does not breach the appearance of fairness, but weighing behavior is not uncommon in our courtrooms. Indeed, it is more the norm than the exception.

If the avoidance of the appearance of impropriety were rendered merely an exhortation, I think it would also make the Commission's constitutional mission of safeguarding the integrity of Washington's judiciary much more difficult. Though some might deem that a plus, I do not; nor, I think, would the public at large. When I served as the Commission's Chair, and years later when I served as disciplinary counsel, I never found that the proscription of the appearance of impropriety was used unwisely. The avoidance of the appearance of impropriety is not a criminal, but an ethical obligation, which is why it is necessarily broad and flexible. I found it a necessary tool for serving the public's interest (and the judiciary's interest) when conduct sometimes unforeseeable - and occasionally unimaginable - required meaningful ethical review.

In sum, to the extent that the proposed Code inadvertently relegated the avoidance of the appearance of impartiality to a mere aspirational goal, I encourage you to correct it. To the extent that the change was deliberate, I urge you, for the good of the judiciary and the common good, to reconsider.

Very truly yours,

Steven A. Reisler
WSBA No. 9384