

803935

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 32520-9-II
(consolidated with No. 34130-1-II)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

The Honorable Richard B. Sanders,

Petitioner,

v.

The State of Washington,

Respondent.

PETITION FOR REVIEW

KIRKPATRICK & LOCKHART
PRESTON GATES & ELLIS LLP

Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Graham M. Wilson, WSBA # 36857
Attorneys for Petitioner
The Honorable Richard B. Sanders

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 Fourth Avenue
Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

ORIGINAL

FILED
JUL 19 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JUL 12 PM 4:35

FILED
COURT OF APPEALS
DIVISION II
07 JUL 16 AM 9:23
STATE OF WASHINGTON
BY DEPUTY

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. IDENTITY OF PETITIONER.....	2
III. COURT OF APPEALS' DECISION	2
IV. ISSUES PRESENTED FOR REVIEW	2
V. STATEMENT OF THE CASE.....	3
VI. ARGUMENT	9
A. The Scope of the Attorney General's Obligation to Defend State Officials is a Question of Substantial Public Importance.	10
B. What Procedures Govern Judicial Ethics Proceedings Involves a Significant Question of Law under the Constitution.....	15
C. The Court of Appeals' Decision Conflicts with other Authority.....	18
VII. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
Washington State Cases	
<i>Eugster v. City of Spokane</i> , 115 Wn. App. 740, 63 P.3d 841 (2003)	11
<i>In re Disciplinary Proceeding Against Sanders</i> , 159 Wn.2d 517, 145 P.3d 1208 (2006), <i>petition for cert.</i> <i>filed</i> (No. 06-1629, June 5, 2007)	7
<i>In re Marriage of Horner</i> , 151 Wn.2d 884, 93 P.3d 124 (2004)	12
<i>In re Matter of Deming</i> , 108 Wn.2d 82, 736 P.2d 639 (1987)	14
<i>In re Sanders</i> , 135 Wn.2d 175, 955 P.2d 369 (1998)	14
<i>Sanders v. State of Washington</i> , (Thurston County Superior Court No. 99-2-02349-5)	4
<i>Musso-Escude v. Edwards</i> , 101 Wn. App. 560, 4 P.3d 151 (2000)	14
<i>Westerman v. Cary</i> , 125 Wn.2d 277, 892 P.2d 1067 (1994)	12
<i>Whatcom County v. State</i> , 99 Wn. App. 237, 993 P.2d 273 (2000)	19, 20
Other State Cases	
<i>Filippone v. Mayor of Newton</i> , 392 Mass. 622, 467 N.E.2d 182 (1984)	13, 14

Washington State Statutes and Constitutional Provisions

Const. Art. IV, § 31.....	16, 17
RCW 4.92.060	19
RCW 4.92.070	19
RCW 42.52.310	17
RCW 42.52.320	17
RCW 42.52.370	17
RCW 42.52.430(7).....	17
RCW 42.52.460	4
RCW 43.10	1
RCW 43.10.030	passim
RCW 43.10.040	passim
WAC 292-09-010.....	17

Rules

CJC Canon 1	3, 5, 6, 8
CJC Canon 2	3
CJC Canon 2(A).....	5, 6, 8
CJC Canon 3(A)(4).....	3, 5, 7, 13
CJCRP 1	16
CJCRP 2(A).....	16
RAP 13.4(b)(1)	10, 18

RAP 13.4(b)(3)	10, 15
RAP 13.4(b)(4)	9, 10

I. INTRODUCTION

This case raises a fundamental question of first impression: when are public officials of the State of Washington entitled to a defense in proceedings concerning acts committed in their official capacity. In the face of plain statutory language requiring the Attorney General to defend Justice Richard B. Sanders before the Commission on Judicial Conduct, the Court of Appeals relied upon statutes it conceded did not directly apply in order to create Attorney General “discretion” to deny a defense (discretion that even the State argued it did not have). Chapter 43.10, RCW mandates that the “attorney general **shall ... defend** all actions and proceedings against any state officer or employee acting in his official capacity” both in administrative proceedings and in state and federal courts, without any limitations. RCW 43.10.030.¹ The Court of Appeals, however, converted the defense statute into a reimbursement statute, requiring public officials to fund their own defense until they are fully exonerated.

The Supreme Court should review this case, primarily, because it raises first impression questions of substantial public interest. The Court of Appeals’ decision abdicates the established duties of the Attorney General, discourages public service, and creates uncertainty as to when, or

¹ Copies of all of the statutes and provisions cited herein appear at Appendix B.

if, public officials and state employees will be entitled to a defense. In addition, review is warranted because the Court of Appeals' decision raises constitutional questions about which procedures govern judicial ethics actions. Finally, the decision conflicts with other authority from that court. Justice Sanders respectfully requests that the Supreme Court grant review and reverse the Court of Appeals.

II. IDENTITY OF PETITIONER

The Honorable Richard B. Sanders asks this court to accept review of the Court of Appeals decision designated in Part III of this petition.

III. COURT OF APPEALS' DECISION

The Court of Appeals entered its decision in the above captioned case on June 12, 2007. A copy of the decision appears as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

- A. Whether, under RCW 43.10.030 and .040, the State must defend state officers and employees before the Commission on Judicial Conduct and the Supreme Court when the relevant allegations arise from their official capacity.
- B. Whether the Ethics in Public Service Act was intended to limit, defeat, and/or repeal the State's obligation to defend state officers under RCW 43.10.030 and .040.
- C. Whether the constitutional procedures governing the

Commission on Judicial Conduct are distinct from the procedures under the Ethics in Public Service Act.

- D. Whether a public officer who has been wrongfully denied the defense to which he is entitled should be awarded attorneys fees and costs in litigation establishing that right.
- E. Whether the Court of Appeals should have remanded this case to the trial court because it construed a statute in a novel way, and the trial court has not made any dispositive ruling applying the statute.

V. STATEMENT OF THE CASE

On January 27, 2003, Justice Sanders participated in a tour of the Special Commitment Center on McNeil Island. Clerk's Papers ("CP") 33-34. Justice Sanders visited the facility in his official capacity and received Mandatory Continuing Judicial Education credit for the trip. CP 78-79. On April 5, 2004, however, the Commission on Judicial Conduct (the "Commission") issued a Statement of Charges alleging that Justice Sanders engaged in ex parte communications during the tour, thereby violating the Code of Judicial Conduct, Canons 1, 2, and 3(A)(4). CP 58.

Facing ethics proceedings before the Commission, Justice Sanders requested that the Attorney General's office provide him a defense pursuant to RCW 43.10.030 and .040. CP 50-51. This was not the first

time that he had made such a request. Justice Sanders was forced to take legal action under the same statutory provisions to compel the Attorney General to defend him against different ethics charges in 1996. CP 31. In that case, the Honorable Richard D. Hicks of the Thurston County Superior Court ruled that the State was obligated to provide Justice Sanders a defense, as well as reimburse him for the fees he incurred in forcing the State to fulfill its statutory duties. *See Sanders v. State of Washington*, (Thurston County Superior Court No. 99-2-02349-5); CP 81-96. Nevertheless, the Attorney General again refused to defend Justice Sanders in 2004, compelling him to retain private counsel at his own expense. CP 53-56; CP 33. Justice Sanders therefore initiated this action against the State of Washington (the “State”).

As proceedings progressed before the Commission, the parties in this case filed cross-motions for summary judgment. CP 31-41, 101- 114. The State did not argue that the Ethics in Public Service Act (the “Ethics Act”) controlled RCW 43.10.030 and .040 as they apply to this case. *See e.g.* CP 108 (describing RCW 42.52.460 as relating to “specific executive ethics matters”). Nor did the State assert that it had the discretion to determine when it defended a state official or employee. CP 101-114.²

² In later briefing, the State expressly argued that it did not have discretion regarding whether to provide an official a defense in an ethics proceeding. Supp. CP 45 (“The State’s position is not, and has not been, that it has discretion to whom it provides a

Like Judge Hicks, the trial court ruled that “RCW 43.10.030 requires the Attorney General to defend state officials acting in their official capacity in, inter alia, administrative proceedings, including proceedings before the Commission on Judicial Conduct, except in the case of misfeasance or malfeasance.” CP 168. The trial court also ruled that Justice Sanders was acting in his official capacity and that, as a matter of law, Justice Sanders committed no acts of malfeasance. CP 168. Yet, because the court read a misfeasance/malfeasance exception into the statute, it ultimately denied the cross-motions for summary judgment. The court ruled that whether Justice Sanders committed misfeasance had to be resolved by the Commission before it could determine whether the State owed Justice Sanders a defense. *Id.*

Because the trial court refused to rule on the merits of his claim, Justice Sanders sought Discretionary Review, which the Court of Appeals granted. CP 170-174; Supplemental Clerk’s Papers (“Supp. CP”) 192-95. Then, before the Court of Appeals could hear the case, the Commission issued its opinion. The Commission exonerated Justice Sanders from all allegations under Canon 3(A)(4) of the Code of Judicial Conduct concerning improper ex parte communications, and found only a violation of the more hortatory Canons 1 and 2(A). Supp. CP 232-34. The

defense at the outset of an ethics/disciplinary/licensing proceeding.”)

Commission also concurred with the trial court's finding that all of the allegations at issue occurred in Justice Sanders' official capacity. Supp. CP 236. While the Commission had exonerated him of the more definite accusations, Justice Sanders filed a Notice of Contest with the Supreme Court of Washington on June 27, 2005, appealing the Commission's findings regarding Canons 1 and 2(A). Supp. CP 240-255.

Based on the Commission's findings, Justice Sanders also filed a Motion to Stay or Voluntarily Dismiss Appeal with the Court of Appeals in order to "allow the parties to place the results of the [Commission's] determinations in the record and finalize resolution of the case at the trial court level." Supp. CP 116. Even accepting the trial court's gloss on the statute, the trial court should have been able to make a definitive ruling because the Commission's decision did not indicate any misfeasance. CP 168; Supp. CP 57. The Court of Appeals agreed with Justice Sanders and granted his motion to stay appellate proceedings. Supp. CP 123.

Following remand, Justice Sanders attempted to engage in limited discovery in order to complete the record and prepare for the trial court to issue a final decision. Supp. CP 149-64. The State moved to quash all of Justice Sanders' discovery requests arguing that no discovery was necessary because the State lacked all discretion on the issue of whether or not to provide a defense. Supp. CP 3-53. While largely denying the

State's motion to quash, the trial court also suggested that it was disinclined to consider further dispositive motions until the resolution of Justice Sanders' appeal of the Commission's decision. Supp. CP 370.

On October 13, 2005, the State filed a motion with the trial court to stay proceedings. Supp. CP 385-98. Justice Sanders opposed the stay because it would interfere with his right to resolve this case. Supp. CP 399-409. The trial court granted the State's motion, and halted proceedings. Supp. CP 635-36. Thus, discovery was never completed, nor did the trial court ever entertain or rule upon dispositive motions.

Justice Sanders again sought discretionary review. Supp. CP 637-40. Justice Sanders moved the Court of Appeals to lift its prior stay and amend the scope of the appeal to include review of the trial court's subsequent order. Justice Sanders argued that because the Commission ruled that he was acting in his official capacity, the State's obligations under RCW 43.10.030 and .040 were clear. The Court of Appeals granted his motion, resuming review of this case on February 9, 2006.

Meanwhile, the Supreme Court issued its opinion in October 2006, upholding the Commission's decision. *See In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006), *petition for cert. filed* (No. 06-1629, June 5, 2007). While Justice Sanders did not engage in ex parte contact in violation of Canon 3(A)(4), the Supreme Court held

that Justice Sanders' actions did create an appearance of partiality in violation of Canons 1 and 2(A). *Id.* at 519-20.

Finally, the Court of Appeals heard oral argument regarding Justice Sanders' entitlement to a defense under RCW 43.10.030 and .040 on December 8, 2006. The State did not question the Attorney General's basic obligations under RCW 43.10.030 and .040 as determined by the trial court, but argued that there were factual questions regarding whether Justice Sanders committed misfeasance or malfeasance and whether he was acting in his official capacity. While neither party had ever raised the issue, the Court of Appeals asked whether a different law, the Ethics Act, may affect the State's duty to defend judges before the Commission. The Court of Appeals then requested supplemental briefing regarding this question on January 3, 2007.

On June 12, 2006, the Court of Appeals issued its decision. *See* Appendix A. The Court of Appeals affirmed that all of the Commission's charges concerned actions taken in Justice Sanders' official capacity. *Id.* at 6 (observing that "there is no dispute that Justice Sanders is a state official and [that] the Commission found that he was acting in his official capacity when he visited the SCC"). The Court of Appeals also agreed that under RCW 43.10.030 and .040, "a finding of willful misfeasance is not determinative". *Id.* at 14. Further the Court of Appeals found that the

statutory use of the term “shall” to describe the defense duty shows a legislative “intent to impose a mandatory duty on a state agency.” *Id.* at 6. Yet, the Court of Appeals still held that the State was not obligated to defend Justice Sanders. The court ruled that the Ethics Act “shows a legislative intent to limit the attorney general’s duty to defend a judge during Commission proceedings [and t]hus, the attorney general has the discretion to provide a defense initially or instead to reimburse an accused judge for his or her defense costs later if the judge is exonerated of ethical wrongdoing.” *Id.* at 12. Finally, the Court of Appeals dismissed the case, *sua sponte*, without allowing the parties to present evidence below under the Court of Appeals’ new standard. It claimed to “affirm” the trial court’s ruling, even though the trial court never made a dispositive ruling in this case. Appendix A at 14.

Justice Sanders now respectfully petitions for review (and reversal) of the Court of Appeals’ decision.

VI. ARGUMENT

Justice Sanders’ Petition merits review for three alternative reasons. First, the scope of the Attorney General’s obligation to defend public servants is a question “of substantial public importance.” RAP 13.4(b)(4). Second, this case governs the scope of representation in judicial ethics proceedings and thus presents a significant question of law

under the Washington State Constitution. *Id.* at (b)(3). Third, the Court of Appeals' decision that the Attorney General has the discretion to deny a state officer a defense when the officer meets all of the statutory prerequisites conflicts with other authority from that court. *Id.* at (b)(1).

A. The Scope of the Attorney General's Obligation to Defend State Officials is a Question of Substantial Public Importance.

Review of this case is first warranted under RAP 13.4(b)(4). The core issue addressed by the Court of Appeals is when the Attorney General is obligated to defend state officers under RCW 43.10.030 and .040.³ More specifically, the Court of Appeals' decision (i) dictates the scope of Attorney General's duties; (ii) influences whether or not qualified candidates are deterred from public service; (iii) affects the functioning of ethics proceedings; and (iv) will impact all state employees in Washington. Applying the Ethics Act here raises an issue of first impression.

An official's entitlement to a publicly funded defense raises issues of substantial public importance. *See Eugster v. City of Spokane*, 115 Wn.

³ RCW 43.10.030 states: "The attorney general shall: ... (3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States."

RCW 43.10.040 states: "The attorney shall also represent the state and all officials ... in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county."

App. 740, 63 P.3d 841 (2003). *Eugster* concerned a member of the Spokane City Council's request for a public defense from the city attorney. *Id.* at 743-44. On appeal, the City argued that review was improper because it had already reached an agreement with the councilman. *Id.* at 751. The Court of Appeals rejected this argument. The Court explained that it could "decide a moot appeal that involves matters of continuing and substantial public interest" and ruled, *inter alia*, that "the issue is a public one." *Id.* at 751 (emphasis added). The same reasoning applies to the present case.

First, this case is of substantial public importance because it defines the scope of the Attorney General's duties to defend all state employees. The Legislature has directed that the Attorney General "shall ... defend" state officials and employees whenever they face allegations concerning their official capacity activity. RCW 43.10.030 and .040. Conversely, the State has argued a number of different positions, including that an officer's right to a defense turns on whether he or she is cleared of all allegations, that the presence of "misfeasance" or "malfeasance" is determinative, and that an officer is never entitled to a defense in ethics proceedings. CP 109; Supp. CP 182; Supp. CP 176. The Court of Appeals then adopted a conclusion that was neither argued by the parties nor consistent with the Legislature's directive. Appendix A at 12.

Authoritative guidance from this Court is needed definitively to establish the scope of the Attorney General's obligations under RCW 43.10.030 and .040. Providing such guidance is of substantial public importance. *In re Marriage of Horner*, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004) (citing *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994)).

Second, the entitlement of public officials and employees to a defense affects whether qualified candidates will be deterred from public service and whether officials and employees will be unduly constrained once obtaining a government position. Washington benefits from encouraging the best, most qualified candidates to seek positions with the government, including the judiciary. Yet, the threat of having to incur immense personal expense to defend actions taken in one's official capacity provides a disincentive to serve. As stated by the Supreme Judicial Court of Massachusetts:

As a matter of policy, public indemnification of public officials serves in part to encourage public service. Judgments against such public officials in actions for civil rights or intentional torts could cause financial ruin. This policy would be defeated if the legal expense of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal, and only later, if at all, reimbursed.

Filippone v. Mayor of Newton, 392 Mass. 622, 629, 467 N.E.2d 182

(1984). Forcing judges to bear the substantial costs of defending themselves before the Commission for a period of years (potentially in excess of a year's salary) would discourage qualified candidates from seeking judicial office. The burden of defending one's self could also discourage state officers and employees from contesting minor or unmeritorious claims.

The Court of Appeals' decision creates an especially significant deterrent to public service because it requires complete exoneration before a judicial officer is entitled to reimbursement. Justice Sanders prevailed on the most important charge of violating Canon 3(A)(4) and yet was denied even a portion of his defense costs. CP 46-48. What if seven charges are brought against a judicial officer who is exonerated on six and receives the lowest level of admonishment? Should he or she be denied any reimbursement? Additionally, reimbursement is not the same as a defense. The system created by the Court of Appeals creates a deterrent to public service because even if an officials or employees are completely exonerated, they must bear their own costs through years of litigation.

Protecting state officials from the burden of potential lawsuits also ensures that, once in office, officials will not be paralyzed by the threat of a lawsuit, but act freely in order to accomplish their duties to the best of their ability. *Cf. Musso-Escude v. Edwards*, 101 Wn. App. 560, 568, 4

P.3d 151 (2000) (“Common law immunity is usually afforded to government officials for public policy reasons, including the injustice of finding liability against an official who is charged by law to exercise discretion and a concern that the threat of liability would dampen an official’s desire to perform his or her duties zealously.”). Whether Washington is able to attract the most qualified candidates to public service, and whether, once in office, state officers and employees are protected when acting in their official capacity is of critical importance to the public as a whole. *Cf. Filippone*, 392 Mass. at 629.

Third, review is warranted because the integrity of the process governing judicial disciplinary actions is of public import in its own right. “A judge accused of misconduct is entitled to no less procedural due process than one accused of crime.” *In re Matter of Deming*, 108 Wn.2d 82, 103, 736 P.2d 639 (1987) (also ruling, in the context of standing, that the nature of “public hearing[s] regarding allegations of misconduct made against a judge” presents issues of “substantial public importance”). Here, the Court of Appeals’ decision concerns the critical question of whether publicly elected judges are able to obtain a proper defense. The state funded defense against Justice Sanders’ 1996 ethics charges was necessary to vindicate a First Amendment right to free speech. *See In re Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998).

Finally, the issues presented in this case are of substantial public importance because they will undoubtedly arise again and in a wide range of circumstances. The Court of Appeals' decision will be directly implicated every time a judge faces proceedings before the Commission. Furthermore, the Attorney General's duties under RCW 43.10.030 and .040 are in no way limited to the judiciary or proceedings before the Commission. On their face, these statutory provisions apply to every state official and employee in Washington as well as proceedings in state courts and administrative tribunals generally. The Court of Appeals has thus interpreted the Ethics Act to create a gaping hole in RCW 43.10.030 and .040. Review of the Court of Appeals' decision is critical given the broad public impact of RCW 43.10.030 and .040, on our state government.

B. What Procedures Govern Judicial Ethics Proceedings Involves a Significant Question of Law under the Constitution.

Apart from the public importance of this case, the Supreme Court should also review Court of Appeals' decision under RAP 13.4(b)(3). The Washington Constitution mandates specific and independent procedures for judicial ethics actions, and yet, in making its ruling, the Court of Appeals applied different statutory procedures concerning other state officials. Justice Sanders' requested a defense in proceedings under the Commission of Judicial Conduct Rules of Procedure ("CJCRP"), but the

Court of Appeals applied procedures from the Ethics Act. Accordingly, the Court of Appeals' decision raises a significant issue under the Constitution of the State of Washington: whether the Ethics Act has some impact, or interferes with the independent constitutional procedures governing the Commission. This question implicates the integrity of the entire judicial branch and the rights of individual judges.

Article IV, Section 31 of the Washington Constitution created the Commission and established specific procedures for ethics actions against the judiciary. For example, Section 31, carefully prescribed what types of individuals would make up the Commission, including judges from a variety of courts as well as lay persons; what forms of discipline the Commission may apply to judges; and how a decision of the Commission could be appealed. Const. Art IV, § 31. The Constitution also directed the Commission to establish additional rules of procedure, which it did through the CJCRP. *See* CJCRP Rules 1 and 2(A). It is these Constitutional procedures that govern ethics actions against judges, and specifically, the proceedings against Justice Sanders.

Conversely, the Ethics Act sets forth a different set of statutory procedures for other state officers, including legislators and officials in

the executive branch.⁴ Although the Ethics Act allows the Commission to enforce certain **substantive** requirements of the law, it also requires that actions against judges be governed by the separate set of procedures mandated by the Washington Constitution. RCW 42.52.370. As noted by the Court of Appeals, the Act “provides that the Commission ‘shall enforce this chapter and rules adopted under it with respect to state officers and employees of the judicial branch and may do so according to procedures prescribed in Article IV, section 31 of the state Constitution.’” Appendix A at 10 (quoting RCW 42.52.370)(emphasis added). The Court of Appeals further recognized that “all proceedings involving state employees of the judicial branch shall proceed under the Ethics Act’s rules, but all proceedings involving judges shall proceed under the Commission on Judicial Conduct Rules of Procedure.” Appendix A at 10-11 (citing WAC 292-09-010). Despite these constitutionally grounded directives, the Court of Appeals applied procedures from the Ethics Act to Justice Sanders’ proceedings before the Commission.

For example, the Ethics Act, RCW 42.52.430(7), requires the Attorney General to defend state officers and employees in actions “subsequent” to ethics proceedings themselves, should the ethics board clear the officer or employee of any wrongdoing. Although recognizing

⁴ See RCW 42.52.310 and .320 discussing the Legislative Ethics Board and RCW 42.52.350 and .360 discussing the Executive Ethics Board.

that “the rules governing Commission proceedings do not contemplate subsequent actions after the dismissal of a disciplinary complaint,” the Court of Appeals still applied this provision to Justice Sanders’ constitutional proceedings before the Commission. Appendix A at 12.

In sum, the Court of Appeals’ decision also merits review because it held that the procedures outlined in the Ethics Act modify the constitutionally mandated process for adjudicating judicial disciplinary actions for violations of the Code of Judicial Conduct. The Supreme Court should accept review to address this issue and confirm that neither the Washington Constitution nor applicable statutory authority support the decision of the Court of Appeals.

C. The Court of Appeals’ Decision Conflicts with other Authority from That Court.

Finally, review of this case is warranted under RAP 13.4(b)(1). A previous decision of the Court of Appeals ruled that the Attorney General has no discretion in determining whether to defend a state official when the official has satisfied all of the requirements of the relevant public defense statute. Review is warranted because the Court of Appeals’ decision in this case is in direct conflict with that authority.

In *Whatcom County v. State*, a county prosecutor sued the State seeking a declaratory judgment that the Attorney General was obligated to

defend him under various public defense statutes, including RCW 4.92.060 and 070, which concern actions for damages. 99 Wn. App. 237, 240, 993 P.2d 273 (2000). In response, the State claimed that “the Attorney General has the exclusive authority to determine whether or not to accept a tender of defense” under RCW 4.92.070.⁵ *Id.* at 250. The Court of Appeals rejected that argument:

The statute states that if certain conditions are met, the Attorney General “shall” defend the official. There is no room for discretion in this standard. Therefore, if a trial court finds that the statutory conditions for defense were met, it follows that the Attorney General wrongfully rejected the request.

Whatcom County, 99 Wn. App. at 251.

Whatcom County correctly ruled that the Attorney General has no discretion to deny a request for a public defense when the requisite statutory conditions are satisfied. Under the plain language of RCW 43.10.030 and .040, which mirror the statutory language in *Whatcom County*, the only statutory condition for a defense is that the officer must have been acting in his official capacity. RCW 43.10.030 (plainly requiring the Attorney General to “[d]efend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.”).

⁵ RCW 4.92.070 states in pertinent part that “[i]f the attorney general shall find that [an] officer’s ... omissions were ... in good faith, within the scope of that person’s official duties ... said request shall be granted.”

As stated above, the Court of Appeals recognized that “there is no dispute that Justice Sanders is a state official and [that] the Commission found that he was acting in his official capacity when he visited the SCC.” Appendix A at 6. And yet, in conflict with *Whatcom County* as well as the plain language of RCW 43.10.030 and .040, the Court of Appeals ruled that the State had the discretion to deny Justice Sanders a defense. *Id.* at 12. The Supreme Court should thus review this case in order to resolve the conflict at the Court of Appeals and clarify that the Attorney General lacks discretion under statutes calling for a mandatory public defense.

VII. CONCLUSION

For each of the reasons stated above, Justice Sanders respectfully requests that the Court grant review and reverse the Court of Appeals.

DATED this 12th day of July, 2007.

Respectfully submitted,

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP

By 
Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Graham M. Wilson, # 36857

Attorneys for Petitioner
The Honorable Richard B. Sanders

K:\15236\10016\GMW\GMW_P20FT

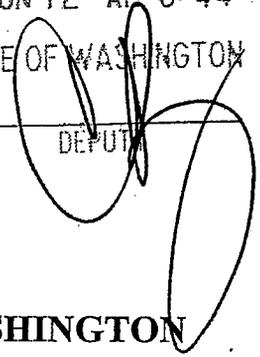
APPENDIX A

FILED
COURT OF APPEALS
DIVISION II

07 JUN 12 AM 8:44

STATE OF WASHINGTON

BY _____
DEPUTY



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE HONORABLE RICHARD B.
SANDERS,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

No. 32520-9-II

(consolidated with 34130-1-II)

PUBLISHED OPINION

SEINFELD, J.P.T.¹ — Washington State Supreme Court Justice Richard Sanders seeks reimbursement from the State of Washington for the attorney fees he incurred while defending himself before the Commission on Judicial Conduct (Commission) and while prosecuting this appeal. Before the Commission proceedings commenced, the attorney general rejected Justice Sanders' request for legal representation. The Commission later ruled that Justice Sanders had violated the Canons of Judicial Conduct and the Supreme Court upheld the Commission's ruling.

The issue before us is whether the relevant statutes granted the attorney general the discretion to refuse representation and, if so, whether they require the State to now reimburse Justice Sanders for his attorney fees. We hold that under chapter 42.52 RCW, the attorney

¹ Judge Karen Seinfeld is serving as a judge pro tempore of the Court of Appeals, Division Two, pursuant to CAR 21.

general has the discretion to decline representation, 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. Thus, we affirm the trial court's ruling dismissing Justice Sanders' declaratory judgment action.

FACTS

On January 27, 2003, Justice Sanders visited the Special Commitment Center (SCC) on McNeil Island. Following that visit, a complaint was filed with the Commission alleging that Justice Sanders had had contact with SCC residents who had cases pending before the Washington Supreme Court. The Commission investigated the complaint and subsequently charged Justice Sanders with violating Canons 1, 2, and 3(A)(4) of the Code of Judicial Conduct.

During the Commission investigation, Justice Sanders asked the attorney general to provide him with a defense at public expense. The attorney general declined, stating that to authorize Justice Sanders' defense would require the State to "make an exception to the long standing policy and interpretation of the statutes that govern use of public funds to defend state officers and employees." 1 Clerk's Papers (CP) (No. 34130-1-II) at 73. The attorney general said that it would defer determining Justice Sanders' eligibility for a public defense until the Commission proceedings concluded; the attorney general had followed this process in Justice Sanders' previous case before the Commission. *See In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998). (After the Supreme Court overturned a Commission violation ruling in the earlier proceeding, the superior court ruled that Justice Sanders was entitled to reimbursement of his defense costs and to an award of fees and costs for bringing the recovery action. The State did not appeal that ruling.)

A week after the Commission filed the charges at issue here, Justice Sanders brought a declaratory judgment action against the State, claiming that the public owed him a defense. The trial court denied the parties' cross motions for summary judgment, ruling that state law required the attorney general to defend state officials acting in their official capacity except in the case of malfeasance or misfeasance; the trial court determined that there was a material issue of fact as to whether Justice Sanders committed misfeasance during his visit to the SCC. This court then granted Justice Sanders' motion for discretionary review of that ruling.

On April 8, 2005, before this court had the opportunity to review the trial court's ruling, the Commission issued a decision holding that Justice Sanders' actions at the SCC violated Canons 1 and 2(A) of the Code of Judicial Conduct. The Commission decision stated that

Justice Sanders

violated Canon 1 by failing to enforce high standards of judicial conduct and also violated Canon 2(A) by failing to promote public confidence in the integrity and impartiality of the judiciary.

2 CP (No. 34130-1-II) at 234.² The Commission admonished Justice Sanders and encouraged him "to exercise utmost caution in considering his involvement in matters concerning the issue of volitional control presented by sexual predators residing at the Special Commitment Center."

2 CP (No. 34130-1-II) at 237-38.

This court then granted Justice Sanders' motion to stay review of the pending appeal, thereby allowing the trial court to apply the Commission's findings to its summary judgment ruling. Following remand to the trial court, Justice Sanders brought a discovery motion, seeking information about how the State has previously interpreted its duty to defend with regard to other

² This language comes from a corrected amended decision that the Commission subsequently issued.

state officials.³ Justice Sanders also appealed the Commission's decision by filing a Notice of Contest with the Washington Supreme Court.

The State filed motions to quash the discovery requests and to stay the trial court proceedings until the State Supreme Court decided the Commission appeal. Citing concerns of judicial economy, the trial court denied the State's motion to quash in part, but granted the stay, concluding that the final decision on factual issues regarding misfeasance would ultimately determine the State's duty to defend.

Justice Sanders then sought discretionary review of the order granting the stay. He also moved to lift this court's stay of his prior appeal and to expand that appeal to include the trial court's stay order. This court granted Justice Sanders' motions.⁴

Meanwhile, the Supreme Court issued its opinion in October 2006, upholding the Commission's decision and its sanction of admonishment. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006). The Supreme Court found that Justice Sanders' conduct at the SCC created an appearance of partiality as a result of ex parte contact in violation of Canons 1 and 2(A). *Sanders*, 159 Wn.2d at 519-20, 522. The Supreme Court denied reconsideration on March 7, 2007.

DISCUSSION

The parties have supported their respective positions regarding the State's duty to defend with citations to statutory provisions, case law, policy arguments, and the contention that the State's role is comparable to that of an insurer.

³ Citing the State's resistance to his discovery requests, Justice Sanders filed a separate lawsuit charging the State with violating the Public Disclosure Act. His appeal of the trial court's ruling in that case is pending.

⁴ Commissioner's Order dated February 9, 2006.

I. RCW 43.10.030 AND RCW 43.10.040

The Washington State Constitution provides that “[t]he attorney general shall be the legal advisor of the state officers, and shall perform such other duties as may be prescribed by law.” CONST. art. III, § 21. The legislature enacted a statutory scheme in accordance with article III, section 21; this scheme describes when the attorney general must provide legal representation for state elected officials, state officers, and state employees. *State v. Herrmann*, 89 Wn.2d 349, 352, 572 P.2d 713 (1977).

Justice Sanders’ principal argument is that under two of these statutes, the attorney general had a duty to commence defending him at the time the Commission filed the charges. The first statute, RCW 43.10.030, sets forth the attorney general’s powers and duties. Subsection 3 provides that the attorney general shall:

Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States.

This territorial statute, which was first passed in statehood in 1891,⁵ remained unchanged until 1975 when the words “or employee acting” were added. Laws of 1975, ch. 40, § 5(3); *Herrmann*, 89 Wn.2d at 352.

The second statute Justice Sanders cites is RCW 43.10.040. Entitled “Representation of boards, commissions and agencies,” it provides as follows:

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

⁵ Laws of 1891, ch. 55, § 2(3); *Herrmann*, 89 Wn.2d at 352.

This statute was passed in 1941 to stop state agencies from the then proliferating practice of hiring private attorneys; it placed the authority for representing state agencies in the attorney general. *Herrmann*, 89 Wn.2d at 354; Laws of 1941, ch. 50.⁶

The trial court in this case concluded that while these statutes generally require the attorney general to defend judges in proceedings before the Commission, there is an exception where the judge committed malfeasance or misfeasance. Justice Sanders contends this was error; he argues that a judicial officer who shows that he was a public official acting in his official capacity at the time of the alleged wrongdoing is entitled to a public defense. As there is no dispute that Justice Sanders is a state official and as the Commission found that he was acting in his official capacity when he visited the SCC, Justice Sanders contends that RCW 43.10.030 and .040 imposed an absolute duty on the attorney general to defend him and that there is no basis to look outside these statutes. *Sanders*, 159 Wn.2d at 523 (Justice Sanders' actions were undertaken in the context of his judicial duties).

Both RCW 43.10.030 and .040 use the word "shall" in setting forth the attorney general's duty to defend. Generally, the legislature's use of the word "shall" in a statute shows an intent to impose a mandatory duty on a state agency. *Washington State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 907-08, 949 P.2d 1291 (1997); *see also State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (when statutory language admits of only one meaning, the legislative intent is apparent, and the courts will not construe the statute otherwise). Nonetheless, the State contends that there is an exception to this broad statutory duty to defend.

⁶ Sections 2 and 4 of the session law were codified at RCW 43.10.067, which provides that no state officer, agency, board, or commission shall employ an attorney other than the attorney general to perform any duty specified to be performed by the attorney general. Laws of 1941, ch. 50, §§ 2, 4; RCW 43.10.067.

Article III, section 21, states that the attorney general “shall be the legal advisor of the state officers.” Article IV, section 31, which established the Commission, is silent on the subject of legal representation during judicial disciplinary proceedings. *See* Laws of 1980, Sub. HJR No. 37, approved November 4, 1980. Nor does any other constitutional provision provide an exception.

The State asks us to examine the rest of the statutory scheme by which the legislature has given effect to article III, section 21, of the state constitution in determining the scope of its duty to defend. *See Harmon v. Dep’t of Soc. & Health Servs.*, 134 Wn.2d 523, 530, 951 P.2d 770 (1998) (in construing a statute, courts may look to other statutes dealing with the same subject matter to discern legislative intent). It points to statutes showing that the legislature has tempered its broad command to defend in RCW 43.10.030 and .040 with grants of discretion limiting the attorney general’s duty to defend under some circumstances.

An example, RCW 4.92.060, provides that when a state officer is sued for damages arising from “acts or omissions while performing, or in good faith purporting to perform, official duties,” such officer may ask the attorney general to authorize a defense at the State’s expense. If the attorney general finds that the officer’s acts “were, or were purported to be in good faith, within the scope of that person’s official duties,” the request for a public defense shall be granted. RCW 4.92.070; *see Herrmann*, 89 Wn.2d at 356 (attorney general has sole discretion under RCW 4.92.070 to determine whether employee acted or purported to act in good faith within scope of his duties).

Similarly, the attorney general may have a duty to defend a state officer charged with a crime arising out of the performance of an official act. RCW 10.01.150. But this duty turns on an agreement between the officer’s employing agency and the attorney general that the officer’s

conduct was “in accordance with established written rules, policies, and guidelines of the state or a state agency and the act performed was within the scope of employment.” RCW 10.01.150. These statutes demonstrate that in the criminal and tort context, the legislature intended to limit the attorney general’s broad duty to defend set forth in RCW 43.10.030 and .040 to situations where the defendant state officer was either acting in good faith or in accordance with state law. But neither statute directly applies here where we are considering a request for a defense in a disciplinary proceeding, not a defense to a tort claim or to a criminal charge.

II. CASE LAW

The State also cites case law to support its argument that the attorney general has discretion to determine whether to defend a judge during disciplinary proceedings, pointing to *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926), and *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977). *Dunbar* does not control here because it discussed whether the attorney general had any legal authority to defend in the first instance, and not whether the duty to defend was discretionary. And *Berge* involved the prosecution of actions and not the defense of state officers.

In *Dunbar*, the attorney general brought a mandamus action to compel the state board of equalization to issue a tax levy in accordance with recent law. 140 Wash. at 437-38. The board of equalization responded that because the attorney general has a constitutional and statutory duty to defend state officers, the attorney general lacks authority to bring an action against state officers. The Supreme Court disagreed, finding that “where the interests of the public are antagonistic to those of state officers . . . it is impossible and improper for the *Attorney General* to defend such state officers.” *Dunbar*, 140 Wash. at 440. The Supreme Court later clarified the *Dunbar* ruling, explaining that the attorney general may properly represent both sides in an

action between the State and one of its officers. *Reiter v. Wallgren*, 28 Wn.2d 872, 879-80, 184 P.2d 571 (1947).

Berge interpreted RCW 43.10.030(2), which requires the attorney general to “prosecute all actions and proceedings . . . which may be necessary in the execution of the duties of any state officer,” as describing a discretionary duty. *Berge*, 88 Wn.2d at 761-62. But the critical phrase “which may be necessary,” which gives the attorney general discretion to litigate in RCW 43.10.030(2), is absent in RCW 43.10.030(3). Thus, *Berge* does not support an exception to the broad mandate in RCW 43.10.030(3) regarding the attorney general’s duty to defend.

The State also contends that the result in *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006) (Division Three), applies by analogy. In *Colby*, the Commission had charged a district court judge with engaging in certain improper actions, and Yakima County declined to pay the judge’s defense costs during Commission proceedings that led to the judge’s resignation. 133 Wn. App. at 388-89. The *Colby* court held that the prosecuting attorney had authority under RCW 4.96.041 and the county code to determine that the judge had not performed those actions in good faith within the scope of his judicial duties.⁷ 133 Wn. App. at 391. Consequently, the *Colby* court upheld the county’s refusal to pay the judge’s legal fees. 133 Wn. App. at 393-94.

⁷ RCW 4.96.041(1) provides that when an action for damages is brought against an officer of a local governmental entity “arising from acts or omissions while performing or in good faith purporting to perform his or her official duties,” that officer may ask the governmental entity to pay for his or her defense. Subsection 2 requires payment if the entity finds that the officer’s actions qualify. After holding that a judicial disciplinary proceeding is not an action for damages to which RCW 4.96.041 applies, Division Three upheld the prosecuting attorney’s refusal to pay for the judge’s legal representation under both RCW 4.96.041(2) and the applicable county code provision. *Colby*, 133 Wn. App. at 391.

The facts in *Colby* bear a resemblance to those here. But the *Colby* case involved a different statute, a different jurisdiction, and a different legal officer—the county prosecuting attorney as opposed to the state attorney general. Thus, it is not controlling authority here.

III. ETHICS IN PUBLIC SERVICE ACT

The statutes defining the attorney general's duty to defend state officers accused of violating the Ethics in Public Service Act (Act), chapter 42.52 RCW, are relevant. An action under the Act is commenced by filing a complaint. The attorney general's duty to defend the accused state officer or employee does not commence until and unless the following circumstances occur: (1) the ethics board reviews the facts alleged in the complaint and determines without a hearing that there is not reasonable cause to believe that the officer or employee has violated the Act; or (2) following a hearing, the ethics board concludes that the officer or employee did not engage in wrongdoing. RCW 42.52.430(7). Thus, if the Act applies to Commission proceedings, clearly there are limits on the attorney general's duty to defend a judge charged with violating the judicial canons.

The Act's language encompasses Commission proceedings. Not only does the Act include the Commission in its definition of "ethics board" and supreme court justices in its definition of "state officer," RCW 42.52.010(8), it also provides that the Commission "shall enforce this chapter and rules adopted under it with respect to state officers and employees of the judicial branch and may do so according to procedures prescribed in Article IV, section 31 of the state Constitution." RCW 42.52.370. The Act further provides that it "shall be construed liberally to effectuate its purposes and policy and to supplement existing laws as may relate to the same subject." RCW 42.52.901. Thus, although the Commission has adopted its own separate procedural rules for judicial disciplinary proceedings, it seems that the legislature did

not intend to exclude either the Commission or judges from the Act, where applying the Act would not be inconsistent with the state constitution, other statutes, or the Commission's rules governing its proceedings and responsibilities. *See* WAC 292-09-010 (all proceedings involving state employees of the judicial branch shall proceed under the Ethics Act's rules, but all proceedings involving judges shall proceed under the Commission on Judicial Conduct Rules of Procedure (CJCRP)).

Comparing and contrasting the overall schemes for handling ethics complaints under the Act with disciplinary proceedings initiated by the Commission, we find significant parallels. First, every complaint is investigated by an employee of the Commission or ethics board. RCW 42.52.410, .420; CJCRP 17. Second, the ethics board may dismiss the complaint without a hearing, and the Commission may dismiss the complaint without filing a statement of charges. RCW 42.52.425; CJCRP 17. Third, if there is reasonable cause to believe that an officer or employee has violated the Act, the ethics board shall hold a public hearing. RCW 42.52.430(1). Similarly, if there is probable cause to believe that a judge has violated any judicial conduct rules, the Commission schedules a public hearing. CJCRP 17, 24. Fourth, if, following the hearing, the ethics board determines that the officer has not violated the Act, it shall dismiss the complaint, and the attorney general shall represent the officer in any action that might be subsequently commenced based on the facts alleged in the complaint. RCW 42.52.430(6), (7). Similarly, if the Commission determines after the hearing that a judge has not violated the rules of judicial conduct, it also shall dismiss the case. CJCRP 24.

As the State notes, there is no indication from the legislature or the courts that the attorney general's defense obligations vis-à-vis Commission proceedings should differ from its obligations as described in the Act. The Act, in RCW 42.52.430(7), does not require the attorney

general to represent a state officer at the outset of an ethics proceeding. Rather, the attorney general's duty to defend a state officer in a subsequent action arises only if the ethics board has exonerated that officer of ethical wrongdoing.

Although the rules governing Commission proceedings do not contemplate subsequent actions after the dismissal of a disciplinary complaint, the State contends that the attorney general's duty to defend during Commission proceedings is similar to the attorney general's duty to defend under RCW 42.52.430(7). This would allow the State the discretion to offer a defense during Commission proceedings if it anticipated that the accused judge might prevail, but the State would have no absolute duty to defend the judge during such proceedings. Instead, the State's duty would be limited to reimbursing the accused judge for defense costs following either the Commission's dismissal of the charges or exoneration of the judge following a hearing. Under this reasoning, here, where the Commission found a violation and the Supreme Court upheld the finding on appeal, the State would have no duty to reimburse Justice Sanders for his defense expenses.

Given that the Commission is required to enforce the Act and the rules adopted under it, and given that the Act is to be construed liberally and is to supplement existing laws relating to the same subject matter, we agree with the State that RCW 42.52.430(7) applies here. And RCW 42.52.430(7) shows a legislative intent to limit the attorney general's duty to defend a judge during Commission proceedings. Thus, the attorney general has the discretion to provide a defense initially or instead to reimburse an accused judge for his or her defense costs later if the judge is exonerated of ethical wrongdoing.

IV. PUBLIC POLICY

Justice Sanders argues that defending state officials at the outset of disciplinary proceedings serves important public policies. As support, he cites language from *Filippone v. Mayor of Newton*, 392 Mass. 622, 629, 467 N.E.2d 182 (Mass. 1984):

As a matter of policy, public indemnification of public officials serves in part to encourage public service. Judgments against such public officials in actions for civil rights or intentional torts could cause financial ruin. This policy would be defeated if the legal expenses of civil rights litigation were to be borne personally throughout years of pretrial activity, trial, and appeal and only later, if at all, reimbursed.

We are not unsympathetic to the concerns expressed in the cited language. But for numerous reasons, this citation is not persuasive here. First, this is not a civil rights case or action for damages. And secondly, we note that Massachusetts, the source of this policy statement, has adopted a statute barring the payment of fees when disciplinary charges are established against a judge. *See In re Matter of Brown*, 427 Mass. 1015, 1016, 696 N.E.2d 140 (Mass. 1998) (citing Mass. Ann. Laws ch. 211C, § 7(15), as prohibiting the payment of fees to judge where disciplinary charges are established); *see also In re Matter of Hamrick*, 204 W. Va. 357, 360 n.4, 512 S.E.2d 870 (W. Va. 1998) (judicial disciplinary rule states that when judge is exonerated at any stage of disciplinary proceeding, he or she shall be entitled to reasonable attorney's fees paid by the state). Thus, even in Massachusetts, Justice Sanders could not recover his attorney fees.

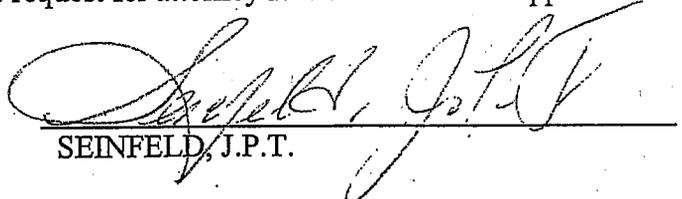
V. THE STATE AS INSURER

Nor are we persuaded by Justice Sanders' policy argument that the attorney general should assume the role of an insurer and defend a judge who has even a potential claim for a defense under RCW 43.10.030 and RCW 43.10.040. His argument rests largely on authority from other jurisdictions that we do not find persuasive. *See, e.g., Frontier Ins. Co. v. State*, 87

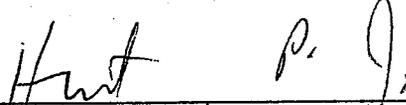
N.Y.2d 864, 638 N.Y.S.2d 933, 662 N.E.2d 251 (N.Y. 1995) (interpreting Public Officers Law § 17(2)(a), which states that the duty to defend set forth therein “shall not arise where such civil action or proceeding is brought by or on behalf of the state.”); *City of Tualatin v. City-County Ins. Servs. Trust*, 129 Or. App. 198, 204, 878 P.2d 1139 (Or. Ct. App. 1994) (holding that statute under which City sought reimbursement from insurer for mayor’s defense costs applied to tort claims but not ethics charges), *aff’d*, 321 Or. 164 (Or. 1995).

Justice Sanders also assigns error to the trial court’s finding that his recovery of defense costs depended on whether he committed willful misfeasance. Given our analysis above, a finding of willful misfeasance is not determinative, and we therefore do not address whether Justice Sanders committed misfeasance when he visited the SCC. Nor need we determine whether the trial court erred in staying the proceedings below.

We affirm the trial court’s refusal to award Justice Sanders the costs of his defense during the Commission proceedings and we deny his request for attorney fees at trial and on appeal.


SEINFELD, J.P.T.

We concur:


HUNT, P.J.


QUINN-BRINTNALL, J.

APPENDIX B

RCW 43.10.030**General powers and duties.**

The attorney general shall:

- (1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;
- (2) Institute 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;
- (3) Defend all actions and proceedings against any state officer or employee acting in his official capacity, in any of the courts of this state or the United States;
- (4) Consult with and advise the several prosecuting attorneys in matters relating to the duties of their office, and when the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution;
- (5) Consult with and advise the governor, members of the legislature, and other state officers, and when requested, give written opinions upon all constitutional or legal questions relating to the duties of such officers;
- (6) Prepare proper drafts of contracts and other instruments relating to subjects in which the state is interested;
- (7) Give written opinions, when requested by either branch of the legislature, or any committee thereof, upon constitutional or legal questions;
- (8) Enforce the proper application of funds appropriated for the public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law;
- (9) Keep in proper books a record of all cases prosecuted or defended by him, on behalf of the state or its officers, and of all proceedings had in relation thereto, and deliver the same to his successor in office;
- (10) Keep books in which he shall record all the official opinions given by him during his term of office, and deliver the same to his successor in office;
- (11) Pay into the state treasury all moneys received by him for the use of the state.

[1975 c 40 § 5; 1971 c 81 § 109; 1965 c 8 § 43.10.030. Prior: (i) 1929 c 92 § 3; RRS § 112. (ii) 1929 c 92 § 4; RRS § 11032; prior: 1891 c 55 § 2; 1888 p 8 § 6.]

RCW 43.10.040

Representation of boards, commissions and agencies.

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

[1965 c 8 § 43.10.040. Prior: 1941 c 50 § 1, part; Rem. Supp. 1941 § 11034-3, part.]

RCW 42.52.010 Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Agency" means any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. "Agency" includes all elective offices, the state legislature, those institutions of higher education created and supported by the state government, and those courts that are parts of state government.

(2) "Head of agency" means the chief executive officer of an agency. In the case of an agency headed by a commission, board, committee, or other body consisting of more than one natural person, agency head means the person or board authorized to appoint agency employees and regulate their conduct.

(3) "Assist" means to act, or offer or agree to act, in such a way as to help, aid, advise, furnish information to, or otherwise provide assistance to another person, believing that the action is of help, aid, advice, or assistance to the person and with intent so to assist such person.

(4) "Beneficial interest" has the meaning ascribed to it under the Washington case law. However, an ownership interest in a mutual fund or similar investment pooling fund in which the owner has no management powers does not constitute a beneficial interest in the entities in which the fund or pool invests.

(5) "Compensation" means anything of economic value, however designated, that is paid, loaned, granted, or transferred, or to be paid, loaned, granted, or transferred for, or in consideration of, personal services to any person.

(6) "Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.

(7) "Contract" or "grant" means an agreement between two or more persons that creates an obligation to do or not to do a particular thing. "Contract" or "grant" includes, but is not limited to, an employment contract, a lease, a license, a purchase agreement, or a sales agreement.

(8) "Ethics boards" means the commission on judicial conduct, the legislative ethics board, and the executive ethics board.

(9) "Family" has the same meaning as "immediate family" in RCW 42.17.020.

(10) "Gift" means anything of economic value for which no consideration is given. "Gift" does not include:

(a) Items from family members or friends where it is clear beyond a reasonable doubt that the gift was not made as part of any design to gain or maintain influence in the agency of which the recipient is an officer or employee;

(b) Items related to the outside business of the recipient that are customary and not related to the recipient's performance of official duties;

(c) Items exchanged among officials and employees or a social event hosted or sponsored by a state officer or state employee for coworkers;

(d) Payments by a governmental or nongovernmental entity of reasonable expenses incurred in connection with a speech, presentation, appearance, or trade mission made in an official capacity. As used in this subsection, "reasonable expenses" are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event;

(e) Items a state officer or state employee is authorized by law to accept;

(f) Payment of enrollment and course fees and reasonable travel expenses attributable to attending seminars and educational programs sponsored by a bona fide governmental or nonprofit professional, educational, trade, or charitable association or institution. As used in this subsection, "reasonable expenses" are limited to travel, lodging, and subsistence expenses incurred the day before through the day after the event;

(g) Items returned by the recipient to the donor within thirty days of receipt or donated to a charitable organization within thirty days of receipt;

(h) Campaign contributions reported under chapter 42.17 RCW;

(i) Discounts available to an individual as a member of an employee group, occupation, or similar broad-based group; and

(j) Awards, prizes, scholarships, or other items provided in recognition of academic or scientific achievement.

(11) "Honorarium" means money or thing of value offered to a state officer or state employee for a speech, appearance, article, or similar item or activity in connection with the state officer's or state employee's official role.

(12) "Official duty" means those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state Constitution.

(13) "Participate" means to participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties.

(14) "Person" means any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

(15) "Regulatory agency" means any state board, commission, department, or officer, except those in the legislative or judicial branches, authorized by law to conduct adjudicative proceedings, issue permits or licenses, or to control or affect interests of identified persons.

(16) "Responsibility" in connection with a transaction involving the state, means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or through subordinates, effectively to approve, disapprove, or otherwise direct state action in respect of such transaction.

(17) "State action" means any action on the part of an agency, including, but not limited to:

(a) A decision, determination, finding, ruling, or order; and

(b) A grant, payment, award, license, contract, transaction, sanction, or approval, or the denial thereof, or failure to act with respect to a decision, determination, finding, ruling, or order.

(18) "State officer" means every person holding a position of public trust in or under an executive, legislative, or judicial office of the state. "State officer" includes judges of the superior court, judges of the court of appeals, justices of the supreme court, members of the legislature together with the secretary of the senate and the chief clerk of the house of representatives, holders of elective offices in the executive branch of state government, chief executive officers of state agencies, members of boards, commissions, or committees with authority over one or more state agencies or institutions, and employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work. For the purposes of this chapter, "state officer" also includes any person exercising or undertaking to exercise the powers or functions of a state officer.

(19) "State employee" means an individual who is employed by an agency in any branch of state government. For purposes of this chapter, employees of the superior courts are not state officers or state employees.

(20) "University" includes "state universities" and "regional universities" as defined in RCW 28B.10.016 and also includes any research or technology institute affiliated with a university, including without limitation, the Spokane Intercollegiate Research and Technology Institute and the Washington Technology Center.

(21) "University research employee" means a state officer or state employee employed by a university, but only to the extent the state officer or state employee is engaged in research, technology transfer, approved consulting activities related to research and technology transfer, or other incidental activities.

(22) "Thing of economic value," in addition to its ordinary meaning, includes:

(a) A loan, property interest, interest in a contract or other chose in action, and employment or another arrangement involving a right to compensation;

(b) An option, irrespective of the conditions to the exercise of the option; and

(c) A promise or undertaking for the present or future delivery or procurement.

(23)(a) "Transaction involving the state" means a proceeding, application, submission, request for a ruling or other

determination, contract, claim, case, or other similar matter that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe:

- (i) Is, or will be, the subject of state action; or
- (ii) Is one to which the state is or will be a party; or
- (iii) Is one in which the state has a direct and substantial proprietary interest.

(b) "Transaction involving the state" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee; or a claim, case, lawsuit, or similar matter if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit.

[2005 c 106 § 1; 1998 c 7 § 1; 1996 c 213 § 1; 1994 c 154 § 101.]

RCW 42.52.310**Legislative ethics board.**

(1) The legislative ethics board is created, composed of nine members, selected as follows:

(a) Two senators, one from each of the two largest caucuses, appointed by the president of the senate;

(b) Two members of the house of representatives, one from each of the two largest caucuses, appointed by the speaker of the house of representatives;

(c) Five citizen members:

(i) One citizen member chosen by the governor from a list of three individuals submitted by each of the four legislative caucuses; and

(ii) One citizen member selected by three of the four other citizen members of the legislative ethics board.

(2) Except for initial members and members completing partial terms, nonlegislative members shall serve a single five-year term.

(3) No more than three of the public members may be identified with the same political party.

(4) Terms of initial nonlegislative board members shall be staggered as follows: One member shall be appointed to a one-year term; one member shall be appointed to a two-year term; one member shall be appointed to a three-year term; one member shall be appointed to a four-year term; and one member shall be appointed for a five-year term.

(5) A vacancy on the board shall be filled in the same manner as the original appointment.

(6) Legislative members shall serve two-year terms, from January 31st of an odd-numbered year until January 31st of the next odd-numbered year.

(7) Each member shall serve for the term of his or her appointment and until his or her successor is appointed.

(8) The citizen members shall annually select a chair from among themselves.

[1994 c 154 § 201.]

RCW 42.52.320**Authority of legislative ethics board.**

(1) The legislative ethics board shall enforce this chapter and rules adopted under it with respect to members and employees of the legislature.

(2) The legislative ethics board shall:

(a) Develop educational materials and training with regard to legislative ethics for legislators and legislative employees;

(b) Issue advisory opinions;

(c) Adopt rules or policies governing the conduct of business by the board, and adopt rules defining working hours for purposes of RCW 42.52.180 and where otherwise authorized under chapter 154, Laws of 1994;

(d) Investigate, hear, and determine complaints by any person or on its own motion;

(e) Impose sanctions including reprimands and monetary penalties;

(f) Recommend suspension or removal to the appropriate legislative entity, or recommend prosecution to the appropriate authority; and

(g) Establish criteria regarding the levels of civil penalties appropriate for different types of violations of this chapter and rules adopted under it.

(3) The board may:

(a) Issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under examination by the board or involved in any hearing;

(b) Administer oaths and affirmations;

(c) Examine witnesses; and

(d) Receive evidence.

(4) Subject to RCW 42.52.540, the board has jurisdiction over any alleged violation that occurred before January 1, 1995, and that was within the jurisdiction of any of the boards established under *chapter 44.60 RCW. The board's jurisdiction with respect to any such alleged violation shall be based on the statutes and rules in effect at [the] time of the violation.

[1994 c 154 § 202.]

Notes:

*Reviser's note: Chapter 44.60 RCW was repealed by 1994 c 154 § 304, effective January 1, 1995.

RCW 42.52.350**Executive ethics board.**

- (1) The executive ethics board is created, composed of five members, appointed by the governor as follows:
 - (a) One member shall be a classified service employee as defined in chapter 41.06 RCW;
 - (b) One member shall be a state officer or state employee in an exempt position;
 - (c) One member shall be a citizen selected from a list of three names submitted by the attorney general;
 - (d) One member shall be a citizen selected from a list of three names submitted by the state auditor; and
 - (e) One member shall be a citizen selected at large by the governor.
- (2) Except for initial members and members completing partial terms, members shall serve a single five-year term.
- (3) No more than three members may be identified with the same political party.
- (4) Terms of initial board members shall be staggered as follows: One member shall be appointed to a one-year term; one member shall be appointed to a two-year term; one member shall be appointed to a three-year term; one member shall be appointed to a four-year term; and one member shall be appointed to a five-year term.
- (5) A vacancy on the board shall be filled in the same manner as the original appointment.
- (6) Each member shall serve for the term of his or her appointment and until his or her successor is appointed.
- (7) The members shall annually select a chair from among themselves.
- (8) Staff shall be provided by the office of the attorney general.

[1994 c 154 § 205.]

RCW 42.52.360**Authority of executive ethics board.**

(1) The executive ethics board shall enforce this chapter and rules adopted under it with respect to statewide elected officers and all other officers and employees in the executive branch, boards and commissions, and institutions of higher education.

(2) The executive ethics board shall enforce this chapter with regard to the activities of university research employees as provided in this subsection.

(a) With respect to compliance with RCW 42.52.030, 42.52.110, 42.52.130, 42.52.140, and 42.52.150, the administrative process shall be consistent with and adhere to no less than the current standards in regulations of the United States public health service and the office of the secretary of the department of health and human services in Title 42 C.F.R. Part 50, Subpart F relating to promotion of objectivity in research.

(b) With respect to compliance with RCW 42.52.040, 42.52.080, and 42.52.120, the administrative process shall include a comprehensive system for the disclosure, review, and approval of outside work activities by university research employees while assuring that such employees are fulfilling their employment obligations to the university.

(c) With respect to compliance with RCW 42.52.160, the administrative process shall include a reasonable determination by the university of acceptable private uses having de minimis costs to the university and a method for establishing fair and reasonable reimbursement charges for private uses the costs of which are in excess of de minimis.

(3) The executive ethics board shall:

(a) Develop educational materials and training;

(b) Adopt rules and policies governing the conduct of business by the board, and adopt rules defining working hours for purposes of RCW 42.52.180 and where otherwise authorized under chapter 154, Laws of 1994;

(c) Issue advisory opinions;

(d) Investigate, hear, and determine complaints by any person or on its own motion;

(e) Impose sanctions including reprimands and monetary penalties;

(f) Recommend to the appropriate authorities suspension, removal from position, prosecution, or other appropriate remedy; and

(g) Establish criteria regarding the levels of civil penalties appropriate for violations of this chapter and rules adopted under it.

(4) The board may:

(a) Issue subpoenas for the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under examination by the board or involved in any hearing;

(b) Administer oaths and affirmations;

(c) Examine witnesses; and

(d) Receive evidence.

(5) Except as provided in RCW 42.52.220, the executive ethics board may review and approve agency policies as provided for in this chapter.

(6) This section does not apply to state officers and state employees of the judicial branch.

[2005 c 106 § 5; 1994 c 154 § 206.]

RCW 42.52.370

Authority of commission on judicial conduct.

The commission on judicial conduct shall enforce this chapter and rules adopted under it with respect to state officers and employees of the judicial branch and may do so according to procedures prescribed in Article IV, section 31 of the state Constitution. In addition to the sanctions authorized in Article IV, section 31 of the state Constitution, the commission may impose sanctions authorized by this chapter.

[1994 c 154 § 207.]

RCW 42.52.430

Public hearing — Findings.

(1) If the ethics board determines there is reasonable cause under RCW 42.52.420 that a violation of this chapter or rules adopted under it occurred, a public hearing on the merits of the complaint shall be held.

(2) The ethics board shall designate the location of the hearing. The case in support of the complaint shall be presented at the hearing by staff of the ethics board.

(3) The respondent shall file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The respondent has the right to cross-examine witnesses.

(4) Testimony taken at the hearing shall be under oath and recorded.

(5) If, based upon a preponderance of the evidence, the ethics board finds that the respondent has violated this chapter or rules adopted under it, the board shall file an order stating findings of fact and enforcement action as authorized under this chapter.

(6) If, upon all the evidence, the ethics board finds that the respondent has not engaged in an alleged violation of this chapter or rules adopted under it, the ethics board shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

(7) If the board makes a determination that there is not reasonable cause to believe that a violation has been or is being committed or has made a finding under subsection (6) of this section, the attorney general shall represent the officer or employee in any action subsequently commenced based on the alleged facts in the complaint.

[1994 c 154 § 213.]

RCW 42.52.460
Citizen actions.

Any person who has notified the appropriate ethics board and the attorney general in writing that there is reason to believe that RCW 42.52.180 is being or has been violated may, in the name of the state, bring a citizen action for any of the actions authorized under this chapter. A citizen action may be brought only if the appropriate ethics board or the attorney general have failed to commence an action under this chapter within forty-five days after notice from the person, the person has thereafter notified the appropriate ethics board and the attorney general that the person will commence a citizen's action within ten days upon their failure to commence an action, and the appropriate ethics board and the attorney general have in fact failed to bring an action within ten days of receipt of the second notice.

If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but the person shall be entitled to be reimbursed by the state of Washington for costs and attorneys' fees incurred. If a citizen's action that the court finds was brought without reasonable cause is dismissed, the court may order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant.

Upon commencement of a citizen action under this section, at the request of a state officer or state employee who is a defendant, the office of the attorney general shall represent the defendant if the attorney general finds that the defendant's conduct complied with this chapter and was within the scope of employment.

[1994 c 154 § 216.]

Beginning of Chapter << 292-09-010 >> 292-09-020

WAC 292-09-010

Purpose of this chapter.

The purpose of this chapter is to provide rules implementing the Ethics in Public Service Act (chapter 42.52 RCW) according to procedures prescribed in Article IV, Section 31, of the Constitution of the state of Washington and chapter 2.64 RCW for the commission on judicial conduct.

All proceedings involving state employees of the judicial branch of state government, except "judges" as defined in *Commission On Judicial Conduct Rules of Procedure (CJCRP)*, shall proceed under the rules set forth in this chapter. All proceedings involving "judges" as defined in RCW 2.64.010 and the Code of Judicial Conduct shall proceed exclusively under the rules set forth in the *CJCRP*.

[Statutory Authority: RCW 42.52.370 and Article IV, section 31 of the state Constitution. 97-13-069, § 292-09-010, filed 6/18/97, effective 7/19/97; 95-05-031 (Order 95-01), § 292-09-010, filed 2/8/95, effective 3/11/95.]



[Courts Home](#) | [Educational Resources](#) | [Constitution](#) | [Search](#) | [Site Map](#) | [eService Center](#)

ARTICLE IV THE JUDICIARY

SECTION 1 JUDICIAL POWER, WHERE VESTED.

The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Court of appeals: Art. 4 Section 30.

SECTION 2 SUPREME COURT.

The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum, and pronounce a decision. The said court shall always be open for the transaction of business except on nonjudicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

SECTION 2(a) TEMPORARY PERFORMANCE OF JUDICIAL DUTIES.

When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state. [AMENDMENT 38, 1961 House Joint Resolution No. 6, p 2757. Approved November, 1962.]

SECTION 3 ELECTION AND TERMS OF SUPREME COURT JUDGES.

The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The supreme court shall select a chief justice from its own membership to serve for a four-year term at the pleasure of a majority of the court as prescribed by supreme court rule. The chief justice shall preside at all sessions of the supreme court. In case of the absence of the chief justice, the majority of the remaining court shall select one of their members to serve as acting chief justice. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court the governor shall only appoint a person to ensure the number of judges as specified by the legislature, to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court, first elected, shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law. [AMENDMENT 89, 1995 Substitute Senate Joint Resolution No. 8210, p 2905. Approved November 7, 1995.]

Original text - Art. 4 Section 3 ELECTION AND TERMS OF SUPREME COURT JUDGES - The judges of the supreme court shall be elected by the qualified electors of the state at large at the general state election at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this Constitution and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judge having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court, first elected, shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

SECTION 3(a) RETIREMENT OF SUPREME COURT AND SUPERIOR COURT JUDGES.

A judge of the supreme court or the superior court shall retire from judicial office at the end of the calendar year in which he attains the age of seventy-five years. The legislature may, from time to time, fix a lesser age for mandatory retirement, not earlier than the end of the calendar year in which any such judge attains the age of seventy years, as the legislature deems proper. This provision shall not affect the term to which any such judge shall have been elected or appointed prior to, or at the time of, approval and ratification of this provision. Notwithstanding the limitations of this Section, the legislature may by general law authorize or require the retirement of judges for physical or mental disability, or any cause rendering judges incapable of performing their judicial duties. [AMENDMENT 25, 1951 House Joint Resolution No. 6, p 960. Approved November 4, 1952.]

SECTION 4 JURISDICTION

The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof.

SECTION 5 SUPERIOR COURT - ELECTION OF JUDGES, TERMS OF, ETC.

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election: Provided, That until otherwise directed by the legislature one judge only shall be elected for the

counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield and Asotin; one judge for the counties of Kittitas, Yakima and Klickitat; one judge for the counties of Clarke, Skamania, Pacific, Cowlitz and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan and Clallam; and one judge for the counties of Whatcom, Skagit and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law or in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this Constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this Constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Supreme court may authorize superior court judge to perform judicial duties in any superior court: Art. 4 Section 2(a).

SECTION 6 JURISDICTION OF SUPERIOR COURTS.

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

[AMENDMENT 87, 1993 House Joint Resolution No. 4201, p 3063. Approved November 2, 1993.]

Amendment 65, part (1977) - Art. 4 Section 6 Jurisdiction of Superior Courts - The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or

municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [AMENDMENT 65, part, 1977 Senate Joint Resolution No. 113, p 1714. Approved November 8, 1977.]

Amendment 65 also amended Art. 4 Section 10.

Amendment 28, part (1952) - Art. 4 Section 6 JURISDICTION OF SUPERIOR COURTS - The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one thousand dollars, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days. [AMENDMENT 28, part, 1951 Substitute House Joint Resolution No. 13, p 962. Approved November 4, 1952.]

Note: Amendment 28 also amended Art. 4 Section 10.

ORIGINAL TEXT - ART. 4 Section 6 JURISDICTION OF SUPERIOR COURTS - The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll or municipal fine, and in all other cases in which the demand, or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in

some other court; and said court shall have the power of naturalization, and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justice's and other inferior courts in their respective counties as may be prescribed by law. They shall be always open except on non-judicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and non-judicial days.

SECTION 7 EXCHANGE OF JUDGES - JUDGE PRO TEMPORE.

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement. [AMENDMENT 94, 2001 Engrossed Senate Joint Resolution No. 8208, p 2327. Approved November 6, 2001.]

Amendment 80 - Art. 4 Section 7 EXCHANGE OF JUDGES - JUDGE PRO TEMPORE - The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement. [Amendment 80, 1987 Senate Joint Resolution No. 8207, p 2815. Approved November 3, 1987.]

ORIGINAL TEXT - ART. 4 Section 7 EXCHANGE OF JUDGES - JUDGE PRO TEMPORE - The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court and sworn to try the case.

SECTION 8 ABSENCE OF JUDICIAL OFFICER.

Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office: Provided, That in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

SECTION 9 REMOVAL OF JUDGES, ATTORNEY GENERAL, ETC.

Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. Such resolution shall be entered at length on the journal of both houses and on the question of

removal the ayes and nays shall also be entered on the journal.

Removal, censure, suspension, or retirement of judges or justices: Art. 4 Section 31.

SECTION 10 JUSTICES OF THE PEACE.

The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace: Provided, That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. Justices of the peace shall have original jurisdiction in cases where the demand or value of the property in controversy is less than three hundred dollars or such greater sum, not to exceed three thousand dollars or as otherwise determined by law, as shall be prescribed by the legislature. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use. [AMENDMENT 65, part, 1977 Senate Joint Resolution No. 113, p 1714. Approved November 8, 1977.]

Amendment 65 also amended Art. 4 Section 6.

Amendment 28, part (1952) - Art. 4 Section 10 JUSTICES OF THE PEACE - The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace: Provided, That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. Justices of the peace shall have original jurisdiction in cases where the demand or value of the property in controversy is less than three hundred dollars or such greater sum, not to exceed one thousand dollars, as shall be prescribed by the legislature. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use. [AMENDMENT 28, part, 1951 Substitute House Joint Resolution No. 13, p 962. Approved November 4, 1952.]

Note: Amendment 28 also amended Art. 4 Section 6.

Original text - Art. 4 Section 10 JUSTICES OF THE PEACE - The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties and jurisdiction of justices of the peace; Provided, That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.

SECTION 11 COURTS OF RECORD.

The supreme court and the superior courts shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.

SECTION 12 INFERIOR COURTS.

The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.

SECTION 13 SALARIES OF JUDICIAL OFFICERS -

HOW PAID, ETC. No judicial officer, except court commissioners and unsalaried justices of the peace, shall receive to his own use any fees or perquisites of office. The judges of the supreme

court and judges of the superior courts shall severally at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected. In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

Authorizing compensation increase during term: Art. 30 Section 1.

Increase or diminution of compensation during term of office prohibited county, city or municipal officers: Art. 11 Section 8. public officers: Art. 2 Section 25. state officers: Art. 3 Section 25.

SECTION 14 SALARIES OF SUPREME AND SUPERIOR COURT JUDGES.

Each of the judges of the supreme court shall receive an annual salary of four thousand dollars (\$4,000); each of the superior court judges shall receive an annual salary of three thousand dollars (\$3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of judges herein provided.

Compensation of legislators, elected state officials, and judges: Art. 28 Section 1.

SECTION 15 INELIGIBILITY OF JUDGES.

The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office, or employment, during the term for which they shall have been elected.

SECTION 16 CHARGING JURIES.

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

SECTION 17 ELIGIBILITY OF JUDGES.

No person shall be eligible to the office of judge of the supreme court, or judge of a superior court, unless he shall have been admitted to practice in the courts of record of this state, or of the Territory of Washington.

SECTION 18 SUPREME COURT REPORTER.

The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.

SECTION 19 JUDGES MAY NOT PRACTICE LAW

No judge of a court of record shall practice law in any court of this state during his continuance in office.

SECTION 20 DECISIONS, WHEN TO BE MADE

Every cause submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof; Provided, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a hearing.

SECTION 21 PUBLICATION OF OPINIONS

The legislature shall provide for the speedy publication of opinions of the supreme court, and all

opinions shall be free for publication by any person.

SECTION 22 CLERK OF THE SUPREME COURT

The judges of the supreme court shall appoint a clerk of that court who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court, and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

SECTION 23 COURT COMMISSIONERS.

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by such judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

SECTION 24 RULES FOR SUPERIOR COURTS.

The judges of the superior courts, shall from time to time, establish uniform rules for the government of the superior courts.

SECTION 25 REPORTS OF SUPERIOR COURT JUDGES.

Superior judges, shall on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest, and the judges of the supreme court shall on or before the first day of January in each year report in writing to the governor such defects and omissions in the laws as they may believe to exist.

SECTION 26 CLERK OF THE SUPERIOR COURT.

The county clerk shall be by virtue of his office, clerk of the superior court.

SECTION 27 STYLE OF PROCESS.

The style of all process shall be, "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

SECTION 28 OATH OF JUDGES.

Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

SECTION 29 ELECTION OF SUPERIOR COURT JUDGES.

Notwithstanding any provision of this Constitution to the contrary, if, after the last day as provided by law for the withdrawal of declarations of candidacy has expired, only one candidate has filed for any single position of superior court judge in any county containing a population of one hundred thousand or more, no primary or election shall be held as to such position, and a certificate of election shall be issued to such candidate. If, after any contested primary for superior court judge in any county, only one candidate is entitled to have his name printed on the general election ballot for any single position, no election shall be held as to such position, and a certificate of election shall be issued to such candidate: Provided, That in the event that there is filed with the county auditor within ten days after the date of the primary, a petition indicating that a write in campaign will be conducted for such single position and signed by one hundred registered voters qualified to vote with respect of the office, then such single position shall be subject to the general election. Provisions for the contingency of the death or disqualification of a sole candidate between the last date for withdrawal and the time when the

election would be held but for the provisions of this Section, and such other provisions as may be deemed necessary to implement the provisions of this Section, may be enacted by the legislature. [AMENDMENT 41, 1965 ex.s. Substitute Senate Joint Resolution No. 6, p 2815. Approved November 8, 1966.]

SECTION 30 COURT OF APPEALS.

(1) Authorization. In addition to the courts authorized in Section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute. (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute. (3) Review of Superior Court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute. (4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of appeals shall be as provided by statute. (5) Administration and Procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court. (6) Conflicts. The provisions of this Section shall supersede any conflicting provisions in prior Sections of this article. [AMENDMENT 50, 1967 Senate Joint Resolution No. 6; see 1969 p 2975. Approved November 5, 1968.]

Reviser's note: This Section which was adopted as Sec. 29 is herein renumbered Sec. 30 to avoid confusion with Sec. 29, supra.

SECTION 31 COMMISSION ON JUDICIAL CONDUCT

(1) There shall be a commission on judicial conduct, existing as an independent agency of the judicial branch, and consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and six persons who are not attorneys appointed by the governor. (2) Whenever the commission receives a complaint against a judge or justice, or otherwise has reason to believe that a judge or justice should be admonished, reprimanded, censured, suspended, removed, or retired, the commission shall first investigate the complaint or belief and then conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint or belief. The investigation and initial proceedings shall be confidential. Upon beginning an initial proceeding, the commission shall notify the judge or justice of the existence of and basis for the initial proceeding. (3) Whenever the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct or that the judge or justice suffers from a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties, the commission shall conduct a public hearing or hearings and shall make public all those records of the initial proceeding that provide the basis for its conclusion. If the commission concludes that there is not probable cause, it shall notify the judge or justice of its conclusion. (4) Upon the completion of the hearing or hearings, the commission in open session shall either dismiss the case, or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice. The commission may not recommend suspension or removal unless it censures the judge or justice for the violation serving as the basis for the recommendation. The commission may recommend retirement of a judge or justice for a disability which is permanent or likely to become permanent and which seriously interferes with the performance of judicial duties. (5) Upon the recommendation of the commission, the supreme court may suspend, remove, or retire a judge or justice. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease. The supreme court shall specify the effect upon salary when it suspends a judge or justice. The supreme court may not suspend, remove, or retire a judge or justice until the commission, after notice and hearing, recommends that action be

taken, and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against the judge or justice. (6) Within thirty days after the commission admonishes, reprimands, or censures a judge or justice, the judge or justice shall have a right of appeal de novo to the supreme court. (7) Any matter before the commission or supreme court may be disposed of by a stipulation entered into in a public proceeding. The stipulation shall be signed by the judge or justice and the commission or court. The stipulation may impose any terms and conditions deemed appropriate by the commission or court. A stipulation shall set forth all material facts relating to the proceeding and the conduct of the judge or justice. (8) Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from his or her judicial position until a final determination is made by the supreme court. (9) The legislature shall provide for commissioners' terms of office and compensation. The commission shall employ one or more investigative officers with appropriate professional training and experience. The investigative officers of the commission shall report directly to the commission. The commission shall also employ such administrative or other staff as are necessary to manage the affairs of the commission. (10) The commission shall, to the extent that compliance does not conflict with this Section, comply with laws of general applicability to state agencies with respect to rule-making procedures; and with respect to public notice of and attendance at commission proceedings other than initial proceedings. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 85, 1989 Substitute Senate Joint Resolution No. 8202, p 3000. Approved November 7, 1989.]

Removal by legislature: Art. 4 Section 9.

Amendment 77 (1986) - Art. 4 Section 31 COMMISSION ON JUDICIAL CONDUCT - REMOVAL, CENSURE, SUSPENSION, OR RETIREMENT OF JUDGES OR JUSTICES - PROCEEDINGS - There shall be a commission on judicial conduct consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and four persons who are not attorneys appointed by the governor and confirmed by the senate. The supreme court may censure, suspend, or remove a judge or justice for violating a rule of judicial conduct and may retire a judge or justice for disability which is permanent or is likely to become permanent and which seriously interferes with the performance of judicial duties. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease. The supreme court shall specify the effect upon salary when disciplinary action other than removal is taken. The supreme court may not discipline or retire a judge or justice until the commission on judicial conduct recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice. Whenever the commission receives a complaint against a judge or justice, it shall first conduct proceedings for the purpose of determining whether sufficient reason exists for conducting a hearing or hearings to deal with the accusations. These initial proceedings shall be confidential, unless confidentiality is waived by the judge or justice, but all subsequent hearings conducted by the commission shall be open to members of the public. Whenever the commission adopts a recommendation that a judge or justice be removed, the judge or justice shall be suspended immediately, with salary, from his or her judicial position until a final determination is made by the supreme court. The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 77, 1986 Senate Joint Resolution No. 136, p 1532. Approved November 4, 1986.]

Amendment 71 (1980) - Art. 4 Section 31 JUDICIAL QUALIFICATIONS COMMISSION - REMOVAL, CENSURE, SUSPENSION, OR RETIREMENT OF JUDGES OR JUSTICES - There shall be a judicial qualifications commission consisting of a judge selected by and from the court of

appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the district court judges, two persons admitted to the practice of law in this state selected by the state bar association, and two persons who are not attorneys appointed by the governor and confirmed by the senate.

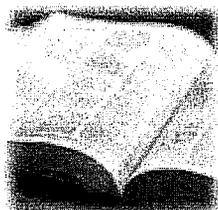
The supreme court may censure, suspend, or remove a judge or justice for violating a rule of judicial conduct and may retire a judge or justice for disability which is permanent or is likely to become permanent and which seriously interferes with the performance of judicial duties. The office of a judge or justice retired or removed by the supreme court becomes vacant, and that person is ineligible for judicial office until eligibility is reinstated by the supreme court. The salary of a removed judge or justice shall cease. The supreme court shall specify the effect upon salary when disciplinary action other than removal is taken. The supreme court may not discipline or retire a judge or justice until the judicial qualifications commission recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice. The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings. [AMENDMENT 71, 1980 Substitute House Joint Resolution No. 37, p 652. Approved November 4, 1980.]

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)

[Back to Top](#) | [Privacy and Disclaimer Notices](#)



July 12, 2007

[ABOUT THE COMMISSION](#) [DISCIPLINARY FUNCTION](#) [COMMISSION ACTIVITY](#) [GOVERNING PROVISIONS](#) [FILING A COMPLAINT](#) [DISCIPLINARY](#)

Section I - Organization and Structure

Home : [Governing Provisions](#) : [CJCRP](#) : Section I - Organization and Structure

CJC website All the internet

RULE 1. DISCIPLINARY AUTHORITY

The disciplinary authority of the commission extends to every judge subject to the Washington State Constitution, Article IV, Section 31, and the Code of Judicial Conduct.

RULE 2. THE COMMISSION ON JUDICIAL CONDUCT

(a) **Purpose.** The commission on judicial conduct administers the judicial discipline and incapacity provisions of the Washington State Constitution, Article IV, Section 31.

(b) **Jurisdiction.**

(1) *Judges.* The commission has jurisdiction over judges regarding allegations of misconduct occurring prior to or during service as a judge and regarding allegations of incapacity during service as a judge.

(2) *Former judges.* The commission has continuing jurisdiction over former judges regarding allegations of misconduct occurring prior to or during service as a judge.

RULE 3. ORGANIZATION AND AUTHORITY OF THE COMMISSION

(a) **Meetings.** Meetings shall be scheduled as necessary. The commission shall meet periodically as determined by the commission to consider administrative and other matters. The chair may call meetings of the commission other than regularly scheduled meetings upon the chair's own motion; the chair shall call a meeting upon the written request of three members of the commission. Business meetings may be conducted by telephone conference calls or other telecommunications means within the provisions of the Open Public Meetings Act, whereby each participant in the meeting can simultaneously hear the others and further, whereby at least one site, identified by proper notice, shall provide the capability for members of the public to hear the conference. Other meetings and executive sessions may be conducted by telephone conference calls.

(b) **Officers.** The commission shall elect one of its members to serve as chair, another to serve as vice-chair, and another to serve as secretary for such terms as the commission shall determine. The vice-chair shall perform the duties of the chair whenever the chair is absent or unable to act.

(c) **Quorum.** Six members of the commission shall constitute a quorum for the transaction of business. A vote of six members of the commission shall be required to adopt rules. A finding of probable cause shall require the concurrence of six members of the commission. The concurrence of six members of the commission shall be required to make a decision in a proceeding. The chair will arrange for an alternate member selected by the appropriate appointing authority to serve in the place of a member whenever a member is disqualified or unable to serve. The alternate member so called upon shall have all the authority of a member of the commission during the time the member is unable to serve.

(d) **Powers and duties.** The duty and authority of the commission shall include but not be limited to:

- (1) Adopting rules of procedure for discipline and incapacity proceedings;
- (2) Appointing commission counsel;
- (3) Employing an executive director and other staff;
- (4) Appointing investigative officers;
- (5) Retaining disciplinary counsel;
- (6) Reviewing the recommendation of the investigative officer and/or disciplinary counsel after screening and a preliminary investigation, and either authorizing a full investigation of a complaint against a respondent in initial proceedings or dismissing the complaint;
- (7) Reviewing the findings of the investigative officer and/or disciplinary counsel after a full investigation of a complaint against a respondent in initial proceedings and dismissing the matter, making a finding of probable cause, or, after making a finding of probable cause, instructing disciplinary counsel to file a statement of charges;
- (8) Ruling on prehearing motions, conducting hearings on a statement of charges, and making findings, conclusions, and a decision;
- (9) Where appropriate, making recommendations to the supreme court for discipline pursuant to Rule 24; or
- (10) Dismissing the case.

(e) **Recusal.**

- (1) A member of the commission should disqualify himself or herself if his or her impartiality might reasonably be questioned because of a conflict of interest or personal bias or prejudice.
- (2) If a member who is a judge or judge pro tem becomes a respondent to a statement of allegations (Rule 17) or statement of charges (Rule 19), that member shall be disqualified from attending further meetings and shall not

perform any commission duties until proceedings on the allegations and/or charges are completed. Should the member be disciplined by the commission, the issue of that member's continuing participation on the commission shall be referred to the member's appointing authority for a decision on whether the member should continue to serve on the commission on judicial conduct.

(3) Respondent may file an affidavit challenging for cause any member who respondent believes cannot impartially consider the statement of charges. The affidavit must be filed within seven days after service of the notice of hearing identifying those members assigned to conduct the hearing. The commission chair, or vice-chair, will decide any challenge for cause if the member does not disqualify himself or herself.

(f) Presiding Officer, Authority. The presiding officer shall have authority to:

- (1) Determine the order of presentation of evidence;
- (2) Identify the materials initially to be provided to the participating members;
- (3) Administer oaths and affirmations;
- (4) Issue subpoenas;
- (5) Confer with participating panel members on all procedural matters, objections, and motions;
- (6) Rule on offers of proof and receive relevant evidence;
- (7) Direct the course of additional questioning of witnesses by participating panel members during the course of a public disciplinary proceeding;
- (8) Take any appropriate action necessary to maintain order during the hearing;
- (9) Permit or require oral argument or briefs and determine the time limits for submission thereof;
- (10) Chair the deliberations of the participating members;
- (11) Announce the commission decision in an open session;
- (12) Take any other action necessary and authorized by any applicable statute or rule or by the hearing panel;
- (13) Waive any requirement of these rules applicable to a public proceeding unless a party shows that it would be prejudiced by such a waiver.

See Rule 3 Comment.

RULE 4. INVESTIGATIVE OFFICER

(a) Appointment. The commission may appoint one or more full-time or part-time investigative officers.

(b) Powers and duties. The duty and authority of the investigative officer shall include but not be limited to:

- (1) Receiving and screening complaints, referring complainants to other agencies when appropriate, conducting preliminary investigations, recommending to the commission, and upon authorization, conducting full investigations, notifying complainants about the status and disposition of their complaints, and making recommendations to the commission on the disposition of complaints after full investigation;
- (2) Maintaining permanent records of the investigative and subsequent proceedings set forth in (1) of this subsection; and
- (3) Performing other duties at the direction of the commission.

RULE 5. COMMISSION COUNSEL

(a) Appointment. The commission may appoint a commission counsel to assist the commission.

(b) Powers and duties. The commission may delegate functions to the commission counsel, including but not limited to the duty and authority to:

- (1) Advising the commission during its deliberations and drafting decisions, orders, reports and other documents;
- (2) Employing and supervising other staff necessary to the performance of the commission's duties;
- (3) Performing other duties at the direction of the commission.

[Return to top](#)

[Home](#) | [About the Commission](#) | [Disciplinary Function](#) | [Commission Activity](#) | [Governing Provisions](#) | [Filing a Complaint](#)

[Discipline Database](#) | [Contact Us](#) | [Privacy Notice Information](#) | [Site map](#)

Copyright © 2000-2001 Washington State Commission on Judicial Conduct
All Rights Reserved



[Courts Home](#) | [Court Rules](#)



[Search](#) | [Site Map](#) | [eService Center](#)

**CANON 1--JUDGES SHALL UPHOLD THE INTEGRITY AND
INDEPENDENCE OF THE JUDICIARY**

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing high standards of judicial conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective.

Comment

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

[Canon 1 amended effective March 25, 1988; June 23, 1995 and
Comment adopted June 23, 1995.]

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)
[Back to Top](#) | [Privacy and Disclaimer Notices](#)



[Courts Home](#) | [Court Rules](#)



[Search](#) | [Site Map](#) | [eService Center](#)

CANON 2--JUDGES SHOULD AVOID IMPROPRIETY AND THE
APPEARANCE OF IMPROPRIETY IN ALL
THEIR ACTIVITIES

(A) Judges should respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

(B) Judges should not allow family, social, or other relationships to influence their judicial conduct or judgment. Judges should not lend the prestige of judicial office to advance the private interests of the judge or others; nor should judges convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

Comment

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

The testimony of judges as character witnesses injects the prestige of their office into the proceeding in which they testify and may be misunderstood to be an official testimonial. This canon, however, does not afford judges a privilege against testifying in response to a subpoena.

(C) Judges should not hold membership in any organization practicing discrimination prohibited by law.

[Canon 2 and Comment amended effective March 25, 1988; June 23, 1995.]

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)

[Back to Top](#) | [Privacy and Disclaimer Notices](#)



Courts Home | Court Rules



Search | Site Map |  eService Center

CANON 3--JUDGES SHALL PERFORM THE DUTIES
OF THEIR OFFICE IMPARTIALLY
AND DILIGENTLY

The judicial duties of judges should take precedence over all other activities. Their judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply:

(A) Adjudicative Responsibilities.

(1) Judges should be faithful to the law and maintain professional competence in it, and comply with the continuing judicial education requirements of GR 26. Judges should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) Judges should maintain order and decorum in proceedings before them.

(3) Judges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity, and should require similar conduct of lawyers, and of the staff, court officials, and others subject to their direction and control.

Comment

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

(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.

Comment

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude judges from consulting with other judges, or with court personnel whose function is to aid judges in carrying out their adjudicative responsibilities. An

appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

(5) Judges shall perform judicial duties without bias or prejudice.

Comment

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

(6) Judges should dispose promptly of the business of the court.

Comment

Prompt disposition of the courts business requires judges to devote adequate time to their duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with them to that end.

(7) Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(8) Judges shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Comment

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(B) Administrative Responsibilities.

(1) Judges should diligently discharge their administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) Judges should require their staff and court officials subject to their direction and control to observe the standards of fidelity and diligence that apply to them.

(3) Judges should not make unnecessary appointments. They should exercise their power of appointment only on the basis of merit, avoiding nepotism and favoritism. They should not approve compensation of appointees beyond the fair value of services rendered.

Comment

Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

(C) Disciplinary Responsibilities.

(1) Judges having actual knowledge that another judge has committed a violation of this Code should take appropriate action. Judges having actual knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office should take or initiate appropriate corrective action, which may include informing the appropriate authority.

(2) Judges having actual knowledge that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. Judges having actual knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's fitness as a lawyer should take or initiate appropriate corrective action, which may include informing the appropriate authority.

(D) Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(d) the judge or the judge's spouse or member of the judge's family residing in the judge's household, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

Comment

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "their impartiality might reasonably be questioned" under Canon 3(D)(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" may require the judge's disqualification.

(2) Judges should inform themselves about their personal and fiduciary economic interests, and make a reasonable effort to inform themselves about the personal economic interests of their spouse and minor children residing in their household.

(E) Remittal of Disqualification.

A judge disqualified by the terms of Canon 3(D)(1)(c) or Canon 3(D)(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

[Canon 3 amended effective September 20, 1976; September 1, 1983; Canon 3 and Comments amended effective March 25, 1988; Canon 3 amended effective December 27, 1991; Canon 3 and Comments amended effective June 23, 1995; Canon 3 amended effective July 1, 2002.]

[Courts](#) | [Organizations](#) | [News](#) | [Opinions](#) | [Rules](#) | [Forms](#) | [Directory](#) | [Library](#)
[Back to Top](#) | [Privacy and Disclaimer Notices](#)

RCW 4.92.060

Action against state officers, employees, volunteers, or foster parents — Request for defense.

Whenever an action or proceeding for damages shall be instituted against any state officer, including state elected officials, employee, volunteer, or foster parent licensed in accordance with chapter 74.15 RCW, arising from acts or omissions while performing, or in good faith purporting to perform, official duties, or, in the case of a foster parent, arising from the good faith provision of foster care services, such officer, employee, volunteer, or foster parent may request the attorney general to authorize the defense of said action or proceeding at the expense of the state.

[1989 c 403 § 2; 1986 c 126 § 5; 1985 c 217 § 1; 1975 1st ex.s. c 126 § 1; 1975 c 40 § 1; 1921 c 79 § 1; RRS § 890-1.]

Notes:

Findings -- 1989 c 403: "The legislature finds and declares that foster parents are a valuable resource providing an important service to the citizens of Washington. The legislature further recognizes that the current insurance crisis has adversely affected some foster-family homes in several ways: (1) In some locales, foster parents are unable to obtain liability insurance coverage over and above homeowner's or tenant's coverage for actions filed against them by the foster child or the child's parents or legal guardian. In addition, the monthly payment made to foster-family homes is not sufficient to cover the cost of obtaining this extended coverage and there is no mechanism in place by which foster parents can recapture this cost; (2) foster parents' personal resources are at risk. Therefore, the legislature is providing relief to address these problems." [1989 c 403 § 1.]

RCW 4.92.070

Actions against state officers, employees, volunteers, or foster parents — Defense by attorney general — Legal expenses.

If the attorney general shall find that said officer, employee, or volunteer's acts or omissions were, or were purported to be in good faith, within the scope of that person's official duties, or, in the case of a foster parent, that the occurrence arose from the good faith provision of foster care services, said request shall be granted, in which event the necessary expenses of the defense of said action or proceeding relating to a state officer, employee, or volunteer shall be paid as provided in RCW 4.92.130. In the case of a foster parent, necessary expenses of the defense shall be paid from the appropriations made for the support of the department to which such foster parent is attached. In such cases the attorney general shall appear and defend such officer, employee, volunteer, or foster parent, who shall assist and cooperate in the defense of such suit. However, the attorney general may not represent or provide private representation for a foster parent in an action or proceeding brought by the department of social and health services against that foster parent.

[1999 c 163 § 5; 1989 c 403 § 3; 1986 c 126 § 6; 1985 c 217 § 2; 1975 1st ex.s. c 126 § 2; 1975 c 40 § 2; 1921 c 79 § 2; RRS § 890-2.]

Notes:

Effective date -- 1999 c 163: See note following RCW 4.92.130.

Findings -- 1989 c 403: See note following RCW 4.92.060.

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

No. 322520-9-II
(consolidated with No. 34130-1-II)

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

The Honorable Richard B. Sanders,

Petitioner,

v.

The State of Washington,

Respondent.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JUL 12 PM 4:35

CERTIFICATE OF SERVICE

KIRKPATRICK & LOCKHART
PRESTON GATES & ELLIS LLP

Paul J. Lawrence, WSBA # 13557
Matthew J. Segal, WSBA # 29797
Graham M. Wilson, WSBA # 36857
Attorneys for Petitioner
The Honorable Richard B. Sanders

KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

ORIGINAL

I, Leah Tarabochia, certify that I am a legal secretary at K&L Gates, and that on the 2th day of July, 2007, I caused a true and correct copy of the Petition for Review to be served on the following in the manner indicated below:

VIA LEGAL MESSENGER VIA U.S. MAIL

Mr. Randall Thomsen
Mr. Timothy G. Leyh
Danielson Harrigan Leyh &
Tollefson LLP
999 3rd Avenue, Suite 4400
Seattle, WA 98104-4017

Peter R. Jarvis, Esq.
Hinshaw & Culbertson
1000 SW Broadway, Suite 1950
Portland, OR 97205-3078



Leah M. Tarabochia

K:\15236\10016\PJL\PJL_P2268