CONCURRING OPINION

Ex Parte Communications

The seriousness of Judge Hutchinson's conduct is underscored by State v. Romano, 34 Wn. App. 567 (1983), where our Court of Appeals did reverse a criminal case for the judge's ex parte communications based upon a denial of due process of law. Whether or not Judge Hutchinson's conduct in this civil proceeding was a basis for reversal, the ex parte communication is proscribed by the Code of Judicial Conduct (CJC) 3(A)(4). As was recognized in Romano, at page 569, "a judge may not initiate or consider ex parte communications concerning a pending proceeding". Also at page 569:

> The law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised.

CJC 3(A)(4) and its comment at footnote 1 in Romano are guidance for judges seeking information on a pending case. A judge may obtain the advice of disinterested experts on the law only, and then only if affording the parties a "reasonable opportunity to respond." There is absolutely no authority for conducting an independent field investigation of the facts. The prohibition includes communications from lawyers, law teachers, and other persons who are not participants in the proceedings (except by amicus curiae). It does not include a judge's consultation with other judges, or with court personnel whose function is to aid the

judge in carrying out his or her adjudicative responsibilities.

Bias and Disqualification

It is noteworthy that in Romano, supra, there was no showing of bias and prejudice as is present in this case. CJC 2(A) requires judges to conduct themselves in such a way as to promote public confidence in the impartiality of the judiciary. Irresponsible and improper displays of bias and prejudice in open court directed to those seeking the aid of the court erode public confidence in the courts.

CJC 3(A)(3) requires a judge to be "patient, dignified, and courteous to litigants." I would find a violation of CJC 3(A)(3) because Judge Hutchinson failed to exercise patience, dignity or courteousness to these litigants.

Judge Hutchinson should have disqualified himself. Comments from the bench directed to litigants which express the judge's personal bias or prejudice and which are rich in the potential to humiliate and demean and which subject parties before the court to public scorn or ridicule are prohibited by CJC 3(C)(1)(a):

> Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding....

The bias and prejudice was personal to the parties before the court and was not an expression of value, philosophy or belief about the law or constitutional principle. Under the provisions of

CJC 3(C)(1)(a) a judge's values, philosophy, or "fixed beliefs about constitutional principles and many other facets of the law" are to be distinguished and do not require disqualification. E.W. Thode, "Reporters Notes to Code of Judicial Conduct" at 61 (1973). It was also personal in the sense that the bias or prejudice arose from an extra-judicial source which resulted in an opinion on the merits based on information acquired from other than participating in the case. United States v. Grinnell Corporation, 384 U.S. 563, 583, 16 L.E.2d 778, 86 S.Ct. 1698 (1966).

CJC 1 sets the tone for all judges. "An independent and honorable judiciary is indispensable to justice in our society." No less than the integrity and independence of the judiciary are at stake each time a judge departs from the Canons. It is implicit in determining a violation of any Canon that a judge has not observed the high standards of conduct required in Canon 1.

Sanction

The Washington State Constitution, Article IV, Section 31 provides in part that after hearing a complaint against a judge the commission:

> shall either dismiss the case, or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice. The commission may not recommend suspension or removal unless it censures the judge or justice for the violation serving as the basis for the recommendation. (Emphasis supplied)

Thus, this commission has constitutional authority after

hearing, if not dismissing to: (1) admonish; (2) reprimand; (3) censure; (4) censure and recommend suspension; (5) censure and recommend removal; or (6) recommend retirement. In deciding an appropriate sanction in this case it is important to note that there are more sanctions or remedies available to the commission than those suggested in the dissent. The sanction approved by the majority, censure, is in the lower middle range of response permitted.

The dissent agrees with the majority that the conduct and violation is "serious" and suggests that a reprimand is appropriate in light of In Re Velie, CJC No. 90-946-F-25 and in the interest of proportionality.

A reprimand is defined by RCW 2.64.010(6) and is only available as a sanction for a "minor" violation of the CJC. It is not, therefore, an appropriate sanction as this is a "serious" violation. It is respectfully submitted that this commission is an independent agency of the judicial branch and does not have the discretion to deviate from the law as it presently exists under such circumstances.

Even though censure is required when there is a serious violation, the commission has the discretion not to recommend to the supreme court that a judge be suspended or removed. Retirement may be recommended when a disability is permanent or likely to become permanent which seriously interferes with the performance of judicial duties. Constitution, Art. IV, Sec. 31. Under the proper circumstances retirement may be recommended as a compassionate

remedy rather than a sanction. This range of options permits not only flexibility but consistency and predictability in decision making while permitting a compassionate analysis of each fact situation presented to the commission.

It is the undersigned's view that in Judge Hutchinson's case there is indeed more serious behavior present than in Judge Velie's case and that the two cases are, therefore, distinguishable.

The October 26, 1993 reconsideration hearing was acted out before a packed courtroom with prior media coverage with the public and the two litigants present. In this context Judge Hutchinson clearly used his official position as a platform to disparage the petitioners with apparently some pre-planned remarks which had the effect of humiliating at least one of the parties (transcript 37-38; Exhibit 2, pp 4-5).

Judge Hutchinson on October 26, 1993 in open court revealed after beginning to announce his decision that he had conducted numerous ex parte contacts amounting to a field investigation of the facts (transcript 65-67; Exhibit 2, pp 3-4).

Judge Hutchinson did on October 26, 1993 in open court use his position of honor and public trust to express his personal views that the petitioners conduct was "immoral" and evidence of "a mentally ill and diseased mind" and showed his disdain by announcing:

> I will reluctantly sign a petition for a name change after the parties have had their privates cut off, next year. And I think maybe it will be relatively safe for them to go into the women's toilets.

(Exhibit 2, p. 6)

Even at the commission hearing, November 4, 1994, Judge Hutchinson maintained that he had the right and the duty to express his opinions in open court on the subjects of morality, immorality, and religion indicating that he had such a right as a "common citizen" and stated: "That is between me and the voters." He explained that he still viewed his conduct as proper and that the single reason given for claiming that he would not do this again was: "Because my wife won't let me." He did finally agree to be bound by the commission ruling. (transcript 76-79).

Judge Hutchinson candidly expressed on direct exam that his views on the medical procedures sought by the parties were based upon his conservative Christian education (transcript 67). He indicated affirmatively on cross that it was his duty to make public statements in court with his robes on as to what his conservative Christian education led him to believe morally on these subjects (transcript 73-75). These actions on his beliefs may reasonably be interpreted to have a chilling effect on our citizens' right of access to our courts. Wash. Const., Art. 1, Sec. 10; John Doe v. Blood Center, 117 Wn.2d 772, 780 (1991).

It should be noted that constitutional principles do provide for the separation of church and state and that it is accepted that each branch of government should not establish nor prevent the free exercise of religion. U.S. Const., Amend. 1; Wash. Const., Art. 1, Sec. 11. It should be further noted that a judge is not a "common citizen" when in office. This is especially true when on the bench

and fully vested in the authority of his or her office. Each judge is bound by the constitution, the laws of this land, and the CJC and should be especially careful to observe them.

We recognize complete freedom of thought. Freedom of speech and action have limits, Korean Church v. Lee, 75 Wn. App. 833, 838 (1994). Some of those limits are recognized in the CJC so as to maintain the honor and integrity of the judiciary and public confidence in our institution. Some limits are met when speech harms persons or their property. The conduct referred to in this and the majority opinion tread upon these ideals and standards. For the reasons stated above Judge Hutchinson's conduct is serious.

In contrast, Judge Velie's misconduct was characterized in the Conclusions of that Commission Decision as relatively minor, but frequent use of coarse language in and out of the courtroom which was repetitive of similar behavior which had been the subject of commission action in 1988. His conduct was characterized in the opinion as non-exploitive of his position. These problems caused resulting concerns to the commission about the negative effect on the judiciary and about the judge's impartiality towards attorneys who appeared before him.

Although there was some expression of concern about the coarse language used in open court, the other misconduct occurred in the course of his official duties outside the courtroom and in his private life off the bench. The ex parte contact problem was a single event and counsel were given notice in open court and had the opportunity to object as was observed in the concurring and

dissenting opinion of K. Collins Sprague at pages 12-13. Comparing the time, place and circumstances of the misconduct in the two cases, they are quite dissimilar.

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