

80393-5

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 AUG 18 P 2:45

BY RONALD A. CARPENTER

apl
CLERK

No. 32520-9-II
No. 34130-1-II
SUPREME COURT No. 80393-5

SUPREME COURT
OF THE STATE OF WASHINGTON

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

**RESPONDENT STATE OF WASHINGTON'S ANSWER TO
PETITION FOR REVIEW**

Timothy G. Leyh, WSBA #14853
Katherine Kennedy, WSBA #15117
Randall T. Thomsen, WSBA #25310
Special Assistant Attorneys General for Respondent
State of Washington

DANIELSON HARRIGAN LEYH &
TOLLEFSON LLP
999 THIRD AVENUE, 44th FLOOR
SEATTLE, WA 98104
(206) 623-1700

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. ISSUE PRESENTED FOR REVIEW.....	3
III. STATEMENT OF THE CASE.....	3
IV. REASONS WHY REVIEW SHOULD BE DENIED.....	7
A. Justice Sanders Has Failed to Establish a “Substantial Public Interest” in Supreme Court Review.....	7
B. This Case Does Not Involve Any Significant Question of Law Under the State Constitution.....	12
C. The Court of Appeals Decision is Consistent with Other Court of Appeals Authority.....	14
V. CONCLUSION.....	18

TABLE OF AUTHORITIES

Table of Cases

<u>Washington Cases</u>	<u>Page</u>
<i>Colby v. Yakima County</i> , 133 Wn. App. 386, 136 P.3d 131 (2006)	17
<i>In re Dependency of A.S.</i> , 101 Wn. App. 60, 6 P.3d 11 (2000)	9
<i>State ex rel. Dunbar v. State Bd. of Equalization</i> , 140 Wash. 433, 249 P. 996 (1926).....	10, 11, 16
<i>Eugster v. City of Spokane</i> , 115 Wn. App. 740, 63 P.3d 841 (2003)	8
<i>State v. Gattavara</i> , 182 Wash. 325, 47 P.2d 18 (1935).....	18
<i>State ex rel. Hartley v. Clausen</i> , 146 Wash. 588, 264 P. 403 (1928).....	18
<i>State v. Herrmann</i> , 89 Wn.2d 349, 572 P.2d 713 (1977).....	12, 13
<i>In re Marriage of Horner</i> , Yolanda 151 Wn.2d 884, 93 P.3d 124 (2004).....	8
<i>Pearce v. G.R. Kirk Co.</i> , 92 Wn.2d 869, 602 P.2d 357 (1979).....	14
<i>Reiter v. Wallgren</i> , 28 Wn.2d 872, 184 P.2d 571 (1947).....	18
<i>Sanders v. State</i> , 2007 Wash. App. LEXIS 1501, 159 P.3d 479 (2007).....	4, 5, 11, 13, 15

Sorenson v. Bellingham,
80 Wn.2d 547, 496 P.2d 512 (1972)7

Whatcom County v. State,
99 Wn. App. 237, 993 P.2d 273 (2000)2, 15

Other Jurisdictions

Board of Chosen Freeholders of the County of Burlington v. Conda,
396 A.2d 613 (N.J. Super. Ct. Law Div. 1978) 12

Bowling v. Brown,
469 A.2d 896 (Md. Ct. Spec. App. 1984) 10

Corning v. Village of Laurel Hollow,
398 N.E.2d 537 (N.Y. Ct. App. 1979) 10

Filippone v. Mayor of Newton,
467 N.E.2d 182 (Mass. 1984) 10

Matthews v. City of Atlantic City,
481 A.2d 842 (N.J. Sup. Ct. Law Div.),
aff'd, 482 A.2d 530 (N.J. Sup. Ct. App. Div. 1984)7, 10

Wright v. Danville,
675 N.E.2d 110 (Ill. 1996) 10

Constitutional Provisions

Const. art. III, § 21 12, 18

Const. art. IV, § 31 12

Statutes

RCW 4.92.0602, 9, 15

RCW 4.92.0702, 5, 9, 15

RCW 10.01.1502, 5, 9

RCW 42.52 <i>et seq.</i>	<i>passim</i>
RCW 43.10.030	<i>passim</i>
RCW 43.10.040	<i>passim</i>

Regulations and Rules

CJC Canon 1	6
CJC Canon 2	6
CJCRP 9	2
ELC 13.9	10
RAP 12.2	9
RAP 13.4	1, 2, 12, 14

Other Authorities

3 WASHINGTON APPELLATE DESKBOOK (2 nd ed. 1998)	15
--	----

I. INTRODUCTION

The Court of Appeals correctly held that the Attorney General has no duty to provide a taxpayer-funded defense to a sitting Supreme Court justice found by the Commission on Judicial Conduct (“CJC”) to have violated ethics rules. That result is supported by the Ethics in Public Service Act, RCW 42.52 *et seq.* (“Ethics Act”), which expressly supplements existing law, including RCW 43.10.030 and .040. Justice Sanders has not established the presence of any factor warranting discretionary review under RAP 13.4(b), and his Petition for Review should be denied.

Contrary to Justice Sanders’ assertion, this case does not present issues of “substantial public interest” requiring discretionary review. *See* RAP 13.4(b)(4). Rather, it involves a narrow question that arises infrequently: whether a judge charged with ethics violations by the profession’s disciplining authority is entitled to a taxpayer-funded defense, even if he is not exonerated.

Justice Sanders does not raise an issue of “substantial public interest” by speculating that public service will be discouraged by a ruling that a judge found to have violated ethics rules must pay his or her own defense costs. The underlying policy decision limiting a public official’s entitlement to a taxpayer-funded defense already has been made by the

Washington legislature in enacting the Ethics Act and other statutes. *See* RCW 4.92.060, .070, 10.01.150. The rules of the CJC expressly provide that a judge is entitled to counsel “at his or her own expense.”¹ These enactments evidence no concern over “detering public service” by holding public officials accountable for their own defense costs associated with breaching ethical obligations. Rather, they reflect a public policy judgment that such accountability is appropriate.

Nor has Justice Sanders raised any “significant question of law” under the Washington Constitution. *See* RAP 13.4(b)(3). He argues that the “significant issue” is “whether the Ethics Act [RCW 42.52] has some impact, or interferes with the independent constitutional procedures governing the Commission.” But he identifies no alleged interference with, or impact on, any “constitutional procedure,” nor any inconsistency or conflict between the CJC’s rules and procedures under the Ethics Act.

Finally, despite what Justice Sanders contends, the Court of Appeals’ decision does not conflict with any other Court of Appeals opinion. *See* RAP 13.4(b)(2). The only allegedly “inconsistent” case cited by Justice Sanders is *Whatcom County v. State*, 99 Wn. App. 237, 993 P.2d 273 (2000), but it involved an entirely different issue, the

¹ CJCRP 9 (“Respondent may retain counsel and have assistance of counsel at his or her own expense.”)

Attorney General's duty to defend prosecutors in a damage action under RCW 4.92, not the duty to provide a judge with a defense against ethics charges.

The Court should deny Justice Sanders' Petition for Review.

II. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals properly hold that under RCW 43.10.030 and .040, and in view of the Ethics Act, RCW 42.52.430(7) and other relevant statutes, the Attorney General has the discretion to decline to provide a defense at the outset of ethics proceedings brought against a judge, subject to a duty to reimburse the judge's defense costs only if he or she is exonerated of ethics charges²

III. STATEMENT OF THE CASE

On June 12, 2007, the Court of Appeals ruled that Justice Sanders was not entitled to reimbursement of defense costs he incurred in

² Justice Sanders incorrectly claims that the State previously asserted in summary judgment and discovery motions that the Attorney General did not have discretion to determine when to defend a state officer. The State has consistently argued that 1) the applicable statutes bar representation because Justice Sanders' ethical breaches are not acts in his "official capacity," and 2) the Attorney General has the discretion to decide [whether to provide a defense. *See, e.g.*, CP 113 ("[I]t is the Attorney General's office . . . that is the proper body to decide whether a defense should be provided.").

For the reasons discussed in this Answer, further review of this case should be denied. However, if review is granted, the State preserves the issue of whether Justice Sanders was acting in his "official capacity" under RCW 43.10.030(3), and whether in the circumstances of this case, RCW 43.10.030 and .040, in and of themselves, also contemplate discretion on the part of the Attorney General in determining whether to provide publicly-funded defense in this case, all as argued by the State before the Court of Appeals.

defending against charges that he violated the Code of Judicial Conduct — charges that were upheld by the CJC and affirmed by the Washington Supreme Court. The appellate court recognized the Attorney General's discretion to decline representation at the inception of an ethics proceeding, "subject to a duty to reimburse a judge for defense costs in the event that the Commission later dismisses the charges or exonerates the judge of all violations of the Canons." *Sanders v. State*, 2007 Wash. App. LEXIS 1501, *1-2, 159 P.3d 479, 480 (2007).

The Court of Appeals decision interpreted RCW 43.10.030 and .040 in light of the "Ethics in Public Service Act," RCW 42.52 *et seq.* ("the Ethics Act"), which is expressly intended to "supplement existing laws as they may relate to the same subject." RCW 42.52.901. The court noted that the Ethics Act did not require the Attorney General to represent state officers at the outset of an ethics proceeding. To the contrary, any duty to pay for a state officer's defense arises only if the officer subsequently is exonerated of ethical wrongdoing. (This also was the result in the 1996 Thurston County case involving different ethics charges against Justice Sanders; the State was required to pay for his defense only after Justice Sanders was exonerated.³)

³ See *Sanders v. State*, Thurston County Superior Court No. 99-2-02349-5 (CP 81-96) (State required to reimburse Justice Sanders' legal expenses in defending ethics charges

The Court of Appeals explained that the Ethics Act demonstrates a legislative intent to limit the Attorney General's duty to defend a judge on ethics charges. This conclusion is consistent with the Attorney General's duty where other types of claims are made against state employees or officials, for example under RCW 4.92.070 (state official entitled to taxpayer-funded defense in actions for damages only if the Attorney General determines that the officer's acts were in good faith performance of official duties) and RCW 10.01.150 (Attorney General to defend a state officer charged with a crime arising out of the performance of an official acts only if the Attorney General agrees that officer's conduct was in accordance with state's rules, policies, and guidelines). These other statutes all demonstrate a clear legislative intent to limit and qualify the reach of RCW 43.10.030 and 43.10.040.

Justice Sanders erroneously contends that the "official capacity" issue already has been decided by the Court of Appeals and the Commission on Judicial Conduct ("CJC"), quoting the Court's observation that "there is no dispute that Justice Sanders is a state official and the Commission found that he was acting in his official capacity when he visited the SCC." But the relevant question for purposes of an entitlement

in a prior CJC proceeding only after Justice Sanders was exonerated of all charges.) *Sanders*, 2007 Wash. App. LEXIS 1501 at *3, 159 P.3d at 480.

to a taxpayer-funded defense is not whether the visit was made in Justice Sanders' official capacity,⁴ but whether Justice Sanders was acting in his official capacity in the specific conduct found to violate Canons 1 and 2A of the Code of Judicial Conduct. Neither the CJC nor the Court of Appeals decided that issue.⁵

In ruling that Justice Sanders violated the Code of Judicial Conduct, the CJC cited to Justice Sanders' *ex parte* conduct in raising the subject of volitional control with residents of the Special Commitment Center despite the fact that volitional control issues were pending in some of the same residents' cases before the Washington Supreme Court. That conduct was the basis for the CJC's finding of violations, and the Supreme Court's affirmance. "Official capacity" acts denote the performance of the official duties of the position, not merely any acts by an official related to that position.⁶ There is no "official duty" to breach ethics rules, and such acts cannot be undertaken in a judge's "official capacity."

⁴ The CJC noted that the proceedings were "not about whether judges should visit correctional institutions." Supp. CP 234. Like the CJC, the Superior Court stated only that "Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island," not that his ethical breaches were conducted within his official duties. CP 168 (emphasis added).

⁵ The CJC made its statement about "official capacity" only in applying mitigating and aggravating factors to determine the appropriate sanction for Justice Sanders' violations of the Code. An aggravating factor was: "Whether misconduct occurred in the Justice's official capacity or his private life." CP 236. The use of "official capacity" in that context is not analogous to its use in RCW 43.10.030, where it connotes an action against the State, acting through its agents in their official capacities.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. Justice Sanders Has Failed to Establish a “Substantial Public Interest” in Supreme Court Review.

Whether a matter is of substantial public interest depends on the degree of public interest present, whether the question is of a public or private nature, the desirability of an authoritative answer, and the likelihood of the question reoccurring. *Sorenson v. Bellingham*, 80 Wn.2d 547, 496 P.2d 512 (1972). The Petition for Review fails to satisfy these criteria.

Justice Sanders argues that review is warranted under the “substantial public interest” test because 1) “authoritative guidance” is needed to “definitively” establish the scope of the Attorney General’s obligation to defend public officials; 2) unless a defense is provided at the outset of ethics proceedings, “qualified candidates will be deterred from public service” and “officials and employees will be unduly constrained”; 3) “the integrity of the process governing judicial disciplinary actions is of public import”; and 4) the issues presented “will undoubtedly arise again” in “a wide range of circumstances.” In fact, this case presents none of the features justifying Supreme Court review. This case actually involves an extremely narrow claim, one that has rarely been presented anywhere in

⁶ See, e.g., *Matthews v. City of Atlantic City*, 481 A.2d 842, 845 (N.J. Sup. Ct. Law),

the United States: the assertion that a judge who violates ethics rules is entitled to a publicly-funded defense of the charges.

Contrary to Justice Sander's argument, the issue presented in this case is not "the scope of the Attorney General's duties to defend all state employees." Pet. for Review at 11. The actual issue — whether a judge, charged by his profession's disciplinary board with breaching ethics rules, is entitled to a taxpayer-funded defense whether or not ethics violations are found — is narrow, and not likely to arise often, as demonstrated by the dearth of case law on the subject. The "public issue" language of *Eugster v. City of Spokane*, 115 Wn. App. 740, 63 P.3d 841 (2003), cited by Justice Sanders, thus is not relevant. *Eugster* did not involve ethical charges; the issue was whether a city councilman was entitled, under RCW 4.96.041 and a Spokane indemnification ordinance, to represent himself at the City's expense against counterclaims by developers in a suit for damages.

Moreover, "an authoritative answer" to the narrow issue actually raised by this case already has been provided by the Court of Appeals in a thoroughly-reasoned and well-supported opinion issued after full briefing, supplemental briefing, and oral argument. The case cited by Justice Sanders, *In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004), is

aff'd, 482 A.2d 530 (N.J. Sup. Ct. App. Div. 1984).

inapposite; it addressed the issue of whether an issue should be heard despite being moot, where there had been no “authoritative determination” because the lower court had failed to “enter specific findings or articulate in its oral opinion” certain factors relevant to its decision. *Id.* at 892. In the case at bar, however, the Court of Appeals provided a detailed written opinion providing an “authoritative determination” of all issues presented by Justice Sanders.⁷

Justice Sanders additionally argues that this case presents an issue of substantial public interest because public service will be deterred or “constrained” by limiting the Attorney General’s duty to provide a taxpayer-funded defense of ethics charges against judges to cases where they are exonerated. This argument is speculative and strained, to say the least. The Washington legislature clearly was not influenced by the alleged potential for such problems when it enacted RCW 42.52 (the Ethics Act), 4.96.060 and .070, and 10.01.150, all of which impose limitations on the defense entitlement, and vest discretion in the Attorney

⁷ Justice Sanders complains that the Court of Appeals improperly dismissed his case *sua sponte*, without allowing the parties to present evidence below under the Court of Appeals ruling. The Court of Appeals is authorized to modify the trial court decision being reviewed, and to take any other action on the merits of the case including dismissing the case. *See* RAP 12.2; *In re Dependency of A.S.*, 101 Wn. App. 60, 72, 6 P.3d 11, 17-18 (2000). The Court of Appeals ruling fully disposed of Justice Sanders’ claims in this case as a matter of law, and accordingly, the court properly dismissed the action.

General.⁸ In similar fashion, this Court has not evidenced concern that imposing the costs of disciplinary proceedings on lawyers who violate their ethical duties will deter entry into the legal profession. See ELC 13.9. The public interest is best served by judicial officers whose conduct meets the Code of Judicial Conduct and is not recreant to the public trust.⁹ The Court of Appeals ruling is consistent with that principle.

Indeed, courts that have considered whether declining defense of state officers in ethical proceedings would deter public service have reasoned that public officers should expect to defend even actions for damages at their own expense, absent a legislative policy choice to the contrary. See *Corning v. Village of Laurel Hollow*, 398 N.E.2d 537, 540 (N.Y. Ct. App. 1979). The CJC's own procedural Rule 9, providing that "Respondent may retain counsel and have assistance of counsel at his or her own expense" (emphasis added) reflects the same perspective.

The Massachusetts case cited by Justice Sanders to support his argument, *Filippone v. Mayor of Newton*, 467 N.E.2d 182, 187 (Mass.

⁸ See *State, ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 440, 249 P. 996, 999 (1926) (the Attorney General has an interest in not "assisting" state officials in violations of the public trust).

⁹ See, e.g., *Matthews*, 481 A.2d at 848 (rejecting public policy argument that failure to indemnify public official for attorneys fees would "discourage" individuals from public office); *Wright v. Danville*, 675 N.E.2d 110, 117 (Ill. 1996) (individuals who violate criminal laws should not be given any incentive to seek public office.); *Bowling v. Brown*, 469 A.2d 896, 901 (Md. Ct. Spec. App. 1984) (reimbursing convicted public officials would discourage the "faithful and courageous" discharge of duty).

1984), is readily distinguishable; it was a case where damages were sought, not an ethics proceeding. As the Court of Appeals in the matter at bar recognized, “Massachusetts, the source of this policy statement, has adopted a statute barring the payment of fees when disciplinary charges are established against a judge.” *Sanders*, 2007 Wash. App. LEXIS 1501 *20, 159 P.3d at 485.

Nor has Justice Sanders established that “the integrity of the [CJC] process” has in any way been threatened or impaired so as to raise any issue of substantial public interest. While Justice Sanders cites to a case regarding a judge’s entitlement to procedural due process, he has not alleged (and cannot allege) that due process requires a taxpayer-funded defense in ethics proceedings, nor does he assert he was denied due process in the underlying ethics case. Justice Sanders also references his “First Amendment right to free speech,” which he claims was vindicated by his state-funded defense against 1996 ethics charges, but he fails to acknowledge that such a defense was required by the Thurston County Superior Court only after he was exonerated.

Finally, there can be no “public interest” in providing a taxpayer-funded defense for ethical violations committed by a judge. The public interest is to avoid “assisting” in ethical breaches. *See State ex rel.*

Dunbar v. State Bd. of Equalization, 140 Wash. 433, 440, 249 P. 996, 999

(1926) (Attorney General may not “sit supinely by and allow state officers to violate their duties and be recreant to their trusts.”); *State v. Herrmann*, 89 Wn.2d 349, 356, 572 P.2d 713, 716 (1977).¹⁰ The Court of Appeals decision vindicates that interest, and review is not warranted.

B. This Case Does Not Involve Any Significant Question of Law Under the State Constitution.

Review also is not warranted by RAP 13.4(b)(3), because the case does not involve a significant question of law under Art. IV, § 31 of the Washington Constitution.¹¹ Justice Sanders is mistaken in his assertion that the Court of Appeals “held that the procedures outlined in the Ethics Act modify the constitutionally mandated process for adjudicating judicial disciplinary actions” In fact, the Court of Appeals correctly noted “significant parallels” between the Ethics Act and the CJC’s rules, including the requirements of reasonable or probable cause, and public hearing. Both the Ethics Act and the CJC rules authorize a range of

¹⁰ In the *Board of Chosen Freeholders of the County of Burlington v. Conda*, 396 A.2d 613, 619 (N.J. Super. Ct. Law Div. 1978), the court denied a judge’s claim for reimbursement of his legal expenses in defending a disciplinary proceeding and reasoned:
No benefit accrued to the public from the defendant’s contumacious conduct . . . Government’s paramount function is the enforcement of the laws and protection of the public interests. It should not be required to protect those who have been charged with violation of those laws or with conduct prejudicial to those interests.

¹¹ This is the first time that Justice Sanders has relied on Art. IV, § 31. Previously, Justice Sanders relied upon Art. III, § 21, which provides that “The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.” But “[t]he constitutional provision is not self-executing,” and does

judicial sanctions including admonishment, reprimand, and censure, after due process has been accorded a judicial officer. Justice Sanders has failed to articulate any way in which “constitutionally mandated process” under the CJC rules is altered or denied under the decision of the Court of Appeals.

While Justice Sanders complains that the Court of Appeals “applied procedures from the Ethics Act” rather than the CJC rules, the only so-called “procedure” he identifies is the Ethics Act’s substantive requirement for the Attorney General to defend state officials in suits subsequent to ethics proceedings when the official has been exonerated, a requirement not relevant to this case. Justice Sanders notes that the CJC rules do not contain a similar provision. But this fact does not raise a constitutional issue. In any event, Justice Sanders was not exonerated; his violations of core Canons of the Code of Judicial Conduct were affirmed, by both the CJC and the Washington Supreme Court.

As the Court of Appeals noted, the Washington Constitution, Art. IV, § 31, provides no authority for Judge Sanders’ assertion of an entitlement to a taxpayer-funded defense of CJC proceedings. *Sanders*, 2007 Wash. App. LEXIS 1501 at *9-10, 159 P.3d at 482. While the CJC

not provide any right to representation beyond that afforded by the statutory scheme. *Herrmann*, 89 Wn.2d at 352, 572 P.2d at 714.

conducted the proceedings against Justice Sanders pursuant to the CJCRP, Justice Sanders has cited to no authority (and there is none) indicating that the Attorney General's defense obligations are different in a CJC proceeding from those under the Ethics Act. Indeed, the CJC's rules provide that a judge is entitled to an attorney, but at his or her own expense.

Because the Ethics Act, adopted after RCW 43.10.030 and .040, was expressly intended to supplement the earlier statutes, the Court of Appeals' references to that Act were entirely proper. *See Pearce v. G. R. Kirk Co.*, 92 Wn.2d 869, 872, 602 P.2d 357, 359 (1979) (legislative enactments relating to the same subject and are not actually in conflict should be interpreted so as to give meaning and effect to both). The Court of Appeals' ruling presents no "significant question of law" under the Washington Constitution.

C. The Court of Appeals Decision is Consistent with Other Court of Appeals Authority.

Review of this case also is unwarranted under RAP 13.4(b)(2) because the Court of Appeals decision does not conflict with any other Court of Appeals decision. Justice Sanders' petition "must do more than merely assert that a conflict exists"; it must "thoughtfully trace the conflict and convince the court the decisions cannot be harmonized or

distinguished.” 3 WASHINGTON APPELLATE DESKBOOK § 27.11, at 27-9 (2nd ed. 1998).

The case cited by Justice Sanders, *Whatcom County v. State*, 99 Wn. App. 237, 993 P.2d 273 (2000), does not conflict with the Court of Appeals decision in this case. The court in *Whatcom County* interpreted RCW 4.92.060 and .070, relating to actions for damages, not the Ethics Act. *See id.* at 240, 993 P.2d at 275; *Sanders*, 2007 Wash. App. LEXIS 1501 at *11, 159 P.3d at 483 (distinguishing RCW 4.92.060 and .070).

Although the statute involved in *Whatcom County* is not at issue here, the Court of Appeals nonetheless harmonized that statute with RCW 43.10.030 and .040. The court correctly recognized that the statute involved in *Whatcom County* evidenced the Legislature’s tempering of the obligations stated in RCW 43.10.030 and .040. *Sanders*, 2007 Wash. App. LEXIS 1501 at *11, 159 P.3d at 483 (“These statutes demonstrate that . . . the legislature intended to limit the attorney general’s broad duty to defend set forth in RCW 43.10.030 and .040 . . .”). Thus, to the extent that it is relevant at all, *Whatcom County* actually supports the State’s position in this case.

Both *Whatcom County* and the Court of Appeals decision here also are consistent with prior decisions of this Court addressing the Attorney General’s duties under RCW 43.10.030. In *Berge v. Gorton*, 88 Wn.2d

756, 567 P.2d 187 (1977),¹² the Court held that although the statute declares that the Attorney General “shall” perform certain duties under .030(2), that directive actually requires the Attorney General to exercise its discretion in determining whether to prosecute an action:

The “duty” imposed upon the Attorney General here was to “exercise discretion.” If in his judgment the proposed litigation was warranted, he could, as the Attorney General, have attempted to bring such action. He was not, however, required by law to do so.

Id. at 761-62, 567 P.2d at 191. The “shall” language precedes and applies to all the subsections of the statute, including .030(3).

In *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926), respondent alleged that the predecessor statute to RCW 43.10.030 compelled the Attorney General to defend all actions against any state officer, precluding the Attorney General from maintaining an action against the respondent. The Court rejected respondent’s argument:

Contention is made that the Attorney General is compelled, under the constitution and statues, to represent state officers, and that therefore he can not begin an action wherein state officers are defendants.

* * *

¹² In *Berge*, the petitioner sought to compel the Attorney General to collect certain funds disbursed as tuition supplements for students attending private colleges and universities. The petitioner relied on RCW 43.10.030(2) and its requirement that the Attorney General “shall . . . [i]nstitute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer . . .” (emphasis added).

The legitimate conclusion of such an argument is that the Attorney General must, if such a situation arise, sit supinely by and allow state officers to violate their duties and be recreant to their trusts, and that instead of preventing such actions it is his duty to defend the delinquents. The law cannot be given any such construction.

Id. at 440, 249 P.2d at 999 (emphasis added). The Court explained that the Attorney General's paramount duty is to the people of the State, and that this may require the Attorney General to withhold its "assistance":

[The Attorney General's] paramount duty is made the protection of the interests of the people of the state, and where he is cognizant of the violations of the constitution or the statutes by a state officer, his duty is to obstruct and not to assist; and where the interests of the public are antagonistic to those of state officers, or where the state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

Id., 249 P.2d at 999 (emphasis added); *see also Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (upholding county prosecutor's discretion to deny a judge's request for reimbursement of attorneys fees incurred in defending a Commission proceeding).

Where the Commission found and this Court affirmed Justice Sanders' violations of judicial ethics rules, the Court of Appeals correctly concluded that the Attorney General had the discretion to decline to provide Justice Sanders a taxpayer-funded defense. That decision is

consistent with the well-settled authority recognizing the Attorney General's discretion in similar matters.¹³

V. CONCLUSION

For the above stated reasons, the Supreme Court should deny Justice Sanders' Petition for Review.

DATED this 13th day of August, 2007.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By



Timothy G. Leyh, WSBA #14853
Katherine Kennedy, WSBA #15117
Randall T. Thomsen, WSBA #25310
Special Assistant Attorneys General for
Respondent State of Washington

FILED AS ATTACHMENT
TO E-MAIL

¹³ See also *Reiter v. Wallgren*, 28 Wn.2d 872, 880, 184 P.2d 571, 575 (1947) ("Under [former statutes "where it is made the duty of the Attorney General to defend all actions against any state officer"], it is both possible and proper for the attorney general to defend such state officers, but it still remains his paramount duty to protect the interests of the people of the state."); see also *State v. Gattavara*, 182 Wash. 325, 329, 47 P.2d 18, 19 (1935) (stating, regarding predecessor statute to RCW 43.10.030, that "the Attorney General might, in the absence of express legislative restriction to the contrary, exercise all such power and authority as the public interest may, from time to time, require"); *State ex rel. Hartley v. Clausen*, 146 Wash. 588, 593, 264 P.2d 403 (1928) (interpreting Const. Art. III, § 21 to confer discretion on the Attorney General to act "upon his own initiative or at the request of the governor . . .").

Rec. 8-13-07

-----Original Message-----

From: Linda Bledsoe [mailto:lindab@dhlit.com]

Sent: Monday, August 13, 2007 2:52 PM

To: OFFICE RECEPTIONIST, CLERK

Cc: Tim Leyh

Subject: Honorable Richard Sanders v. State of Washington - Supreme Court No. 80393-5

Dear Court:

We are attaching for filing the Respondent State of Washington's Answer to Justice Richard Sanders' Petition for Review, as well as our Affidavit of Service. Thank you.

The attorney filing this is:

Timothy G. Leyh

WSBA #14853

206-623-1700

Danielson Harrigan Leyh & Tollefson LLP

999 Third Avenue, Suite 4400

Seattle, WA 98104

<<08.13.07 affidavit service.pdf>> <<08.13.07 Respondent State of WA Answer to Sanders Petition for Review.pdf>>

Thank you.

Linda Bledsoe

Assistant to Tim Leyh

This internet e-mail message contains confidential, privileged information that is intended only for the addressee. If you have received this e-mail message in error, please call us (collect, if necessary) immediately at (206) 623-1700 and ask to speak to the message sender. Thank you. We appreciate your assistance in correcting this matter.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 AUG 13 P 2:45 34130-1-II
32520-9-II

BY RONALD R. CARPENTER

**SUPREME COURT
OF THE STATE OF WASHINGTON**
CLERK

HONORABLE RICHARD B. SANDERS,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

AFFIDAVIT OF SERVICE

Timothy G. Leyh, WSBA #14853
Katherine Kennedy, WSBA #15117
Randall T. Thomsen, WSBA #25310
Special Assistant Attorneys General for Respondent
State of Washington

Danielson Harrigan Leyh & Tollefson,
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700

