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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE MATTER OF:

The Honorable Richard B. Sanders
Justice, Washington Supreme Court

NO. 200149-1

**OPPOSITION TO MOTION
FOR DISCRETIONARY REVIEW**

CLERK

BY C. J. HERRITT

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Comes now Disciplinary Counsel for the Commission on Judicial Conduct and responds to Respondent's interlocutory Motion for Discretionary Review of pre-hearing rulings on discovery by the Commission on Judicial Conduct. The motion should be denied. The Commission's constitutionally based process specifically precludes interlocutory appeal of discovery rulings. Moreover, disruption of this disciplinary action is not justified and Disciplinary Counsel has more than fulfilled discovery obligations due.

COMMISSION PROCEDURES SHOULD NOT BE FRAGMENTED

Article IV, §31 of the State Constitution creates the Commission as "an independent agency of the judicial branch," for the express purpose of enforcing the Code of Judicial Conduct. The independence of the Commission is essential to its ability to function as the ethics enforcement entity for the entire judicial branch of State government, including the members of the State Supreme Court. Article IV, §31(10) specifically directs the Commission to establish rules of procedure for Commission proceedings. The Commission on Judicial Conduct Rules of Procedure [CJCRP] embody

**OPPOSITION TO MOTION FOR DISCRETIONARY
REVIEW - 1**

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1 this constitutional directive. CJCRP 22(b)(3) clearly and expressly precludes the type of
2 interlocutory review sought here:

3 Disputes concerning discovery shall be determined
4 by the commission or presiding officer before whom
5 the matter is pending. **These decisions of the**
6 **commission may not be appealed before the entry**
7 **of the final order.** (Emphasis added.)

8 In addition to this specific and controlling rule, interlocutory appellate
9 review of the discovery dispute herein is improper. Though the Commission's procedures
10 and goals are to a large extent *sui generis*, it is axiomatic that judicial policy disfavors
11 appeals of non-final trial court rulings. The party seeking discretionary review must meet
12 a high burden to interrupt the orderly process of trial:

13 An error affecting the internal workings of the
14 lawsuit would be reviewable only if 'obvious'
15 and ... only if it truly rendered further proceedings
16 useless.

17 Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington*
18 *Rules of Appellate Procedure*, 61 Wash. Rev. 1541, 1546.

19 This Court should proceed with exceptional caution in addressing an attempt to
20 fragment judicial disciplinary proceedings. As noted above, the Commission on Judicial
21 Conduct is not a trial court, but an independent agency within the judicial branch created
22 by the Washington State Constitution. The Commission is constitutionally composed of a
23 mixture of members of the bench, bar, and non-lawyer members of the public who are
24 specially charged with the duty to enforce the Code of Judicial Conduct. This independent
25 constitutional body was established to conduct initial proceedings and hearings regarding
26 judicial conduct and discipline. Under Wa. Const. Art. IV §31, paragraph (5), the

1 Supreme Court may act to suspend or remove a judicial officer only “upon
2 recommendation of the Commission” made after the conclusion of a fact-finding hearing.

3 Due process is satisfied, and has been deemed satisfied in every similarly-
4 composed Commission in the country where challenged, because a judge or justice is
5 given a right of appeal *de novo* if the Commission admonishes, reprimands, or censures
6 him or her. *Id.*, paragraph (6).

7
8 The Constitution does not confer, expressly nor implicitly, appellate court
9 jurisdiction to review Commission proceedings on an interlocutory basis. Nor is such
10 interlocutory relief necessary, as *de novo* review is guaranteed for the judicial officer
11 following an adverse finding by the Commission.

12
13 Under a similar constitutional scheme in Pennsylvania, the Supreme Court there
14 refused a writ to compel the Judicial Inquiry and Review Board to prematurely make
15 records public. The Pennsylvania court held that it lacked authority to act on any matter
16 relating to the Board until the Board filed a recommendation with the Court. *First*
17 *Amendment Coalition v. Judicial Inquiry and Review Board*, 501 Pa. 179, 460 A.2d 722
18 (1983).

19
20 Petitioner's reliance on the Disciplinary Rules for Judges [DRJ] as authority for
21 discretionary review is misplaced. The DRJ do not have any applicability to interlocutory,
22 non-final rulings of the Commission. DRJ 1(a) provides that the scope of all of the DRJ is
23 the review of decisions recommending discipline. The DRJ do not make reference to
24 interlocutory appeal from Commission rulings because such appeals are not proper¹.

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¹ Although it is possible to conceive of extraordinary and irreversible threatened error
justifying such relief, such is not demonstrated in the instant case.

1 Respondent files this Motion under DRJ 8, which addresses motions generally: "A party
2 may seek relief, other than a decision of the case on the merits, by a motion." Rules of
3 Appellate Procedure [RAP] 17.3(a) and 17.4 are referenced for procedures applicable to
4 such a motion. Significantly, DRJ 8 does not reference RAP 17.3(b), the provision that
5 specifically addresses motions for discretionary review. Thus DRJ 8 does not offer
6 independent authority for an interlocutory appeal.
7

8
9 **RESPONDENT HAS BEEN GIVEN PLENARY AND ADEQUATE**
10 **DISCOVERY IN THIS CASE**

11 Analysis of the facts of the instant case in light of the RAP militate against
12 granting discretionary interlocutory review. This case involves Respondent's
13 conversations during a one-day visit with sexually violent predators committed to the
14 Special Commitment Center. The Statement of Charges, Appendix B to Respondent's
15 Motion, states the Commission's charges, and Respondent's Answer, Appendix C,
16 outlines the differing facts and legal interpretations relied on in defense. Ongoing
17 discovery has so far involved six depositions and provision of many documents by the
18 Commission. Hearing is anticipated for this fall, though no date has been set. It is
19 somewhat ironic that Respondent has filed this Motion at the same time as he is
20 maintaining there are no genuine issues of material fact, and thus the Commission should
21 grant summary judgment. That Motion is scheduled for argument before the Commission
22 on August 20th.
23

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25 Respondent argues that interlocutory review of the Presiding Officer's rulings on
26 discovery is justified because the Commission "has committed obvious error in not

1 allowing appropriate discovery and its failure to do so renders further proceeding useless.”
2 Motion at page 14. Respondent has attached Disciplinary Counsel’s Response before the
3 Commission to his broad discovery requests as Appendix H. Attached hereto are the
4 sworn statements of witnesses provided Respondent pursuant to the normal discovery
5 procedures under the Commission’s rules. A cursory review of these statements clarifies
6 that Respondent’s legitimate areas of inquiry have been fully responded to: the statements
7 of witnesses Hackett and Bowers contain a detailed list of cases pending and impending at
8 the time of his visit to the Special Commitment Center and the specific topics in litigation
9 relating to the subjects Respondent broached with residents. The Commission will be
10 presented with Respondent’s own definition of the terms “pending” and “impending,” and
11 apparently (judging by his deposition) with a variant definition from one of the witnesses
12 on Respondent’s behalf. The Supreme Court docket reflects a third definition and the
13 statements of witnesses Hackett and Bowers reflect definitions in keeping with the docket
14 sheets. These facts will present the Commission with a decision to make about the
15 meaning of the Canons on *ex parte* contact and the appearance of impropriety. There is
16 no failure of factual disclosure, but a genuine dispute on interpretation of the Code of
17 Judicial Conduct. This is the purview of the Commission in the first instance, to be
18 reviewed by the Supreme Court if a violation is found.
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22 Similarly, the substance of Respondent’s conversations with committed sexual
23 predators is outlined in the nearly contemporaneous notes of witness McLaughlin, whom
24 Respondent has deposed. His statement is attached to the Respondent’s Motion at
25 Appendix L. He has also probed the memories of specifics of those conversations by
26 deposing three other percipient witnesses and examining the documents they produced.

1 There are no mysteries here, nor any attempt to hide the facts of what even Respondent
2 once described as a “simple case.”

3 In sum, Respondent is not, as he repeatedly claims, “left to guess” at what proof
4 will be put before the Commission regarding his behavior. Rather he is attempting to
5 argue, as he has in other pleadings, that a judge must have “intentional knowledge”
6 (Motion at page 11) to violate Canon 3(A)(4) and therefore he must be apprised of
7 precisely what evidence will be put forward on this topic, and the trial strategy with which
8 it will be presented. As argued by Disciplinary Counsel before the Commission, that is
9 not the law.
10

11 The issue raised in this Motion, however, is not what law applies, but whether
12 Respondent has sufficient notice of what facts are alleged to support the Statement of
13 Charges. The evidence of Respondent’s reckless disregard of information about residents,
14 about relevant pending cases, and the subjects he broached in conversation with residents
15 – has all been laid out in detail.
16

17 Respondent’s other requests are part of an implied challenge (not yet made
18 explicitly) to the one-tier system under which the Commission operates. Respondent
19 basically argues that Disciplinary Counsel must be required to violate the Commission’s
20 confidentiality rules by disclosing confidential information from the Commission’s
21 preliminary proceedings in order to enable his challenge to the constitutionality of the
22 Commission’s duly enacted rules of procedure. This is patently incorrect. See Response
23 to Motion for Discovery, Appendix H to Respondent’s Motion, at pages 4-5. Respondent
24 has simply not met the threshold showing of prejudice of any Commission member to
25 justify his extraordinary discovery requests or disqualification of any member. His
26

1 Motion aimed at disqualifying members of the Commission, nonetheless, is pending
2 before the Commission.

3 Interestingly, Respondent makes absolutely no mention of the Commission's own
4 rules of discovery and the possible resort to the Civil Rules when there is sufficient cause
5 shown. Respondent's interlocutory Motion appears to dispense with all reference to
6 discovery rules. Respondent argues, at page 19, that he is "essentially being denied any
7 effective discovery at all. The Commission seeks to have the case tried only on the
8 information it wishes to produce...." This statement could, of course, be applied to any
9 plaintiff. It is disclosure of the information on which the Commission seeks to try its case
10 that is required, and has been afforded here.
11
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13 CONCLUSION

14 The Commission's Rules of Procedure specifically prohibit this type of
15 interlocutory appeal. As the present action demonstrates, a respondent judge may bring
16 numerous motions in the course of a disciplinary proceeding. In general, permitting
17 interlocutory appeal of each ruling by the presiding officer and/or full hearing panel would
18 intractably extend and disrupt the proceeding. The Respondent, the Commission, and the
19 public have a strong interest in prompt resolution of charges brought against a sitting
20 judge or justice. Interlocutory interference with the Commission's proceeding has not
21 been granted by the Supreme Court in the past and should be denied in this instance.
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