BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON

In Re the Matter of The Honorable David S. Keenan Superior Court Judge for King County	CJC No. 9608-F-189 **OPINION DISSENTING IN PART**

I write to dissent in part from the decision of the panel. I agree with the majority that Judge Keenan violated the Code of Judicial Conduct (CJC), Rules 1.3 (Avoiding Abuse of the Prestige of Judicial Office), and that by so doing, he also violated Rule 1.1 (Compliance with the Law, including the CJC.) I agree with the reasoning of the majority that Rule 1.3 is clear in drawing a line between acting to benefit legal education, versus acting to benefit other types of education. Because I find the ad to have violated Rule 1.3, I agree also with the sanction of admonishment. I also believe that the conduct here, in violating a clear rule, without first consulting with others, deserves admonishment, considering the factors laid out by the majority. In doing so I also would like to acknowledge Judge Keenan's work in the legal and judicial community on issues including education, racial justice, and access to justice.

I am not, however, convinced that Judge Keenan violated Rule 1.2 (Promoting Confidence in the Judiciary).

Judges "should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." CJC Preamble [2]. "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." Rule 1.2, Comment [5].

First, I note that I believe Rule 1.2 allows a judge to state that they are working to correct weaknesses or historical mistakes of the Court itself. In this case, even if the ad in question explicitly stated (which it did not) that Judge Keenan wants to advocate for marginalized communities, I am not convinced that would violate the Code. Especially in regard to issues that are historical weaknesses for the courts, whether it be marginalizing certain populations, allowing racial bias, or joining in oppressing protected minority groups, I do not believe that Rule 1.2 prohibits a judge from acknowledging their interest in working to correct those very injustices. There is nothing about acknowledging those historical and current problems, and indicating an interest in working on those issues, that reduces public confidence in the impartiality, integrity, or competence of the judiciary. Rather, acknowledging such weaknesses in the judicial system should increase public confidence in the judiciary. The words "marginalized communities" does not specifically describe any particular litigant who might appear in court, but instead acknowledges historical mistakes of the courts and other systems in excluding some people from accessing the protections of the courts and government.

By making this distinction I am not commenting on the benevolence of the concern Judge Keenan noted, but rather focusing on addressing a concern which is a historical failure of the courts. A judge could make a statement about a valued group, like victims of domestic violence, which could call into question the judge's impartiality. But courts have not historically unfairly excluded or oppressed "divorced fathers," "victims," "those accused of sex offenses," and "landlords", (see Majority Opinion), but rather have ruled on cases involving those litigants as required by the law. Stating an intention to advocate for those groups (benevolent or harmful) from the bench could be a violation of Rule 1.2, because it would be advocating for the concerns of those groups, not working to address historical mistakes of the Court itself. But I believe that a judge should advocate, within their own courts, for allowing marginalized communities to have

access to the courts, and the Code of Judicial Conduct similarly encourages judges to "participate in activities that . . . promote access to justice for all." Rule 1.2, Comment [4].

I recognize that some Commissioners might find the use of the word "advocate" in that context troubling. But it is central to my position that the statement before us is different. This Commission should not be in the position of sanctioning a judge for how someone might mistakenly understand his or her words, unless the mistaken reading would be reasonable. I specifically disagree with the majority's Finding of Fact #11 that such a reading would be reasonable. Simply because a statement could possibly be confused to mean something else does not mean that it is reasonable to so understand it.

The basic facts of this case are not in dispute. Judge Keenan allowed his picture to run in a bus advertisement for North Seattle College, with the following text: "A Superior Court Judge, David Keenan got into law in part to advocate for marginalized communities. David's changing the world. He started at North." I agree that if the words were other than they are, it could violate the rule. A judge's right to free speech is reasonably constrained to avoid presenting an impression of partiality. The majority lists a number of possible statements which are obviously troubling, but those do not describe our case here. Judge Keenan did not even go so far as to assert that he currently supports the cause of marginalized communities. He rather states that he got into the law in part to advocate for those communities.

Most judges were attorneys before taking the bench. Attorneys are advocates. They take sides and litigate for parties. Any judge who was a lawyer before taking the bench advocated for their clients. That fact does not disqualify attorneys from becoming judges. Judge Keenan testified that he was referring to why he first got into the law, not that he was advocating for those communities from the bench. I do not think a reasonable person would be confused by this statement to believe that Judge Keenan was asserting bias or partiality for some vague "marginalized community". I do not believe that Rule 1.2 muzzles judges from acknowledging why they went to law school, or what issues were their areas of focus when they practiced. In

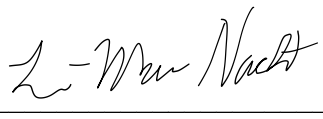
the case before us Judge Keenan did not assert or imply that he would favor members of marginalized communities if they appeared before him – he merely asserted one of his motivations for becoming involved in the legal system. That motivation is one which is laudable, not embarrassing, and focuses on an area which has been an area historically questioned by many members of the public. Stating his interest explicitly could only be reasonably seen to increase public confidence in the courts.

I join Commissioner Appleton in also specifically disagreeing with the majority's Finding of Fact #14 ("The ads could be viewed by a reasonable person as campaign ads for Judge Keenan.") I do not believe we have a sufficient factual basis to make that finding. I have considered whether bus ads are, in and of themselves, embarrassing to judiciary to such an extent as to be improper. I cannot make such a finding on this record.

Based upon the plain meaning of the words in the ad, considered in the context of the historical issue of the judicial system excluding marginalized people, I find no violation of Rule 1.2.

DATED this 5th day of February, 2021.

COMMISSION ON JUDICIAL CONDUCT



Lin-Marie Nacht