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No. 32520-9-II
No. 34130-1-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

THE HONORABLE RICHARD B. SANDERS,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

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DIVISION II
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BRIEF OF RESPONDENT STATE OF WASHINGTON

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I. INTRODUCTION

The principal question before the Court is whether state statutes require taxpayers to fund the defense of state officers and employees, including Justice Sanders, where state regulatory boards have charged them with violations of ethics codes, and they have not been exonerated of those charges.

Justice Sanders asserts that Washington law requires taxpayers to pay for his defense in proceedings brought against him by the Commission on Judicial Conduct ("CJC") which resulted in findings that he violated the Code of Judicial Conduct, even if his appeal of the CJC's determinations is unsuccessful.[1] The State respectfully submits that Washington statutes do not authorize or require a publicly-funded defense in such circumstances.

II. RESPONDENT'S STATEMENT OF ISSUES

1. RCW 43.10.030 authorizes a taxpayer-funded defense in proceedings against a state officer or employee "acting in his official capacity." Claims made against an officer or employee in his or her "official capacity" must arise from performance of official duties, and are in essence claims against the office, not the individual. Because charges

under the Code of Judicial Conduct are quintessentially personal to an individual judge, and violating the Code can never be an "official duty," is the State authorized to deny a defense of such charges?

2. The sole purpose of RCW 43.10.040, as demonstrated by its legislative history, was to clarify that the Attorney General has exclusive authority to represent the State, its agencies, officers, and employees where such defense is otherwise authorized. Does the statute nonetheless confer on all state officials the right to a defense at public expense in any proceeding, regardless of its nature or outcome?

3. Two Washington Supreme Court cases, *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), and *State ex. rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926), have interpreted RCW 43.10.030 (or its predecessor statute) as granting discretion to the Attorney General in deciding whether to engage in litigation on behalf of the State. Thus, does the Attorney General have discretion under RCW 43.10.030 to decline to provide a taxpayer-funded defense to Justice Sanders in the circumstances of this case?

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[1] The Commission has found that Justice Sanders violated the Code. Justice Sanders has appealed the Commission's decision and his appeal is pending.

4. An insurer's duty to defend is based on a contractual obligation and the potential that the insurer may bear responsibility to indemnify the insured if a judgment is entered. Is Justice Sanders' insurance analogy inapposite, where the State has no contractual obligation to provide him with a defense of the CJC charges, and the State would bear no responsibility for his violations of ethical rules?

5. The superior court entered a stay of this matter, pending resolution of Justice Sanders' appeal of the CJC decision, based on its analysis of the factors identified in *King v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000), including the efficient use of judicial resources. Was the stay thus entered on tenable grounds and for tenable reasons, precluding any "abuse of discretion" determination by this Court?

6. Attorney fees may be recovered only when authorized by contract, a statute, or a recognized ground of equity. Fees are recoverable under the rationale of *Olympic S.S. Co. Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) only where an insurer improperly withholds insurance coverage. Should this Court deny Justice Sanders' request for attorneys fees in prosecuting this action because there is no basis in law for such an award?

III. STATEMENT OF FACTS

Justice Sanders' Visit to the SCC. On January 27, 2003, Justice Sanders visited the Special Commitment Center ("SCC") on McNeil Island. The CJC found that during the visit, Justice Sanders spoke with individuals who had cases pending before the Supreme Court, and he discussed the subject of "volitional control" at a time when the Justices were circulating draft opinions dealing with that precise subject in *In re the Detention of Bernard Thorell,* No. 69574-1 ("*Thorell*"). Supp. CP 233, ll. 14-26. Justice Sanders later was required to recuse himself from hearing matters in *Thorell* because of his conduct. Justice Sanders also accepted a document from Ralph Spink, a SCC resident who then had a matter filed in the Washington Supreme Court, and kept it for a time in his Supreme Court office. Supp. CP 230, ll. 27-29.

CJC Charges. Following Justice Sanders' contacts with residents of the SCC who had cases pending before the Washington Supreme Court, a complaint was filed with the CJC. The CJC investigated the complaint, sent Justice Sanders a "Statement of Allegations" on October 8, 2003, and filed formal charges on April 5, 2004, alleging that Justice Sanders violated the Code of Judicial Conduct.

Justice Sanders Sues for Declaratory Relief. During the CJC investigation, on November 25, 2003, Justice Sanders wrote the Attorney

General, requesting defense at public expense in the CJC proceedings. CP 17-18. The Attorney General declined, consistent with its regular policy regarding state officials charged with ethics violations:

> To authorize your defense at this time, and advance legal costs attendant to your defense before the Judicial Conduct Commission, would require us 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. The proper approach is to allow the proceeding before the Judicial Conduct Commission to proceed, and based on the outcome of the proceeding, determine whether reimbursement is justified, as was done previously by the Thurston County Superior Court [in an earlier case involving Justice Sanders that was heard by Judge Hicks, *Sanders v. State*, Superior Court of Thurston County, Case No. 99-2-02349-5.[2]] At the conclusion of that proceeding, we can determine if your conduct was within the scope of employment and fully in conformity with the policies or rules governing judicial conduct . . . . Supp. CP 72-75.

The State expressed its concern that

> [t]o offer such representation in the absence of clear statutory authority subjects the state to additional and potentially inappropriate defense costs. Authorizing representation at the outset of an ethics or disciplinary matter presents a risk that public funds will be used to defend what may ultimately be found to be a violation of an ethics, or other possibly criminal, statute.[3]

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[2] In a prior case, Justice Sanders sued the State for reimbursement of the attorneys fees he incurred in defending against a CJC proceeding. *See In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998) (providing background of disciplinary charges). Unlike this case, however, Justice Sanders sued the State after he was exonerated by the CJC. The superior court ruled that Justice Sanders was entitled to reimbursement and the State elected not to appeal that order. Supp. CP 556-59.

In April 2004, a week after the CJC filed its charges, Justice Sanders sued the State, seeking a declaratory judgment that the public owed him a defense to the ethics charges by the CJC. CP 4-8. The State answered, denying Justice Sanders' allegations. CP 9-30.

The Superior Court Denies Cross-Motions for Summary Judgment. In June 2004, the parties filed cross-motions for summary judgment. CP 31-41; CP 101-14. By oral opinion and later by a written order, Thurston County Superior Court Judge Tabor found that issues of fact existed as to whether Justice Sanders had violated the Code of Judicial Conduct, and the nature of the violations, and denied both motions for summary judgment. RP (August 3, 2004) at 49-54; CP 167-69.

The superior court explained its view that that RCW 43.10.030 does not compel taxpayer-funded defense where a state officer or employee has engaged in malfeasance or misfeasance, reasoning:

> 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.

It further stated:

> I am not going to grant summary judgment here today to either side, and the reason is that I feel that the issue of whether or not there was misfeasance in this particular case

> is a factual issue that's going to have to be considered in another context.[4]

Justice Sanders sought discretionary review of the trial court's order in this Court under RAP 2.3(b). Supp. CP 637-40. The State agreed with the motion. This Court granted discretionary review on January 12, 2005, stating that

> [t]he application of RCW 43.10.030 and RCW 43.10.040, particularly its application to providing a defense at public expense during a pending proceeding, is a controlling question of law as to which a reasonable difference of opinion exists.[5]

The CJC Finds that Justice Sanders Violated the Code. On April 8, 2005, the CJC issued its decision, holding that Justice Sanders had violated Canons 1 and 2(A) of the Code of Judicial Conduct by his acts at the SCC.[6] A Corrected Amended Commission Decision was issued on

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[4] In its August 3, 2004 oral opinion, the court also explained:

> Whether or not a conversation was ex parte communication between a justice of the Supreme Court and people that had matters pending before it would depend upon the nature of the conversation. That's been set forth generally here, but as allegations, and not as facts. And those facts are going to have to be determined. There are arguments on both sides as to whether or not any occurrence was purposeful or willful. That will have to be determined.

RP at 52.

[5] Ruling Granting Review at 3.

[6] Canon 1 states:

> 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

May 27, 2005. The CJC concluded that Justice Sanders' actions "impaired the integrity and appearance of impartiality of the judiciary and, thus, gave rise to Canon violations." Supp. CP 233, ll. 5-6. It held that Justice Sanders' conduct

> 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. Supp. CP 234, ll. 17-18.

The CJC noted that the proceeding was "not about whether judges should visit correctional institutions." But

> [i]f a tour is sponsored or originated by prisoners, prison rights advocates or other non-judicial groups, judges must be cognizant that they have a responsibility to exercise reasonable judgment in such an activity and anticipate potential conflicts and notify counsel when appropriate. Supp. CP 234, ll. 23-28.

The CJC admonished Justice Sanders, and "encouraged" him "to exercise utmost caution in considering his involvement in matters

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> 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.

Canon 2(A) states:

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

concerning the issue of volitional control presented by sexual predators residing at the Special Commitment Center." Supp. CP 237-238.

The CJC held that "responses [from SCC residents] to [Justice Sanders'] general inquiry on the subject" of volitional control were not "sufficient to sustain a Canon 3(a)(4) violation."[7] However, in ruling that Justice Sanders had violated Canons 1 and 2A, the CJC cited to Justice Sanders' *ex parte* conduct in raising the subject of volitional control with residents. The CJC stated: "It is reasonable that lawyers handling appeals that involve 'volitional control' issues would have concerns about [Justice Sanders'] objectivity and impartiality based on this conduct." Supp. CP 233, ll. 24-26.

Justice Sanders Stays Review in this Court. Justice Sanders moved on May 4, 2005 to stay review in this action, representing to this Court that he sought the stay "to allow the trial court to apply the Commission's findings to [the trial court's summary judgment] ruling." Supp. CP 389. Over the State's objection, this Court granted Justice Sanders' motion to stay on May 19, 2005. Supp. CP 465.

Justice Sanders Appeals the CJC Decision and Commences Discovery. Justice Sanders, however, did not thereafter file a motion in

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[7] Opening Brief of Appellant at 10-11 (citing to Supp. CP 232).

the superior court "to allow the trial court to apply the Commission's findings." Instead, on June 27, 2005, Justice Sanders appealed the CJC's decision by filing a Notice of Contest in the Washington Supreme Court pursuant to Rule 3 of the Discipline Rules for Judges ("DRJ"). Supp. CP 242-55. Among the matters that Justice Sanders challenged in his Notice of Contest were determinations by the CJC that he did not act as a "reasonable judge" would do on an institutional visit, and that "there was misconduct." Supp. CP 242-55 at 9, ¶(g)(g); 10, ¶¶ (ll), (mm). Justice Sanders also used the stay he had received in this Court to embark on discovery against the State.

On July 21, the State objected to Justice Sanders' discovery requests, moving to quash a deposition notice and the other discovery requests.[8] At the hearing on the motion to quash, the superior court reiterated its previously-stated view that it could not resolve the issues in this case until final adjudication of the CJC proceeding. The court stated:

> I'm still back where I originally was in regard to there being a factual issue that I said had to be resolved by the Commission and that had to do with misfeasance. If, indeed, there is still an appeal, and I understand there is, about just how substantive any prohibitions that Justice Sanders has been found to have violated are, this Court is not going to be in any position to rule until that's resolved.

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[8] The State contended that the case involved only controlling questions of law and Justice Sanders was judicially estopped from seeking discovery because of his prior representations to this Court. *See* CP 4.

RP (July 29, 2005) at 6.

The superior court granted in part the State's Motion to Quash by denying Justice Sanders permission to seek discovery on issues related to communications with the media or his tour of the SCC. RP (July 29, 2005) at 14. Justice Sanders subsequently renewed his notice to conduct the depositions, and also served requests for production. Supp. CP 372-76; 377-84.

The Superior Court Stays the Superior Court Proceeding. On October 13, 2005, the State moved to stay the superior court case until the CJC appeal was decided. Supp. CP 385-98. Justice Sanders resisted the stay. Supp. CP 399-409.

The superior court granted the stay on November 4, reasoning as follows:

> I have on two, at least two prior occasions and perhaps more, and certainly I'm stating here today, that I believe that the ultimate decision by the Judicial Conduct Commission, and perhaps that's a misstatement, the ultimate decision about the Judicial Conduct Commission's decisions is going to determine this case. I said that from the very beginning that I believe there were factual issues whether or not misfeasance existed. In any event, I believe that is what ultimately is going to be back before this Court.
>
> * * *
>
> In any event, the purpose of granting a stay in the *King* [*v. Olympic Pipe Line Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000)] case, and while that was a criminal case, was

> judicial economy more than anything else, if you will, and economy of all efforts. This case is already convoluted enough as far as I'm concerned. RP (November 4, 2005) at 18-19.

Justice Sanders Again Seeks Review. On December 2, 2005, Justice Sanders sought review of the superior court's order granting the stay. Supp. CP 637-40. Justice Sanders subsequently moved to lift the existing stay on his prior appeal in this Court and to expand the appeal to encompass the superior court's order granting the stay.[9] RAP 5.3(h). On February 9, 2006, the Commissioner of this Court granted Justice Sanders' motion, lifted the stay, and extended the existing discretionary review to the question of the stay.[10]

IV. SUMMARY OF ARGUMENT

The superior court properly denied Justice Sanders' motion for summary judgment because the two statutes on which he relies do not authorize the State to provide a taxpayer-funded defense to an official charged by a disciplinary board with ethics violations, unless the official has been exonerated.[11]

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[9] December 27, 2005 Motion to Lift the Stay of Appeal and Expand Scope of Discretionary Review

[10] February 9, 2006 Ruling Lifting Stay and Extending Review.

[11] Justice Sanders repeatedly references the previous litigation in which Thurston County Superior Court Judge Hicks ordered the State to reimburse Justice Sanders' legal expenses in a prior lawsuit, as though this case presents the same issue. Justice Sanders

RCW 43.10.030 authorizes a taxpayer-funded defense prior to exoneration of a public official only where the underlying claims giving rise to the request for a defense are, in essence, against the government entity or office, as opposed to actions seeking to impose personal liability or sanctions on the individual office-holder for acts outside official duties. The prosecution of ethical violations, such as those brought against Justice Sanders by the CJC, is the quintessential example of a proceeding against the individual holding the office, as opposed to an action against the office itself, or the State. CJC proceedings are personal, not representative in nature, and would not attach to the individual's successor in office. They are not proceedings based on actions in the judge's "official capacity," but rather are based on acts in breach of the ethical duties of the office.[12]

Justice Sanders argues that because the Code of Judicial Conduct imposes duties on him as a judge, his acts in violation of these duties must be in his official capacity. This is pure sophistry. An act in violation of

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fails to explain that Judge Hicks' order was issued only *after Justice Sanders was exonerated of all charges*. The situation in the case at bar is completely different; at this point, after a full hearing before the CJC, Justice Sanders has been found by clear and convincing evidence to have violated the core Canons of the Code of Judicial Conduct.

[12] While Justice Sanders argues that the CJC and the superior court already have determined the "official capacity" question, at most they addressed only in general whether his visit to the Special Commitment Center ("SCC") was in his official capacity – not whether the conduct which was determined to have violated the ethical rules occurred in his official capacity.

the ethical duties of a judge is the antithesis of an act in a judge's official capacity.

If Justice Sanders' argument were accepted, the statutes on which he relies, RCW 43.10.030 and RCW 43.10.040, would authorize the Attorney General to provide a taxpayer-funded defense to every public officer who commits ethical violations while on the job, whether it be a violation of the Code of Judicial Conduct, the acceptance of a bribe, or other unethical conduct. Simply put, violating the core ethical duties of a public office can never be part of an officer's or employee's "official duties."

As its legislative history makes evident, RCW 43.10.040 does not independently provide a right to a publicly-funded defense. Rather, it mandates that if such a defense is otherwise allowed, the Attorney General has the exclusive authority to provide the defense.

These conclusions are entirely consistent with prior decisions of the Washington Supreme Court holding that RCW 43.10.030 affords the Attorney General discretion to decide whether to commence legal proceedings. *See, e.g., Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977). Indeed, the courts have recognized that the Attorney General has a paramount duty to the people of the State to avoid "assisting" in ethical breaches. *See State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash.

433, 440, 249 P. 996, 999 (1926) (Attorney General may not "sit supinely by and allow state officers to violate their duties and be recreant to their trusts."). Where the CJC found probable cause to commence disciplinary proceedings against Justice Sanders, and after a full evidentiary hearing determined that Justice Sanders violated the Code, the public interest requires denial of a taxpayer-funded defense unless Justice Sanders is exonerated in his appeal to the Washington Supreme Court.

This conclusion also is consistent with other Washington statutes relating to the defense of claims against public employees and officials, which vest discretion in the Attorney General to determine the appropriateness of a publicly-funded defense. For example, the statute governing proceedings against state officers and employees before the State Ethics Board authorizes the Attorney General to provide a defense only after (1) the Executive Ethics Board declines to commence a disciplinary proceeding, (2) an action nonetheless is pressed by a citizen, and (3) "the attorney general finds that the defendant's conduct complied with this chapter ['Ethics in Public Service,' RCW 42.52] and was within the scope of employment." RCW 42.52.460. Discretion also is vested in the Attorney General in civil actions for damages. Under RCW 4.92.060 and .070, before providing a defense, the Attorney General determines

whether an officer or employee sued for damages was acting in good faith and within the scope of official duties.

The superior court correctly denied Justice Sanders' motion for summary judgment because of disputed issues of material fact regarding his conduct at the SCC, *i.e.*, whether his conduct constituted "misfeasance."[13] In denying summary judgment to Justice Sanders, the trial court properly rejected Justice Sanders' argument that RCW 43.10.030 and .040 require a publicly-funded defense regardless of whether he is exonerated of ethical violations.

The insurance defense principles argued by Justice Sanders as supporting an alleged duty to defend are inapposite. An insurer's duty to defend arises by virtue of contractual agreement and the potential obligation of the insurer to indemnify the insured. Here, there is no contractual agreement and no potential State obligation to indemnify against Justice Sanders' ethical violations.

The superior court acted within its discretion in staying the superior court proceedings until the final resolution of the CJC proceeding. The superior court properly balanced the factors in *King v. Olympic Pipe Line Co.*, 104 Wn.2d 338, 16 P.3d 45 (2000). Until the final

determination of Justice Sanders' appeal of the CJC decision, continuation of the superior court proceedings – with burdensome, irrelevant discovery, and costly motion practice – would have been a waste of judicial resources and taxpayer money.

V. ARGUMENT

A. RCW 43.10.030 and .040 Do Not Require the State to Provide a Publicly-Funded Defense to Justice Sanders.

Neither RCW 43.10.030 nor 43.10.040 require the State to provide a taxpayer-funded defense to a public officer in a proceeding where the officer is charged with ethics violations unless and until the official is ultimately exonerated.[14] Following a full evidentiary hearing, the CJC determined that Justice Sanders violated the ethical standards required by the Code of Judicial Conduct. Justice Sanders' ethical breaches, and ethical breaches generally, occur in a public officer's individual capacity. Violating the Code of Judicial Conduct is not part of the "official duties" of a judge, nor within his or her "official capacity."

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[13] Although the State disagrees with the "willfulness" requirement that the trial court grafted onto the "misfeasance" standard, the trial court was nonetheless correct in finding genuine issues of material fact regarding Justice Sanders' "misfeasance."

[14] Justice Sanders cites to the Washington Constitution, article III, section 21, which provides that "The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Const. art. III, § 21. But "[t]he constitutional provision is not self-executing," and does not provide any right to representation beyond that afforded by the statutory scheme. *State v. Herrmann*, 89 Wn.2d 349, 352, 572 P.2d 713, 714 (1977).

1. RCW 43.10.030 authorizes the Attorney General to defend a public officer only for the performance of official duties. Violating the Code of Judicial Conduct is not part of the official duties of a judge.

RCW 43.10.030 entitles a public officer to a publicly-funded defense in proceedings against the public officer only when the conduct complained of occurred while he was "acting in his official capacity":

> The attorney general shall: . . . [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.

RCW 43.10.030(3) (emphasis added).

RCW 43.10.030 does not encompass proceedings brought against an officer in his personal capacity, even when the proceeding relates to acts taken by the individual while holding public office. The phrase "acting in" denotes the performance of the official duties of the position – not merely any acts by an official related to that position. *See, e.g., Matthews v. City of Atlantic City*, 481 A.2d 842, 845 (N.J. Sup. Ct. Law Div.), *aff'd*, 482 A.2d 530 (N.J. Sup. Ct. App. Div. 1984) (proceeding against individual acting in an official capacity is one in which affects the "office, functions and duties" of the position; "[i]f the allegations of the law suit itself do not involve the exercise of or the failure to exercise an official duty, the public official is not entitled to indemnification . . . ") (Citation omitted).

The United States Supreme Court case of *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985), illustrates the principle that an official's activities may be office-related, but nonetheless undertaken in his personal and not "official" capacity.[15] The Supreme Court explained that an official capacity proceeding "generally represents only another way of pleading an action against an entity of which an officer is an agent. *Id.* at 165 (emphasis added). An official capacity suit is, "in all respects other than name, to be treated as a suit against the entity." *Id.* at 166, 105 S. Ct. at 3105.

The Washington Supreme Court described an "official capacity" lawsuit consistently with *Graham* in *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 98, 829 P.2d 746 (1992). There, the Court described an "official capacity" lawsuit as follows:

> This is an "official capacity" lawsuit. In other words, appellant is suing only the County; the hearing examiner and individual county council members have been named defendants only in their official capacities as representatives of the County.

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[15] *Graham* was a civil rights action involving a warrantless raid on a house by local and state police seeking a murder suspect. The court dismissed the State of Kentucky from the case, but plaintiff sought to hold the state liable for its attorneys fees under 42 U.S.C. § 1988. The United States Supreme Court held that the state could not be required to pay fees because plaintiff had prevailed only against state and local officials who were sued in their personal, not their official capacities. The Court noted that personal-capacity suits sought to impose personal liability on an individual for actions taken under color of state law, while official-capacity lawsuits "generally represent only another way of pleading an action against an entity of which an officer is an agent." 473 U.S. at 165-66, 105 S. Ct. at 3105.

Numerous cases in various contexts confirm this meaning of an "official capacity" proceeding.[16]

The Washington Supreme Court illustrated the distinction between acts pursuant to official duties, and an officer's personal acts, in *Nelson v. Bartell*, 4 Wn.2d 174, 103 P.2d 30 (1940) (in driving to perform an official act, *i.e.*, serve a subpoena, sheriff was not engaged in an "official capacity"; injury caused by his negligence did not give rise to liability on the sheriff's bond which covered liability for damages due to acts in an officer's "official capacity").

RCW 43.10.030 reflects the basic principle that if a court proceeding is brought against an officer in the performance of his or her official duties, the proceeding is, in effect, against the government – not the individual officer – and thus a state-provided defense is appropriate.

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[16] *See, e.g., Babcock v. State*, 116 Wn.2d 596, 620-21, 809 P.2d 143, 156 (1991) ("Suits against individuals in their official capacity are treated like suits against entities and personal defenses do not apply to suits against entities.") (citing to *Kentucky v. Graham*, 473 U.S. 159 (1985)); *Waldron v. City of Snohomish*, 41 Wash. 566, 568, 83 P. 1106, 1107 (1906) ("The original defendants were sued in their official capacity, and the effect of any service and of any notice made upon them as such officials applied to and was binding upon their successors in office to the same extent as if they had continued in office. The successors assumed the offices held by their predecessors *cum onere*."); *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 291, 4 P.3d 808, 833 (2000) (Sanders, J., concurring) ("For example, 'the only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses."); *see also* Fed. R. Civ. P. 25(d) (public officer sued in the officer's "official capacity"); *Parsons v. Beebe*, 777 P.2d 1224, 1226 (Idaho Ct. App. 1989) (interpreting statute with language similar to RCW 43.10.030 and holding that

In contrast, an action by the CJC to enforce judicial ethics rules is an action against the individual judge charged with the violations, not against the State. A CJC action can never be a proceeding against a judge acting in his or her "official capacity," because acts violating the Code—which describes the ethical duties of a judge--cannot be part of the judge's official duties. A policy favoring public payment of defense costs to state officials makes sense when applied to protect judges from frivolous claims by unhappy litigants. It makes no sense at all when applied to defense of ethics charges by regulatory boards or commissions such as the CJC.

2. Neither the CJC nor the superior court ruled that Justice Sanders' ethical violations occurred in his "official capacity."

Justice Sanders' argument relies in large part on his incorrect assertion that both the CJC and the superior court already have ruled that the acts forming the basis for the CJC charges were "official capacity" acts for purposes of publicly-funded defense under RCW 43.10.030. In fact, neither tribunal has so ruled or even considered the question. The clear import of both decisions was that Justice Sanders' "visit" to the Special Commitment Center was within his official duties as a judge. Neither decision even suggests, let alone concludes, that violating the Code of

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because judges "were acting in their official capacities" in making judicial ruling, the Attorney General could properly defend case).

Judicial Conduct is an act in the official capacity of a judge. Ethical violations are the antithesis of an "official duty," and by definition cannot have been "official capacity" acts. Justice Sanders was not charged with violating the Code by visiting the SCC.[17] Rather, the basis for the CJC proceedings against him was his improper communication with SCC residents about issues pending before the Washington Supreme Court, and other interactions with the residents while on an otherwise proper visit.

The CJC's statement that Justice Sanders' "misconduct took place in the Justice's official capacity" does not suggest otherwise, when read in context. The CJC made that statement only in applying the mitigating and aggravating factors to determine the appropriate sanction for Justice Sanders' violations of the Code. One factor was: "Whether misconduct occurred in the Justice's official capacity or his private life." CJCRP 6(c). Supp. CP 236, ll. 6-7. It was in this context that the CJC held "the misconduct took place in the Justice's official capacity." Justice Sanders visited the SCC as a judge, not "in" his private life. The statement that "misconduct took place in the Justice's official capacity" simply means that his acts took place in the larger context of a visit that was undertaken as a judge, not a private individual. The CJC clearly did not consider,

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[17] The CJC explained that Justice Sanders was not being disciplined because of his visit: "This proceeding is not about whether judges should visit correctional institutions. The

rule, or imply that the ethical violations found were "official" acts.[18]

Likewise, the superior court stated only that "Justice Sanders was acting in his official capacity when he visited the special offender unit at McNeil Island," not that his ethical breaches were conducted within his official duties. CP 168 (emphasis added).

3. Conduct that violates the Code is not "official capacity" conduct.

Disciplinary proceedings against a judge are quintessentially personal capacity proceedings, not "official capacity" proceedings, since it can never be part of one's official duty to violate ethics rules. While a judge is subject to the CJC's authority as a consequence of his or her position, he or she is subject to CJC disciplinary sanctions as an individual."[19]

In fact, a majority of jurisdictions have concluded that a public entity has no obligation to defend judges or other public officers who are accused of ethical misconduct. *See, e.g., Hart v. County of Sagadahoc*, 609 A.2d 282 (Me. 1992) (judge not entitled to attorneys fees in defending

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Commission strongly encourages judges to visit correctional institutions." Supp. CP 234.

[18] To the contrary, in the CJC proceeding, Justice Sanders advocated a position similar to the one he argues in his appeal by claiming that he should not be disciplined for visiting a correctional institution. The CJC rejected the contention because the proceeding was not about whether judges should visit correctional institutions. *See* Supp. CP 234.

ethics charges under the Code of Judicial Conduct even though judge was exonerated); *Board of Chosen Freeholders of the County of Burlington v. Conda*, 396 A.2d 613 (N.J. Super. Ct. Law Div. 1978) (judge not entitled to reimbursement of legal expenses incurred in defending disciplinary proceedings); *Chavez v. City of Tampa*, 560 So.2d 1214 (Fla. Dist. Ct. App. 1990) (Florida indemnification statute did not entitle city official to reimbursement of her attorneys fees in successfully defending charges of unethical conduct); *City of Tualatin v. City-County Ins. Servs. Trust,* 878 P.2d 1139 (Or. Ct. App. 1994) (Oregon indemnification statute regarding public body's obligation to defend tort claims against mayor did not apply to ethics charges, and thus insurer was not obligated to reimburse City); Kimberly J. Winbush, Annotation, *Payment of Attorneys' Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body*, 47 A.L.R. 5th 553, at § 2(a) (1997) (most officials charged with ethics violations have not been reimbursed for their attorneys' fees).

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[19] It is a judge's individual conduct that subjects him or her to a disciplinary proceeding. *See, e.g., In re Disciplinary Proceeding Against Anderson*, 138 Wn.2d 830, 851, 981 P.2d 426, 436 (1999) (Code implicates both judicial and extrajudicial behavior).

As the New Jersey Court explained in denying a judge's claim for reimbursement of his legal expenses in defending a disciplinary proceeding:

> No benefit accrued to the public from the defendant's contumacious conduct. . . . Government's paramount function is the enforcement of the laws and protection of the public interests. It should not be required to protect those who have been charged with violation of those laws or with conduct prejudicial to those interests.

Board of Chosen Freeholders of the County of Burlington v. Conda, 396 A.2d 613, 619 (N.J. Super. Ct. Law Div. 1978).

4. RCW 43.10.040 does not grant an independent right to representation.

Justice Sanders argues that RCW 43.10.040 extends a duty by the Attorney General to defend public officers in administrative proceedings. But that statute specifies only that if a public officer is otherwise entitled to a defense, the Attorney General shall be the designated representative.[20] RCW 43.10.040 was one section of a more general statute adopted for the express purpose of "providing for the legal representation of the State of Washington and departments, commissions, boards, agencies, and administrative tribunals thereof . . ," *i.e.*, suits against governmental

[20] At best, the statute, either on its face or as applied to the facts of this case, is fairly susceptible to different, reasonable interpretations, and the Court may consider legislative history to resolve the ambiguity. *Stahl v. Delicor of Puget Sound, Inc.*, 109 Wn. App. 98,

offices, not individuals facing ethics charges. Laws of 1941, ch. 50.[21]

The intent of the legislature in enacting RCW 43.10.040 was not to grant public officials a publicly-funded defense in administrative proceedings, but "to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General." *Herrmann*, 89 Wn.2d at 354, 572 P.2d at 715. The Attorney General's office sponsored the statute,[22] presumably to resolve any ambiguity about the requirement that state agencies and boards use the Attorney General rather than retaining private counsel.[23] The statute was never intended to provide an independent right of representation to public employees or officials.[24]

103, 34 P.3d 259, 262 (2001), *rev'd on other grounds*, 148 Wn.2d 876, 64 P.3d 10 (2003).

[21] Sections 2 and 4 of the session law were codified at RCW 43.10.067. That statute specifies that no state officer, agency, board or commission shall employ any attorney, other than the attorney general, to perform any of the duties specified to be performed by the Attorney General. *See* Laws of 1941, ch. 50, §§ 2, 4; RCW 43.10.067.

[22] *See, e.g.,* 1941 Senate Journal at 99 (bill introduced by "Departmental Request").

[23] For instance, until passage of RCW 41.10.040, cases had arisen over the issue of whether state agencies, boards and commissions could retain private counsel. *See, e.g., State ex rel. State Bd. of Med. Exam'rs v. Clausen*, 84 Wash. 279, 146 P. 630 (1915); *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935). The Attorney General issued an opinion, contemporaneous with the statute's passage, concluding that RCW 41.10.040 resolved the issue of whether private counsel could be employed. *See* 1941 Wash. Att'y Gen. 13 (1941) (by virtue of RCW 41.10.040, Attorney General becomes legal adviser to the Washington State Apple Advertising Commission).

[24] An Attorney General opinion explained, in interpreting RCW 43.10.067:

> [T[he statute only prohibits the employment of lawyers to perform those functions or duties ". . . specified by law to be performed by the

B. The Attorney General Has Discretion to Determine Whether and When to Provide a Publicly-Funded Defense.

The Attorney General has discretion to determine whether a publicly-funded defense is consistent with its statutory mandate and the public interest. In a disciplinary proceeding where ethical misconduct is charged against an individual state official, and the public interest is at stake, the Attorney General is authorized to decline to provide a defense unless the individual is exonerated.

1. The Supreme Court has interpreted RCW 43.10.030 as granting the Attorney General discretion.

The Washington Supreme Court has recognized the discretionary nature of the Attorney General's obligations under RCW 43.10.030. In *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977),[25] the Court held that although the statute declares that the Attorney General "shall" perform certain duties under .030(2), that directive actually requires the Attorney General to exercise its discretion:

> attorney general, . . ." Thus, it is not a violation of the statute for a state agency to employ a person who happens to be a lawyer so long as that person is not employed to act as attorney for the agency or to represent it in court proceedings or the like.

23 Wash. Att'y Gen. (1984).

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

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

Id. at 761-62, 567 P.2d at 191. The "shall" language precedes and applies to all the subsections of the statute, including .030(3) on which Justice Sanders relies. The Supreme Court already has decided that the Attorney General has discretion under the statute as a whole.

The Attorney General's exercise of discretion under RCW 43.10.030 is particularly important in view of the Attorney General's paramount duty to the State's citizens to avoid "assisting" officials who have violated state law or been "recreant to their trusts." *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 440, 249 P. 996 (1926). In *Dunbar,* the respondent alleged that the predecessor statute to RCW 43.10.030 compelled the Attorney General to defend all actions against any state officer, precluding the Attorney General from maintaining an action against the respondent. The Supreme Court rejected respondent's argument:

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

(emphasis added).

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

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

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

Id., 249 P.2d at 999 (emphasis added); *see Reiter v. Wallgren*, 28 Wn.2d 872, 880, 184 P.2d 571, 575 (1947) ("Under [former statutes "where it is made the duty of the Attorney General to defend all actions against any state officer"], it is both possible and proper for the attorney general to defend such state officers, but it still remains his paramount duty to protect the interests of the people of the state."); *see also State v. Gattavara*, 182 Wash. 325, 329, 47 P.2d 18, 19 (1935) (stating, regarding predecessor statute to RCW 43.10.030, that "the Attorney General might, in the

absence of express legislative restriction to the contrary, exercise all such power and authority as the public interest may, from time to time, require").[26]

In Justice Sanders' case, the Attorney General is entitled to use his discretion to decline a defense, pending ultimate resolution of the CJC's disciplinary proceedings against Justice Sanders. The Code of Judicial Conduct, and particularly Canons 1 and 2(A) that the CJC held Justice Sanders violated, are fundamental to an impartial and independent judiciary, and are "indispensable to justice in our society."[27] The official comments to Canons 1 and 2 explain:

> 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.[28]

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[26] *See also State ex rel. Hartley v. Clausen*, 146 Wash. 588, 593, 264 P.2d 403 (1928) (interpreting Const. Art. III, § 21 to confer discretion on the Attorney General to act "upon his own initiative or at the request of the governor . . . ").

[27] *See In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 187-88, 955 P.2d 369, 374 (1998) ("The interest embodied in Canon 1 of the Code of Judicial Conduct calls upon judges to preserve the integrity and impartiality of the judiciary by establishing, maintaining, and enforcing high standards of judicial conduct. Without question, this interest is compelling."). The *Sanders* decision cited to *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (Stewart, J., concurring) ("There could hardly be a higher governmental interest than a State's interest in the quality of its judiciary.").

[28] CJC Canon 1 cmt.

> 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.[29]

When a judicial officer is charged with violating those core Canons, the Attorney General's paramount duty is to protect the interests of the people of the State and to avoid "assisting" the official charged with the ethical breaches. The Attorney General at least has the discretion to determine whether a publicly-funded defense is appropriate at the outset of ethics proceedings.

2. The discretion that RCW 43.10.030 affords the Attorney General is consistent with other similar state statutes.

The Legislature's grant of discretion to the Attorney General under RCW 43.10.030, in situations such as the present, is consistent with the discretion afforded the Attorney General under other statutes addressing the defense of public officials.

Under the statute governing proceedings before the State Ethics Board, which applies to state officials other than judges, the Attorney General may represent the defendant only in an action brought by a citizen, after the Executive Ethics Board declines to commence such proceedings, and after "the attorney general finds that the defendant's conduct complied with this chapter ['Ethics in Public Service,' RCW

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[29] CJC Canon 2 cmt.

42.52] and was within the scope of employment." RCW 42.52.460.

Similarly, in an action or proceeding for *damages* (as opposed to a proceeding charging ethical violations) against a state officer, the legislature has determined that the Attorney General may authorize defense if the Attorney General finds that an officer's acts or omissions were "purported to be in good faith" and "within the scope of that person's official duties." RCW 4.92.060 and .070. The legislature made the policy decision that a taxpayer-funded defense would be afforded state officials who were sued for *damages*. It did not make that policy choice with respect to officers and employees charged in disciplinary proceedings with violating ethical codes of conduct. As the cases discussed above recognize, sound public policy supports such a legislative choice.

Likewise, where a state officer or employee is charged with a criminal offense arising out of the performance of an official act, in order to provide a defense the Attorney General (and the agency that employed the officer or employee) must conclude that the officer's or employee's conduct was "fully 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. If "official capacity" was as broad as Justice Sanders urges, there would be no need

for statutes such as RCW 4.92.060 and .070, 42.52.460, and RCW 10.01.150.

In the most recent decision relating to these issues, based on RCW 4.96.041,[30] the Court of Appeals upheld a county prosecutor's discretion to deny a judge's request for reimbursement of attorneys fees incurred in defending a CJC proceeding, where it was determined that the judge's conduct was "not in good faith performed within the scope of his judicial duties." *Colby v. Yakima County*, ___ Wn. App. ___, ___ P.3d ___ (2006). The appellate court reasoned: "It is not the court's function to second guess the prosecuting attorney's determination following such a delegation of legislative authority." *Id.* at ___, ____ P.3d at ___. The *Colby* decision reflects the endorsement of an analogous process, in which discretion is afforded the Attorney General to determine whether a defense is appropriate.

3. Public policy favors the Attorney General discretion to determine whether to provide a publicly-funded defense.

Justice Sanders does not, and cannot, cite to any case or legislative finding favoring a public policy of providing a taxpayer-funded defense in

[30] In that statute, the legislature authorized local governmental entities to adopt a procedure to authorize the defense of an officer an action or proceeding.

circumstances similar to his own.[31] Nor may the Court conclude that such a policy exists under the principles of statutory construction.[32] The only Washington cases and statutes analogous to Justice Sanders' situation reflect a contrary policy, *i.e.,* that the Attorney General has a duty to not defend public officers charged with unethical or unlawful conduct, at least until they have been exonerated. *See Berge,* 88 Wn.2d at 761-62; *Dunbar,* 140 Wash. at 440. The policy embodied by these cases is to encourage compliance with ethical standards by public officials, especially judges.[33]

While Justice Sanders cites a purported "public policy" of defending public officers to "[p]rotect state officials from liability . . . ,"

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[31] Justice Sanders' "Cf." citation to *Musso-Escude v. Edwards*, 101 Wn. App. 560, 4 P.3d 151 (2000), is unpersuasive. That case explains the public policy underlying "common law immunity" from actions for *damages*. There is no common law immunity from disciplinary proceedings. The policy considerations in the two arenas are decidedly different. As recognized by cases throughout this brief, no sound public policy is served by shielding officers and employees from disciplinary actions based on violation of ethics codes.

[32] The Court of Appeals has cautioned:

> Public *policy,* as a rule, is recognized by the courts of this state when the Legislature has acted, and not before. Therefore, the courts are not free, under the guise of statutory construction, to expand the requirements of law beyond those that the Legislature has seen fit to require.

Sayan v. United Servs. Auto. Ass'n, 43 Wn. App. 148, 159, 716 P.2d 895, 901 (1986).

[33] *In re Disciplinary Proceeding Against Kaiser*, 111 Wn.2d 275, 288, 759 P.2d 392, 399 (1988) ("The State's interest in protecting the good reputation of the judiciary is compelling, as every court which considers the issue has recognized."); *Board of Chosen Freeholders*, 396 A.2d at 619 ("[I]t is to the public benefit to have the integrity of court orders upheld . . . It should not be required to protect those who have been charged with violation of those laws or with conduct prejudicial to those interests.").

the New York and Massachusetts cases on which he relies involved situations where damages were sought.[34] Had disciplinary proceedings by state regulatory boards been involved, the results in both cases no doubt would have been different.[35] Furthermore, Justice Sanders relies on a New York lower court opinion,[36] but a New York appellate court has ruled to the contrary that, as a matter of policy, public officers should expect to defend even actions for damages at their own expense, absent a legislative policy choice to the contrary. *Corning v. Village of Laurel Hollow*, 398 N.E.2d 537, 540 (N.Y. Ct. App. 1979) (citations omitted) (quoting *Matter of Chapman v. City of N.Y.*, 168 N.Y. 80, 85-86). The suggestion that personal responsibility for complying with ethics codes will lead to a dearth of qualified public officers and employees is not well-founded.

C. The Attorney General is not Required to Reimburse Justice Sanders for his Fees Unless and Until Justice Sanders is Exonerated.

At most, a duty to reimburse Justice Sanders for his attorneys fees

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[34] *See Filippone v. Mayor of Newton*, 467 N.E.2d 182, 187 (Mass. 1984) (indemnification warranted because of risk of judgment in a civil rights or intentional tort action); *Mathis v. State of N.Y.*, 531 N.Y.S.2d 680 (N.Y. Gen. Term 1988) (purpose of indemnification statute was to avoid financial ruin as a consequence of a substantial judgment).

[35] New York's indemnity statute bars the state from defending public officers involved in state disciplinary proceedings *See* N.Y. PUB. OFF. § 17(2)(a) ("This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or on behalf of the state."). Likewise, Massachusetts only authorizes the indemnification of public employees for claims arising out of intentional torts or civil rights violations. MASS. GEN. LAWS ch. 258, § 9 (2006).

would exist only after he is exonerated of the disciplinary charges raised against him.[37] Those courts that have approved of the payment of public officials' defense costs (almost exclusively for non-disciplinary proceedings) have ordinarily done so only when the public official has successfully defended against the charges raised against him or her. Under such circumstances, there may be a valid public purpose for reimbursing defense costs.

Cases involving post-exoneration reimbursement were summarized in *Wright v. Danville*, 675 N.E.2d 110 (Ill. 1996), where the court rejected an attempt by several city commissioners to obtain reimbursement for their attorneys fees after they were convicted of a crime relating to conflicts of interest:

> Although plaintiffs are correct in their assertion that courts in some jurisdictions have determined that defending a public official from criminal charges may be a proper public purpose, it is generally held in these jurisdictions that a valid public purpose exists only when the authority of the municipality is limited to the reimbursement of legal expenses incurred in a successful defense.

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[36] *Mathis v. State of N.Y.*, 531 N.Y.S.2d 680 (N.Y. Gen. Term 1988).

[37] Allowing reimbursement only in the event that Justice Sanders is exonerated is consistent with Judge Hick's ruling in the prior matter in which Justice Sanders sought reimbursement for his attorneys in defending against a CJC proceeding. *See* Supp. CP 560-70.

Wright, 675 N.E.2d at 116.[38] The court explained that indemnifying a public official for his or her attorneys fees when the officer has unsuccessfully defended against the allegation would thwart the public's interest:

> [H]olding public officials personally liable for the expenses incurred in unsuccessfully defending charges of their criminal misconduct in office tends to protect the public and to secure honest and faithful service by such servants. Indeed, allowing expenditure of public funds for such use would encourage a disregard of duty and place a premium upon negligent or refusal of public officials to perform the duties imposed upon them by law.

Id. Although *Wright* arose in the context of criminal charges, its reasoning that no public purpose is served in reimbursing legal defense costs except upon exoneration, applies equally to disciplinary actions charging violation of ethics codes.

D. The Superior Court Properly Denied Summary Judgment to Justice Sanders.

The superior court denied Justice Sanders' motion for summary

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[38] The *Wright* court cited the following cases: *Ellison v. Reid*, 397 So.2d 352, 354 (Fla. Dist. Ct. App. 1981) (auditor entitled to reimbursement of attorneys fees after he successfully defended against ethics charges); *Lomelo v. City of Sunrise*, 423 So.2d 974, 976-77 (Fla. Dist. Ct. App. App. 1982); *Snowden v. Anne Arundel County*, 456 A.2d 380, 385 (Md. 1983) (indemnity ordinance served public purpose primarily because it limited reimbursement to those public officials who had successfully defended themselves against criminal charges); *Bowens v. City of Pontiac*, 419 N.W.2d 24, 26 (Mich. Ct. App. 1988) (Shepherd, J., concurring); *Sonnenberg v. Farmington Township*, 197 N.W.2d 853, 854 (Mich. Ct. App. 1972); *Kroschel v. City of Afton*, 512 N.W.2d 351, 355 (Minn. Ct. App.), *rev'd*, 524 N.W.2d 719 (Minn. 1994); *Valerius v. City of Newark*, 423 A.2d 988, 991-92 (N.J. 1980); *Beckett v. Board of Supervisors*, 363 S.E.2d 918, 921 n.7 (Va. 1988).

judgment based on its view that, for an officer to act in his or her "official capacity" for purposes of RCW 43.10.030, the officer must not have committed misfeasance or malfeasance in the performance of his or her duties. The superior court concluded that whether Justice Sanders committed misfeasance could not be determined until Justice Sanders' appeal from the CJC proceedings was final. Accordingly, the trial court denied summary judgment to Justice Sanders. CP 167-69.

For the reasons discussed above, the State respectfully submits that the superior court's limitation on defense at taxpayer expense in disciplinary proceedings for violation of ethics codes is too narrow, and that the law does not authorize public payment for Justice Sanders' defense in disciplinary proceedings commenced by the CJC unless and until he is exonerated.

Moreover, notwithstanding the superior court's interlocutory ruling,[39] no finding of intentionality or willfulness is required for misfeasance.[40] "Misfeasance" simply involves "wrongful conduct that

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[39] The superior court's written order mistakenly grafts a "willfulness" requirement onto the definition of "misfeasance." Judge Tabor addressed willfulness in his oral ruling in the context of *In re Recall of Evan Kast*, 144 Wn.2d 807, 31 P.3d 677 (2001). But the "willfulness" standard described in *Kast* was not part of the required showing for "misfeasance," but rather was applied in determining a violation of the oath of office – which is not at issue here.

[40] Even if misfeasance required willfulness, Judge Sanders' conduct exemplifies such a state of mind. To demonstrate "willfulness," a party must prove more than carelessness

affects, interrupts, or interferes with the performance of an official duty," or "performance of a duty in an improper manner." *See* RCW 29.82.010(1); BLACK'S LAW DICTIONARY 1000 (6th ed. 1990); *In the Matter of Recall Charges Against Robin Feetham*, 149 Wn.2d 860, 72 P.3d 741 (2003) (mayor engaged in misfeasance or malfeasance by affecting, interrupting, or interfering with the performance of an official duty, when he instructed the two building officials to not enforce building codes.)

Even if willfulness were required for misfeasance, willfulness does not require proof of intent to violate the Code, but simply intent to perform the acts that were ultimately determined to breach the ethics rules. It is well-settled that a lawyer need not know that his conduct violates the codes of professional responsibility in order to be disciplined. *See In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 416, 98 P.3d 477, 488 (2004) ("[C]onsciousness that particular conduct violates the RPCs is not a prerequisite for a finding of knowledge."); *Office of Disciplinary Counsel v. AU*, 113 P.3d 203, 216 (Haw. 2005).

Justice Sanders' conduct, including discussions with SCC residents

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or negligence. *See, e.g., Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998) (in a case regarding "willful" withholding of wages, court defines "willful" as "volitional" or the opposite of "carelessness"); *Carlson v. Lake Chelan Cmty.*

who had cases pending before the Supreme Court about a precise issue presented in their cases, interfered with his own performance of a duty, and constituted performance of duties in an improper manner. This is shown by his need to subsequently recuse himself from the *Thorell* case because of those contacts.[41]

The CJC rulings confirm this conclusion. Supp. CP 197-238. The CJC found by "clear cogent and convincing evidence" that Justice Sanders violated Canons 1 and 2(A). Supp. CP 233. The CJC said:

> Judges are expected to exercise prudent judgment. In this case, the record is replete with evidence where the Respondent failed to meet that expectation. Those lapses have impaired the integrity and appearance of impartiality of the judiciary and, thus, give rise to the Canon violations. Supp. CP 233, ll. 2-6 (emphasis added).

The CJC then noted multiple examples to illustrate its conclusion, including Justice Sanders' decision to proceed with his visit to the SCC without inquiring about the people with whom he would meet, and his *ex parte* communications about contested issues with residents whose cases were then pending before the Supreme Court. Supp. CP 233, ll. 14-20; Supp. CP 228, ll. 18-20; ll. 20 to 229, l. 4. Justice Sanders had been

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Hosp., 116 Wn. App. 718, 737, 75 P.3d 533 (2003) (defining "willful" as "without reasonable excuse").

[41] Indeed, the CJC advised Justice Sanders "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." Supp. CP 237-38.

warned by his colleagues on the bench of the potential conflicts, and made the visit after other Justices (who also originally were to visit), reconsidered and declined to attend. Supp. CP 228, l. 17 to 229, l. 8.

E. Washington Insurance Law on an Insurer's Duty to Defend is Inapposite.

Insurance coverage principles are not relevant to this case. The insurance "duty to defend" is predicated on a contractual obligation of the insurer, and the potential that the insurer may owe a duty to indemnify if a judgment is entered against the insured. THOMAS V. HARRIS, WASHINGTON INSURANCE LAW 11-1, at § 11.1 (2nd ed. 2006) (duty to defend "exist[s] solely because an insurer has agreed to perform" under contract); *Viking Ins. Co. v. Hill*, 57 Wn. App. 341, 346, 787 P.2d 1385, 1388 (1990) (insurer's duty to defend based on the risk that the insurer would be liable for indemnification of its insured). The State could never have a duty to indemnify, or bear responsibility, for an official's ethical violations. When, as here, no indemnity obligation exists,[42] and the State has assumed no responsibility for Justice Sanders' conduct at the SCC, no analogous "duty to defend" arises.

The principal case relied upon by Justice Sanders, *Frontier Ins.*

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[42] Even where there is a contractual indemnity right, it is common for the indemnitee to enter into an "undertaking" by which he or she agrees to repay the amounts advanced if a non-indemnified claim (such as an intentional fraud) is proven.

Co. v. State of New York, 662 N.E.2d 251 (N.Y. 1995), is easily distinguishable. It involved tort claims, not disciplinary proceedings. There, the State of New York denied the defense requests of two doctors sued for allegedly committing medical malpractice. Had the proceeding been a disciplinary proceeding, the statute at issue would have specifically barred the Attorney General from providing a defense. N.Y. PUB. OFF. § 17(2)(a) ("This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or on behalf of the state."). The same statute involved in *Frontier* has routinely been interpreted to prohibit the defense or indemnification of employees in disciplinary proceedings.[43]

The New York statute at issue in *Frontier* also was broader than RCW 43.10.030, making the insurance analogy more appropriate. In contrast to RCW 43.10.030, section 17(2)(a) of the "Public Officers Law" required a defense when conduct was "alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties . . ." N.Y. PUB. OFF. § 17(2)(a) (2005) (emphasis added). RCW 43.10.030 does not contain any parallel language, and

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[43] *See* 2002-4 N.Y. Att'y Gen. (2002) (provisions of N.Y. PUB. OFF. § 17 do not authorize reimbursement to employee for legal fees incurred by hiring private attorney to respond to complaint filed with disciplinary committee); *see also* 93-23 N.Y. Att'y Gen. (1993) (interpreting similar statute [N.Y. PUB. OFF. § 18] and concluding that it does not authorize reimbursement of employee's defense costs in administrative proceeding before local board of ethics).

requires that the state official actually be acting in his or her official capacity.

An Oregon case illustrates that legal principles regarding an insurer's duty to defend do not necessarily dictate a government's duty to defend a public official in an ethics proceeding. In *City of Tualatin v. City-County Ins. Servs. Trust,* 878 P.2d 1139 (Or. Ct. App. 1994), an ethics commission accused the Mayor of Tualatin of having an alleged conflict of interest in a land use matter. The city paid for the mayor's defense and tendered a claim to the defendant-insurer, which had agreed to indemnify the city to the extent the City had a defense obligation under the Oregon statutes. The insurer later refused to reimburse the city, the city sued, and the trial court granted summary judgment to the insurer. In affirming dismissal of the claim, the appellate court held that the duty to defend applied only to tort claims. It also rejected the city's argument that a defense of ethics charges was required under a statute, ORS 30.287(1), that provided that an official could request a defense in an action "based in fact upon an alleged act or omission in the performance of duty":

> [The city] also points out that interpreting the language in ORS 30.287 as extending the public body's duty to defend is not unusual: In many insurance contracts, the insurer's duty to defend is broader than its duty to indemnify the insured.
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> ***
>
> Read in context, the disputed language in ORS 30.287(1)

> does not extend the duty to defend. . . . As discussed above, the ethics complaint is not a tort claim or demand that required City's defense under OTCA. Thus, [the defendant] was not required to reimburse City for the cost of the mayor's defense under the parties' agreement. The trial court did not err in granting summary judgment to [the defendant].[44]

In sum, insurance principles do not apply to this action.

F. The Superior Court Did Not Abuse its Discretion in Staying the Superior Court Action.

The trial court did not abuse its discretion in staying this action pending final resolution of Justice Sanders' appeal from the CJC proceeding. According to the Court of Appeals,

> [t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

King v. Olympic Pipe Line Co., 104 Wn. App. 338, 350, 16 P.3d 45, 51 (2000). An "abuse of discretion" can be established only if the superior court's ruling was based on untenable grounds or stated untenable reasons. *See Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554, 559 (1990).

The superior court in this case had sound reasons for granting a stay, based on the *King* factors and the fact that the defense cost issue

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[44] *Id.* at 1142-43. The Oregon Supreme Court affirmed the Court of Appeals but did not specifically address the insurance analogy in assessing the defendant's duty to defend.

could not be determined until Justice Sanders' appeal of the CJC's ruling was finally resolved. The superior court's oral opinion reflected a balancing of the parties' and the public's interests. The court properly concluded that, as in *King,* judicial economy and "economy of all efforts" required a stay. RP (November 4, 2005) at 19. The public interest also militates in favor of a stay. The public interest in assuring that officials who have violated ethics rules are not "assisted" in their wrongdoing by a publicly-funded defense, is best served by staying the underlying matter until the Supreme Court decision on the CJC appeal.[45] *See Dunbar*, 140 Wash. at 440, 249 P. at 299.

Justice Sanders' argument that the superior court "incorrectly relied on *King*" because neither a parallel criminal case nor Fifth Amendment right is involved here, is not well-taken.[46] The Court of Appeals in *King* expressly stated that its multi-factor test would have "general application to request for stays in the context of parallel

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See City of Tualatin v. City-County Ins. Servs. Trust, 894 P.2d 1158 (Or. 1995).

[45] The State's briefing on the stay motion contains additional discussion of the *King* factors. *See* Supp. CP 385-98.

[46] In fact, disciplinary proceedings against judges have been analogized to criminal proceedings. *See In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 256, 970 P.2d 731, 746 (1999) (Sanders, J., dissenting) ("Such a high standard of proof [in a CJC proceeding] is required because professional disciplinary proceedings are quasicriminal in nature and the judge's professional reputation is at stake.").

proceedings."[47] *Id.* at 349. Moreover, Justice Sanders offers no criteria or standard contrary to *King*.

G. Justice Sanders' Demand for his Attorneys Fees in Prosecuting this Action is Unjustified.

"Attorney fees may be recovered only when authorized by a private agreement of the parties, a statute, or a recognized ground of equity." *Pennsylvania Life Ins. Co. v. Employment Sec. Dep't*, 97 Wn.2d 412, 413, 645 P.2d 693, 694 (1982) (emphasis added). Justice Sanders' request for attorneys fees incurred in seeking to compel taxpayer-funded defense of the CJC proceeding falls under none of these categories.[48]

Justice Sanders' entire theory for recovering his attorneys fees in this action rests on the argument that his statutory claim is the equivalent of an insurance claim and thus *Olympic S.S. Co. Inc. v. Centennial Ins.*

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[47] In the *King* case, the trial court stayed discovery in a civil case where parallel criminal and civil cases were proceeding. The Court of Appeals, however, expressly "intend[ed] [its] discussion to have general application to requests for stays in the context of parallel proceedings." 104 Wn. App. at 349. The situation in this case, where the two matters are closely interrelated and the determinations of the Supreme Court could resolve the issues in the lower court, compels a stay even more strongly than the circumstances in *King*.

[48] Justice Sanders does not claim that a private agreement or recognized ground in equity exists that would otherwise entitle him to an award of fees. Nor does Justice Sanders claim that successful prosecution of a declaratory action under either RCW 43.10.030 or RCW 43.10.040 would entitle him to attorneys fees. *See, e.g., Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 541, 585 P.2d 71 (1978) (court lacks power under declaratory judgment act to award attorneys fees other than statutory attorneys fees).

Co., 117 Wn.2d 37, 811 P.2d 673 (1991), applies analogously.[49] But *Olympic S.S.* is a "narrow exception" to the American rule, applicable only where "specific facts and circumstances warrant." *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896, 898 (1994). The Supreme Court held that an award of attorneys fees was appropriate in *Olympic S.S.* because an insured, by affirmatively acquiring a contract of insurance, "seeks protection from expenses arising from litigation, not vexatious, time-consuming, expensive litigation with his insurer." *Olympic S.S.*, 117 Wn.2d at 52. That rationale has no application in the case at bar. The State is not an insurer; there is no contractual undertaking in this case. The State is unaware of a single case in which a Washington court has applied *Olympic* in a non-insurance matter, let alone a matter involving the defense of a disciplinary proceeding, and Justice Sanders has cited to none.

Even courts that have concluded a public officer is entitled to reimbursement or indemnification ordinarily bar that officer from recovery of the attorneys fees incurred in successfully pursuing the claim for reimbursement. *See, e.g., Thornber v. City of Fort Walton Beach*, 568 So.2d 914, 919-20 (Fla. 1990) (city-council members entitled to attorneys'

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[49] Even if the analogy was appropriate, Justice Sanders would not be entitled to his attorneys fees under *Olympic S.S.* if he ultimately does not prevail in this action. *See*

fees incurred in enjoining a recall petition and in defending a federal civil-rights suit, but not for those attorney costs incurred in obtaining the fee award); *Van Horn v. City of Trenton*, 404 A.2d 615, 620 (N.J. 1979) (statute under which the officer obtained reimbursement for the underlying suit did not authorize a fee award for reimbursement litigation); *Errington v Mansfield Township Bd. of Educ.*, 241 A.2d 271, 275 (N.J. Super. Ct. App. Div. 1968) (school board members who successfully obtained reimbursement for attorneys' fees incurred in defending a libel action were not entitled to reimbursement for their legal costs spent in the fee litigation); *see also Corning*, 398 N.E.2d at 547 (Meyer, J., dissenting) (even if officials otherwise were entitled to reimbursement of fees, they were not entitled to payment of fees for the suit to collect those reimbursable fees).

Because there is no statutory authority or recognized ground in equity to entitle him to an award, Justice Sanders should be denied his attorneys fees in this case even if he ultimately is successful.

V. CONCLUSION

For the above stated reasons, the Court of Appeals should deny Justice Sanders' discretionary appeal and rule that neither RCW 43.10.030 nor RCW 43.10.040 require the State to provide Justice Sanders a

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Holly Mt. Res., Ltd. v. Westport Ins., 130 Wn. App. 635, 652, 104 P.3d 725, 734 (2005).

publicly-funded defense for the CJC proceedings. The Court of Appeals also should affirm the superior court's granting of the State's motion to stay, and deny any award of fees.

DATED this 7th day of July, 2006.

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34130-1-II
32520-9-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HONORABLE RICHARD B. SANDERS,

Plaintiff/Petitioner,

vs.

STATE OF WASHINGTON,

Defendant/Respondent.

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AFFIDAVIT OF SERVICE

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ORIGINAL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Susie Clifford, being first duly sworn, upon oath deposes and says:

1. That I am over the age of eighteen years, not a party hereto and am competent to testify to the facts set forth herein.

2. That on July 7, 2006, I caused a copy of the **BRIEF OF RESPONDENT STATE OF WASHINGTON,** to be served on counsel of record list below by messenger delivery.

Paul Lawrence
Matthew Segal
Preston Gates & Ellis
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

Susie Clifford
SUSIE CLIFFORD

SUBSCRIBED AND SWORN TO this 7th day of July, 2006.

Leslie A. Rothbaum
NOTARY PUBLIC in and for the State of Washington, residing at Bainbridge Isl.
My commission expires 7/15/10