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COMMISSION ON JUDICIAL CONDUCT

BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF:

The Honorable Richard B. Sanders
Justice, Washington Supreme Court

NO. 4072-F-109

RESPONSE TO RESPONDENT'S
MOTION FOR SUMMARY JUDGMENT

Comes now Disciplinary Counsel for the Commission on Judicial Conduct and responds to Respondent's Motion for Summary Judgment. Respondent is entitled to summary judgment if he has demonstrated there is no genuine issue as to any material fact. *Stalter v. State, 151 Wn.2d 148, 154 (2004)*. The facts are to be construed in the light most favorable to the non-moving party. *Berger v. Sonneland, 144 Wn. 2d 91, 102-102, 26 P.3d 257 (2001)*. He has failed to meet that burden.

In his Motion, Respondent disregards the sworn statements and informal information already provided in discovery about Justice Sanders' initiation of discussions with residents at the Special Commitment Center [SCC] and about pending and impending cases. Further, he suggests that all relevant legal terms and ethical duties be decided without reference to the specific disputed facts of this case. Reasoned judgment dictates otherwise.

RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY
JUDGMENT - 1

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I. CHARGES AND FACTUAL SUPPORT

In this disciplinary proceeding, Respondent is charged with violating Canons 1, 2, and 3(A)(4) of the Code of Judicial Conduct by engaging in *ex parte* conversations with people with cases pending or impending before the Washington Supreme Court. He is also charged with creating the appearance of impropriety in violation of CJC Canon 2.

Exhibit 1, Statement of Charges.

Justice Sanders contests many of the specific factual allegations in the Statement of Charges which are supported by the attached documentation:

1. The Commission charges that he visited the SCC at the invitation of some of the residents. Exhibit 1, Statement of Charges, page 2. The supporting documentation, provided by Disciplinary Counsel to Respondent and attached hereto, are the letter from Andre Young (Exhibit 2) and Justice Sander's response thereto (Exhibit 3.) Respondent, however, contests this simple fact. See Answer, Exhibit 4 at page 3, number 10.

2. The Statement of Charges (Exhibit 1 at page 2) states that "[t]hese charges are not premised on the mere fact of the visit, but on Respondent's inappropriate communications with and acceptance of documents from residents of the Special Commitment Center." Respondent contests this in his Answer, Exhibit 4, at page 3, number 12, wherein he proposes "the actual premise of the Statement of Charges is that a mere visit is a violation." The content of his conversations with residents are outlined in the sworn statement of witness Alan McLaughlin, attached hereto as Exhibit 5. That statement also describes the receipt of documents from two residents during his visit. Respondent contests that fact in his Declaration on Summary Judgment, page 7, No. 21, claiming he received only one document. See also his Deposition, Exhibit 6 at page 56.

1 3. The Commission also alleges that “Residents at the Center are a unique
2 population of individuals unusually likely to have cases pending in the appellate court
3 system at all times. The residents heavily litigate many aspects of their detention at the
4 facility.” Exhibit 1 at page 2. That allegation is supported by, among other sources, sworn
5 statements of David Hackett at page 7-8 and Todd Bowers, attached hereto as Exhibits 7
6 and 8, as well as a letter from Justice Ireland, attached to Justice Sanders’ Deposition,
7 Exhibit 6, as Exhibit 3. Respondent also denies this fact, Answer, Exhibit 4, page 4, No.
8 15.
9

10 4. The Commission charges, at page 2, that “...some residents had cases pending
11 in the Washington Supreme Court or had cases impending, in that their appeals were
12 being processed in the state court system and therefore likely to be reviewed by the
13 Washington Supreme Court.” The Declarations of Bowers and Hackett (Exhibits 7 and 8)
14 list specific cases that were before Justice Sanders as a member of Department One for
15 decision on discretionary review, for instance. Respondent rejects a definition of
16 “pending” that includes these cases, admitting only that Johnson had a pending matter.
17 “Except for Johnson, Justice Sanders had no contact on any of the other cases and no
18 involvement with them.” Motion for Summary Judgment, page 13, lines 16-18;
19 Deposition, Exhibit 6, page 19, lines 6-15. While it is up to the Commission to define
20 “pending” and “impending,” it is important to examine the specific, contested factual
21 assertions put forward to support that definition. The assertion that Respondent had “no
22 contact” and “no involvement” is such an assertion of fact.
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24

25 5. The Commission charges, Exhibit 1, at page 2, that “Respondent specifically
26 anticipated discussions with residents at the facility, as evidenced by his January 23, 2003

1 letter ...” stating such discussions would be “one of the highlights of the tour...,” quoting
2 from Justice Sanders’ letter, attached hereto as Exhibit 3. Respondent has asserted that
3 these discussions were completely incidental: “...not part of the original agenda and
4 happened spontaneously when some of the prisoners asked if they could speak to Justice
5 Sanders.” Deposition, Exhibit 6 at page 18, lines 15-20. Alan McLaughlin’s sworn
6 statement demonstrates, Exhibit 5, the conversations Respondent conducted with multiple
7 residents at the facility were facilitated specifically to accommodate his desire for them.
8

9 6. The Commission charges, at page 2, that “[w]hile at the Center, he conversed
10 with more than fifteen residents and initiated discussions on topics at issue in pending and
11 impending cases.” This central allegation is supported by the declarations of Alan
12 McLaughlin , Ex 5, and Ross Farr, Exhibit 9. Respondent vigorously contests that he
13 initiated discussions or that any of his conversations concerned topics at issue in any
14 pending or impending cases. Answer, Exhibit 4 at page 6, at Nos. 27 And 28; Deposition,
15 Exhibit 6 at page 17, lines 18-21. More specifically, Justice Sanders’ Answer, Exhibit 4 at
16 page 6, No. 30, denies that he “specifically asked residents individually to relate their
17 criminal histories and acts that led to their detentions, to relate their treatment issues and
18 their thoughts on the issue of volitional control over sexually violent behavior.” Though
19 lacking in specific recollection, Respondent suggested in his Deposition, Exhibit 6 at
20 pages 66-71, that he “might have asked” some of these questions.
21

22 7. The Commission charges, Exhibit 1 at page 2, as an example, that Respondent
23 asked individually and repeatedly for residents’ “...thoughts on the issue of volitional
24 control over sexually violent behavior.” Alan McLaughlin’s nearly contemporaneous
25 notes, contained in his sworn statement, Exhibit 5, support this allegation. Contrary to his
26

1 Answer, the Respondent admitted in his deposition that he “may have thrown something
2 in there about volitional control.” Exhibit 6 at Page 70, lines 14-15. His recollection
3 alters the context however: “Well, the question would have been: Do you think that you
4 lacked volitional control when you committed these sex offenses? That would have been
5 the question.” *Id.* at lines 20-23. The Statements of David Hackett and Todd Bowers,
6 Exhibits 7 and 8, assert how relevant and fundamental the issue of “volitional control” is
7 in Sexual Violent Predator commitment proceedings.
8

9 8. The Commission also charges, Exhibit 1 at page 3, that Respondent did not
10 advise counsel “representing the State’s interests in commitment proceedings, nor counsel
11 representing residents with pending and impending cases...” before or after his visit. The
12 Respondent’s denial on this issue appears to be based on the assertion of fact that someone
13 was aware of the visit. Answer, Exhibit 4 at page 7, No. 32.
14

15 9. The Commission charges, Exhibit 1 at page 3, that “...Respondent also
16 accepted two documents from residents who had cases pending in the appellate court
17 system. Respondent did not provide any counsel involved in those cases with information
18 about or access to these documents until requested by an assistant attorney general to do
19 so.” These allegations are supported by Alan McLaughlin’s statement, Exhibit 5, about
20 his direct observations and the statement of David Hackett, Exhibit 7. Respondent
21 contests them in part, denying any recollection of receiving an envelope of “court papers”
22 from one resident. Answer, Exhibit 4 at page 7, No. 33. He admits he put the document
23 he recalls receiving into his personal files without taking any further action until asked to
24 do so.
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LEGAL ARGUMENT

Respondent correctly quotes the Canon prohibiting *ex parte* communication, then immediately engrafts the language of the 1924 version which allows him to ignore the language and clear meaning of the Code as it has existed for 30 years. For instance, Respondent argues that he must have actually taken into consideration information learned *ex parte* to breach Canon 3(A)(4). The Canon reads:

(4) Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. Judges, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before them, by *amicus curiae* only, if they afford the parties reasonable opportunity to respond.

Canon 3(A)(4) prohibits "other communications," which the Comment makes clear may come from "other persons who are not participants in the proceeding...." Respondent's reading ignores this prohibition and Canon 2(A)'s prohibition on creating an appearance of impropriety.

Nonetheless, the facts of this case, albeit disputed by the Respondent, show that he initiated and/or considered *ex parte* information. To the extent Respondent took a proactive approach toward procuring information from residents, a reasonable person would conclude that Respondent initiated conversations with those residents. Moreover, insofar as his communications convinced him to recuse himself in the precedential case of six residents, *In re Thorell*, it is reasonable to conclude that he actually took into consideration the information he learned in those *ex parte* communications.

1 Respondent additionally argues that the *ex parte* rule applies only if a judge
2 actually knows of the pending or impending case and actually knows that the information
3 being imparted concerns the same. His position is untenable. By adding the requirement
4 of specific proof that the judge applied the information learned, Respondent's assertion
5 that he does not recall the names of the individuals he talked to (Deposition, Exhibit 6 at
6 page 58, lines 1-4) becomes a complete defense. As a policy matter, such a construction
7 would permit unscrupulous judges to gather *ex parte* communications at will, so long as
8 they remained even willfully ignorant of the specific names of the people with whom they
9 communicate. In this case, such an argument is not even supported by the facts, as he
10 was most certainly at least on notice of the name of an individual he had already written
11 two opinions about who introduced himself in conversation at the SCC (see Statement of
12 David Hackett, Exhibit 7 at page 3, Nos. 13 and 14,) was in the midst of exchanging
13 opinions on an issue involving others, and had in advance corresponded by name with
14 Andre Young. The Respondent's analogy (Motion at page 11) to a judge fielding an
15 unsolicited question from a fellow church-goer is disingenuously inapposite to the case
16 before the Commission.
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19 As a legal matter, Respondent's argument also lacks support. *Scienter* is generally
20 not an element of an *ex parte* violation. See Steven Lubet, *Ex Parte Communications: An*
21 *Issue in Judicial Conduct*, 74 *Judicature* 96, 97 (1990):
22

23 *Ex parte* communication, however, is a 'strict liability' offense
24 that can lead both to judicial discipline and reversible error.
25 innocent intent is not a defense, nor should it be, given the
26 relative lack of doctrinal complexity that accompanies the concept.

Accord, *In re Zoarski*, 632 A. 2.d 1114, 1118-1119 (Conn. 1993):

1 Scienter is not essential for the occurrence of an ethical violation.
2 Judges are chargeable for deviations from the statutes governing
3 their conduct, even though the application of the statutes to
4 particular circumstances may not be readily apparent (citing
5 other cases.)

6 Accord *In re Tesmer*, 219 Wis.2d 709 (Wisc. 1998). (A judge's conduct is willful,
7 whether or not the judge has actual knowledge of the prohibition of a rule of the Code of
8 Judicial Ethics.)

9 Canon 3(A)(4) also precludes a judge from considering the views of nonparties as
10 well as parties on matters at issue in pending or impending cases. The very heart of an
11 appellate judge's role is to limit his knowledge of facts to those in the record. The
12 specific subjects Respondent broached with multiple residents during this visit were, at the
13 least, recklessly improper. He was in effect gathering facts or opinions on topics at issue
14 in cases where, as an appellate judge, he was duty bound to decide based only on a review
15 of the record made below. Furthermore, many of the cases of sexually violent predators
16 involve a challenge to the sufficiency of the factual record below, as was the case in
17 Thorell. See also the statements of David Hackett and Todd Bowers, Exhibits 7 and 8.

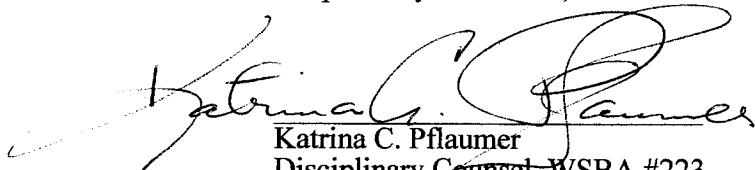
18 Respondent suggests that he can find no other case similar on the facts. It should
19 not be a surprise that this case presents rather unique facts: a Supreme Court Justice visits
20 an institution without any attempt to ascertain pending cases and issues, despite the signed
21 invitation of a litigious resident (who himself suggests contacting counsel,) despite his
22 leading opinions on the law underlying the commitment of all the residents, despite the
23 pendency of a precedential case on which he has already worked involving six residents,
24 despite the warning of a fellow Justice (See Deposition, Exhibit 6, Exhibit 3 thereto,)
25 without any attempt to identify counsel, who then asks residents about an issue central to
26

1 the pending case and to numerous other cases likely to come before the Court. An
2 appellate judge occupies a different role than a trial judge, who sometimes acts as a fact-
3 finder and often as a sentencing judge. An appellate judge must be limited to the record
4 that comes before him. To gather facts, self-assessments, biographical information all of
5 which are crucial to the sexually violent predator evaluation he is charged with reviewing
6 on the record – it is plainly beyond the scope of his role and endangers both the reality and
7 appearance of his impartiality. Respondent conceded as much by recusing himself in the
8 *Thorell* matter, which deprived those individuals and the State and the other Justices of his
9 important input on those cases and the many others the outcomes of which were stayed
10 pending the *Thorell* decision.
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13 This case presents a strong contest between the parties, both on the facts and the
14 law. Summary judgment is improper under these circumstances.
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17 Dated this 22nd day of July, 2004
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19 Respectfully Submitted,

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21 Katrina C. Pflaumer
22 Disciplinary Counsel, WSBA #223
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**BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON**

In re the Matter of
Justice Richard B. Sanders
Washington State Supreme Court

DECLARATION OF MAILING

No. 4072-F-109

I certify under penalty of perjury of the laws of the State of Washington, that at the direction of Disciplinary Counsel Katrina Pflaumer, I caused to be served a true copy of:

- Response to Respondent's Motion for Summary Judgment with exhibits
- Response to Respondent's Challenge to Commission Members and Alternates for Cause with exhibits

by the method indicated below and addressed to the following:

Kurt Bulmer
Attorney at Law
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John Strait
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1154 15th Avenue E.
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By United States Mail, first class, postage paid.

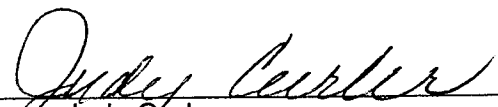
A copy of the documents listed above without exhibits was served upon:

Kurt Bulmer

John Strait

BY Electronic mail

DATED this 22nd day of July, 2004.



Judy Curler

NOTE:

**Exhibits associated with this document
are available at the Commission's office.**