BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON

In Re the Matter of: The Hon. Merle E. Wilcox District and Municipal Courts of Island County	NO. 94-1693-F-52 **CONCURRENCE WITH DISSENT**

I agree with the dissent of Commission member K. Collins Sprague. I write separately to further emphasize what I perceive to be incongruities and non sequiturs in the majority decision.

Judge Wilcox was served with a Statement of Charges that accused him of child molestation and sexual misconduct with a minor, assault and reckless endangerment, inappropriate demeanor, inappropriate ex parte communications, verbal abuse, ticket fixing, inappropriate touching and verbal abuse of a court employee. Some of the allegations involved alleged incidents that occurred 18 years ago, before Judge Wilcox became a judge.

After a five-day fact-finding hearing, the majority of the ten-member panel of Commission members determined that Judge Wilcox conducted himself in a manner that made his stepdaughters uncomfortable, mitigated Lynne Wilcox's traffic ticket at a time when he was socially involved with her, allowed himself to be pulled into an effort to obtain a substitute judge on a case involving Lynne Wilcox, made an unwelcome sexual comment and inappropriately touched a court employee, and, during a domestic dispute after having too much to drink, kicked Lynne Wilcox, poured beer on her and grabbed her in a sexual manner.

A majority of the panel found there was no clear, cogent and convincing evidence that Judge Wilcox engaged in conduct that constituted sexual molestation. There were no findings that entering the bathroom while it was occupied, the attempted kiss, the tickling, the tongue and ear incident, and the lap-straddling were sexually motivated. Yet the majority signing the Commission's decision finds all of these incidents were elements of a pattern of inappropriate sexual behavior. These findings and conclusions are at odds with the majority's other findings which resolve some of these incidents in favor of Judge Wilcox. To now assign vestiges of credibility to all the incidents alleging sexual misconduct is contrary to the majority's own findings.

There can be no quarrel with the Majority Concurrence and Dissent that misconduct toward women cannot be tolerated. If the incidents had been established by the necessary quantum of proof, that message would certainly be warranted. However, the need to send a message and to preserve the image of the judiciary should not overshadow the need to prove charges and violations of the Canons by clear, cogent and convincing evidence. As Justice Callow wrote in In Re Deming, 108 Wn.2d 82, 89, 736 P.2d 639, 744 P.2d 340 (1987):

> The independence of the referees of government must not be compromised nor judges intimidated by a judicial qualifications commission that fails to remember that its dual function is not only to protect the public from judges who violate the Code of Judicial Conduct, but also to protect judges from harassment and meritless complaints.

Judge Wilcox made his stepchildren uncomfortable. They were at times offended by his actions, and his conduct was deemed unwelcome. His actions may have been insensitive, but they were not criminal or unethical. This evidence does not support a finding that they constituted violations of the Canons.

As noted Commission member Sprague's dissent, much of the testimony offered to prove the charges was vague, couched in imprecise and nonspecific terms, clearly the product of special interest born of anger and in many instances inherently unreliable. The

instances of proven misconduct were isolated events. I would limit the imposition of sanctions to only those instances proven. For these reasons, I respectfully dissent.

DATED this 1st day of December, 1995.

Hon. Philip J. Thompson

Anthony Thein

Margo Keller