

**FILED**

AUG 18 2004

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 REPLY TO SUMMARY  
JUDGMENT MOTION

Respondent's latest submissions mischaracterize the Commission's function in this case. The Commission's task is not to craft hyper-technical legal rules, nor to affirm in the abstract the legal definitions Respondent proposes, without authority, of critical words in the Canons. This case is not appropriate for resolution on summary judgment. The Commission is required, in this case and in others before it, to apply the Canons of Judicial Conduct to the manner in which judges conduct themselves, so as to insure the integrity and independence of the judiciary and the public's faith in it. Definitions and standards for conduct are developed in the context of particular factual situations.

Canons 1 and 2, in particular, address the ethical aspirations expressed by the Code of Judicial Conduct. Although Respondent suggests they have

RESPONSE TO RESPONSE TO SUMMARY JUDGMENT  
MOTION - 1

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1 no independent validity, they are critical to the constitutional mandate of the  
2 Commission. The Code is not a criminal code with specific elements defining  
3 every potential judicial transgression, but a largely aspirational document,  
4 directing judges to achieve and maintain standards of behavior. As stated in  
5 the last sentence of the Preamble, “[t]he Code is intended ... to state basic  
6 standards which should govern the conduct of judges and to provide  
7 guidance to assist judges in establishing and maintaining high standards of  
8 judicial and personal conduct.” It is to be applied with a rule of reason, to be  
9 interpreted in the light of experience, not only to maintain the actuality of  
10 judicial propriety but also the appearance of propriety. The goal is to  
11 maintain citizens’ confidence in the independence and integrity of the  
12 judiciary, which is one of the reasons non law-trained members sit on the  
13 Commission and apply their experience and common sense. In part because  
14 the Code is aspirational and general, and not Napoleonic, an exploration of  
15 the specific facts of a case is essential to the Commission’s charge. The  
16 common understanding of witnesses who are lawyers in the field in question,  
17 and who have worked on the cases at issue, is entirely relevant to inform the  
18 members’ decision-making in this case.  
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1           Witnesses Bowers and Hackett *are* practitioners in the field, and their  
2           experience and how they work with these specific sexual predator cases, as  
3           the attorneys who actually present the issues, is directly relevant. The  
4           members can choose the weight they wish to accord their testimony, but that  
5           testimony is essential to the inquiry. Moreover, their experience and  
6           qualifications make them experts in the law of commitment of sexually  
7           violent predators, as well as fact witnesses. They are therefore entitled to  
8           read court documents of public record and express opinions on them as  
9           experts under Evidence Rule 702. The court documents on which they base  
10          their opinions are first of all subject to judicial notice, and will be admissible  
11          at hearing by clerk-certified copies or on stipulation to save everyone time  
12          and money. At this stage, the Commission may consider them under  
13          Evidence Rule 703, as the type of documents such litigating experts typically  
14          rely on. Under ER 703, they need not be admissible. Witnesses Hackett and  
15          Bowers are similarly entitled to rely on the notes of Alan McLaughlin of  
16          specific residents Respondent talked to at the Special Commitment Center  
17          [SCC.] To avoid hyper-technical objections, however, we herewith tender  
18          sworn statements of witnesses McLaughlin and Bowers to cure alleged  
19          inadequacies and expedite resolution of this Motion. We also tender the  
20          decision in the *Thorell* case in response to Justice Sanders' attachment of the  
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1       briefs. It clearly illustrates the points about the nature of sexually violent  
2       predator litigation made in the statements of witnesses Hackett and Bowers.  
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4               Even considering Respondent's Motion and Reply as if this were a  
5       normal civil case, they read much like closing arguments. Disciplinary  
6       Counsel is not obliged to put its entire case before the Commission at this  
7       preliminary stage. The only question is whether there are material facts in  
8       contention.  
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10              Indeed, the sworn statement of Alan McLaughlin before the  
11       Commission attached to the Response, even without the additional notes  
12       attached hereto, includes the general contents of the conversations  
13       Respondent initiated with groups of individuals, the responses of some by  
14       name, and the passing of documents to Respondent. The Commission may  
15       begin and end there for purposes of this Motion. Respondent contends he did  
16       not receive two documents. He contends he did not initiate any conversations  
17       or *ex parte* contact. These facts are in contention. Canon 3(A)(4) prohibits  
18       any such initiated communications regarding a pending matter – regardless of  
19       whom is contacted, as the Comment makes abundantly clear:  
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24                       The proscription against communications concerning  
25                       a proceeding includes communications from lawyers, law  
26                       teachers, and other persons who are not participants in  
                      the proceeding, except to the limited extent permitted....

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2 A judge is directed by this Canon not to convene a group of neighbors and  
3 ask them what they think about an issue pending before the court – though  
4 none of them has a case there. A judge should not go into a corporation and  
5 ask a group of executives what they think about the “responsible corporate  
6 officer doctrine” when the sufficiency of instruction on that issue is pending  
7 in another case. Or, take the issue of alcohol and specific criminal intent: if  
8 a case were before the court regarding whether a separate jury instruction  
9 should have been given or whether the record was sufficient on alcohol  
10 impairment, would the Canon allow an appellate judge to visit inmates and  
11 ask them what they thought about alcohol and their intentions in committing  
12 the acts that got them there? “What did you do to get here? Were you drunk?  
13 Did it affect your judgment? How much did you drink?”

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18 In other words, it is not necessary for Disciplinary Counsel to prove  
19 the specific individuals Respondent talked to had cases pending for this  
20 disciplinary action to be well-founded, although some he talked to did indeed  
21 have such cases. For purposes of this Motion though, material facts are  
22 disputed and Respondent is not entitled to a judgment on the law.  
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1           Furthermore, Respondent suggests that the Commission make  
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3 important decisions on the meaning of words in the Canons without reference  
4 to the factual context here. In fact, Respondent proposes his own hyper-  
5 technical distinctions and definitions of his own invention and then ignores  
6 common sense in filling in the outlines. Disciplinary Counsel respectfully  
7 suggests that such advisory opinions, rendered in the abstract, are usually  
8 avoided by courts. The Commission should apply the aspirational goals set  
9 out in the Canons with reference to the specific conduct, which in this case is  
10 assertively contested.  
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13           It is only necessary to take a few examples where Respondent  
14 proposes some very specific definitions – which the Commission must accept  
15 for him to prevail at this stage in the proceeding, as a matter of law: Canon  
16 3(A)(4) refers to “**pending or impending**” cases. It is indeed up to the  
17 Commission to define “pending” and “impending,” but in context. There are  
18 important factual issues in Respondent’s assertion that, “Except for Johnson,  
19 Justice Sanders had no contact on any of the other cases and no involvement  
20 with them.” Motion at 13, lines 16-18. This is an assertion of fact that is  
21 contested. Moreover, even under Respondent’s restrictive definitions, he had  
22 *ex parte* contact regarding one pending case. It would be appropriate for the  
23 Commission to continue to hearing even if that were the only case involved.  
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1 There are substantial factual issues surrounding Respondent's recusal in that  
2 case. As David Hackett's statement makes clear, page 4, No. 17, Justice  
3 Sanders only recused on the motion of a party. Respondent argues this is a  
4 "cure" for the alleged violation, though cites no authority on which the  
5 Commission would reach that conclusion. The Commission should address  
6 the question of whether recusal is part of the harm or a cure that precludes  
7 disciplinary action based on the facts of this case, after a full hearing.  
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10 It is also important for the Commission to have a full understanding of  
11 the nature of sexually violent predator cases, to adjudge the seriousness or  
12 not of the actual communications that occurred. These are previewed in the  
13 statements of witnesses Hackett and Bowers, and underlined in the attached  
14 opinion in the *Thorell* case. In sexually violent predator cases, the appellate  
15 courts review the degree of impairment reflected in an individual's sexually  
16 violent acts. They review the expert opinions offered on the record. They  
17 review the acts themselves. They review the information about the  
18 defendant's background, sometimes going back to childhood.  
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23 It is not simply Respondent's questions about volitional control that  
24 are problematic in this case, though they most directly address a pending  
25 legal issue. The general questions about criminal acts and background and  
26 motivation are all issues that are to be individually assessed by appellate

1 courts on the record, and properly on nothing outside the record. While  
2 Respondent argues he was not asking about individual cases, he was, in fact.  
3 That is one of many facts that stand strongly in contention in this case and  
4 should be fleshed out by testimony in a hearing.  
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6 There are other examples of definitions the Commission must address  
7 in this case, which contested facts should inform:  
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9 **“Initiate”** in Respondent’s definition does not include asking the  
10 institution to provide interaction with the residents or asking them  
11 collectively and individually what they thought about a legal term. A  
12 dictionary definition of “initiate” means to “cause to begin”. Respondent  
13 caused to begin these conversations by asking the institution to set them up.  
14 He asked questions individually and collectively, thus causing the  
15 conversation to begin. The Commission should hear testimony on these  
16 contested facts, as Respondent claims these conversations were happenstance  
17 or incidental; occurring “spontaneously and not part of the original agenda,”  
18 as he said in his deposition, page 18, lines 15-20. After hearing these  
19 conflicting assertions of fact about the interchanges with residents, the  
20 Commission will be in a position to define “initiate” in the context of this  
21 case and to offer specific guidance to other judges during institutional visits.  
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1 Another example is the word “**consider**”: Respondent asks that  
2 Disciplinary Counsel prove what was in his mind. The law says that an  
3 individual is presumed to intend the natural consequences of his actions.  
4 These actions are in contention here. Common sense suggests that the action  
5 of recusal in an important case before the Court had something to do with  
6 these conversations. In setting aspirational standards, should this  
7 Commission find it is recklessly improper to receive a document that the  
8 resident tells a judge is a legal document? Respondent contends it depends  
9 solely on what is in the envelope or whether the justice used it in a decision.  
10 The contested point here is that Respondent claims that he never took such an  
11 envelope. Proof of contested actions is important for the Commission to  
12 further elucidate the appropriate standards of conduct for judges.  
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17 Also, consider the definitions Respondent has proposed for “**Ex**  
18 **parte/Concerning:**” Part of the problem here is that Respondent ignores  
19 part of Canon 3. As stated above, it is not permitted for a judge to seek out  
20 information that relates to cases pending or impending, regardless of whether  
21 it is from a party. Respondent may not seek out others’ opinions on the  
22 relevance of volitional control to their actions, as these opinions go to a case  
23 before him. To what extent he did so is highly contested and central to the  
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1 factual context here, though Respondent's recollections on the issue seem to  
2 be evolving.

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4 Respondent dismisses the appearance of impropriety as an appendage  
5 to Canon 3 (Justice Sanders' Reply to Commission's Response to Summary  
6 Judgment Motion at page 4). Thus for him, Canons 1 and 2 have no separate  
7 validity but are totally dependent on the Commission's findings on Canon 3.  
8 If he can parse out the technicalities and show that his discussions with  
9 litigants were not directly on point to the legal issues before him regarding  
10 these particular individuals, he asserts there is no appearance problem.  
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12 Disciplinary Counsel suggests the Commission's position should be  
13 otherwise. Proof of how many individual conversations occurred with people  
14 who had or predictably would have litigation before the Court and/or this  
15 individual Justice should inform the Commission's decision on the meaning  
16 and range of Canons 1 and 2. In fact, the decision to recuse in one case was  
17 apparently made based on this appearance of impropriety. How is the  
18 appearance issue in recusal related to that in a disciplinary proceeding?  
19 These issues should be addressed in specific context, after specific findings  
20 on disputed material facts.  
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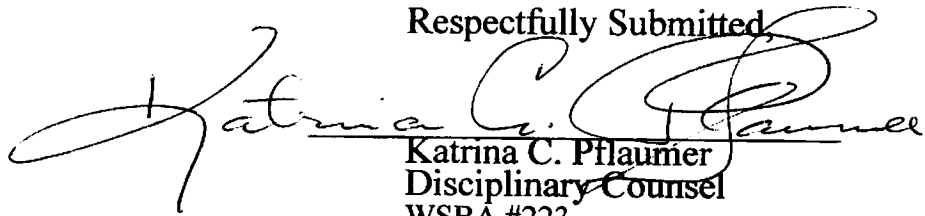
25 The Commission's constitutional mandate is to decide the reach of the  
26 Canons in factually specific situations. If the Commission deals only in

1     abstractions, as proposed by Respondent, it will not have fulfilled its  
2     constitutionally mandated directive to provide guidance for the judiciary and  
3     the public on an important issue: specific advice for what is inappropriate *ex*  
4     *parte* contact in the setting of judicial visits to institutional settings.  
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6             The Motion for Summary Judgment should be denied, and the case  
7     should be heard fully on the merits.  
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10     Dated this 18th day of August, 2004  
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12                             Respectfully Submitted,

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14                             Katrina C. Pflaumer  
15                             Disciplinary Counsel  
16                             WSBA #223