

## **QUESTIONS PRESENTED**

1. Is a judge's right to due process violated when he is disciplined based on a vague standard of the "appearance of impropriety," even after he is exonerated of any actual impropriety or violation of specific provisions of the Code of Judicial Conduct?

2. Are Canons 1 and 2A of the Washington Code of Judicial Conduct (the "CJC") unconstitutionally void for vagueness?

3. Are a judge's First Amendment rights violated when he is disciplined for meeting with and discussing with the public an issue of public concern and there is no finding he engaged in any improper ex parte communication?

4. Does a one-tier judicial disciplinary system violate due process when it combines the investigatory, prosecutorial, and adjudicatory functions into a single body without erecting walls between the different functions?

5. Does due process require a one-tier judicial disciplinary body to allow an accused judge to discover information the disciplinary body received prior to filing formal charges against the judge in order to confront that information at trial or to determine if any of the adjudicators are biased against him?

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### **OPINIONS BELOW**

The opinion of the Supreme Court of Washington is reported at 159 Wn.2d 517, 145 P.3d 1208. It is reprinted at Appendix A. The order of the Supreme Court of Washington, denying Justice Sanders' motion for reconsideration, is unreported and reprinted at Appendix E. The relevant orders and decision of the Washington Commission on Judicial Conduct are unreported and are reprinted at Appendices B, C, and D.

### **JURISDICTION**

The Supreme Court of Washington rendered its opinion in this case on October 26, 2006. A timely motion for reconsideration was denied, and a declaration of finality entered, on March 7, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **Constitutional Provisions**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. Am. I.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Am. V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Am. XIV.

Washington Code of Judicial Conduct Provisions

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. Washington State Code of Judicial Conduct Canon 1.

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 should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Washington State Code of Judicial Conduct Canon 2(A).

Washington Commission on Judicial Conduct  
Procedural Rules

The statement of charges alleging misconduct or incapacity shall be available for public inspection. Investigative files and records shall not be disclosed unless they formed the basis for probable cause. Those records of the initial proceeding that were the basis of

a finding of probable cause shall become public as of the date of the fact-finding hearing. CJCRP 11(b)(2).

After initial proceedings, the commission shall:  
. . . (C) Find that probable cause exists that respondent has violated a rule of judicial conduct or may be suffering from an incapacity that seriously interferes with the performance of judicial duties and is permanent or likely to become permanent. Upon such a finding of probable cause, the commission shall identify the records of the initial proceedings that are the basis for the finding and order the service and filing of a statement of charges. The commission shall also identify those materials and information within the commission's knowledge which tend to negate the determination of the commission. CJCRP 17(d)(4)(C).

Required disclosure. Within fourteen days after the filing of the answer, disciplinary counsel shall disclose to respondent or respondent's lawyer the records identified by the commission pursuant to Rule 17(d)(4)(C), unless otherwise provided by commission protective order. CJCRP 22(a)(1).

The taking of depositions, the requests for admissions, and all other discovery procedures authorized by Rules 26 through 37 of the Superior Court Civil Rules are available only upon stipulation or prior permission of the presiding officer upon a showing of good cause. CJCRP 22(b)(1).

#### **STATEMENT OF THE CASE**

The citizens of Washington elected Richard B. Sanders a Washington Supreme Court justice in November 1995. He has been reelected to consecutive terms, and is currently serving. In March 2003, the members of the court were invited to visit the McNeil Island Special Commitment Center (the "Center"), which houses sexually violent predators. Judges are encouraged to participate in such visits, and earn continuing legal education credits for doing so, as Justice Sanders did here. The Washington

State Commission on Judicial Conduct (the “Commission”) and the Washington Supreme Court nonetheless sanctioned Justice Sanders because he associated and spoke with Center residents during his visit.

After receiving the invitation, Justice Sanders contacted the Center superintendent to make arrangements for a tour. He notified the other justices of those arrangements. Justice Sanders toured the Center. Before visiting the Center, he made the following request of the Center superintendent by letter dated January 23, 2003:

Please advise the residents that it is not my role to factually investigate particular legal circumstances of any individual and that discussion of same might be grounds to seek my recusal in any pending or future proceeding. That would be my only ground rule and should any discussion lead in that direction I will reiterate what I just said.

Although I have received correspondence from some of the residents regarding the upcoming tour, that correspondence was neither solicited or responded to . . . If there are any particular legal problems, however, they must be dealt with fairly and impartially in the context of appropriate litigation upon which this tour shall and must have no influence whatsoever.

During his visit, Center staff placed Justice Sanders in a conference room where he met with groups of residents. Before beginning any of those meetings, Justice Sanders warned the residents that he could not talk with them about their personal legal circumstances because to do so might prevent him from hearing future matters. Periodically thereafter, Justice Sanders repeated these limitations to the residents.

Justice Sanders began the meetings by requesting that the residents tell him about their respective criminal records and treatment experiences at the Center. During his discussions with one group of residents, Justice Sanders asked some of the residents whether they believed they personally had the ability

to control their sexual urges.<sup>1</sup> Justice Sanders did not solicit or offer any opinion on any legal issue, nor did he indicate how he might vote in any case.

At the time Justice Sanders visited the Center, the Washington Supreme Court was considering *In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003). Drafts of both a majority opinion and a dissent by Justice Sanders were circulating among the justices. *Thorell* was a sexual predator commitment case involving six petitioners, including at least one of the Center residents with whom Justice Sanders met. The court was considering, in light of this Court's decision in *Kansas v. Crane*, 534 U.S. 407 (2002), whether the determination that a sexually violent predator lacks behavioral control must be found separately by the jury, based upon a jury instruction. *Thorell*, 72 P.3d at 713. This issue was not discussed with residents or staff during Justice Sanders' visit. After his visit, and by request of the prosecutors in *Thorell*, Justice Sanders recused himself from any further proceedings in that case.

The primary staff person at the Center assigned to Justice Sanders' visit was Alan McLaughlin. Prior to the visit, McLaughlin discussed the visit with an assistant attorney general and a county deputy prosecutor, who both handle sexual predator cases. They instructed McLaughlin to make notes of the visit. He had never before memorialized any tour. McLaughlin reported back to the Attorney General and King County Prosecutor's Offices. Representatives from the King County and Snohomish County Prosecutors Offices filed a complaint with the Commission on March 16, 2003, accusing Justice Sanders of violating the Washington Code of Judicial Conduct ("CJC").

The Commission operates a "one-tier" judicial disciplinary system, blending the investigative and adjudicatory functions into a single body.<sup>2</sup> Commission members interact with and

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<sup>1</sup> "Volitional control" is an issue relating to the commitment, confinement, and treatment of sexually violent predators.

<sup>2</sup> The Commission is comprised of eleven members: six non-attorney citizens, two lawyers, and three judges.

receive information from investigatory staff and disciplinary counsel before formal charges are filed. After charges are filed, staff members are no longer supposed to have ex parte communications with Commission members.<sup>3</sup> As happened in this case, prior to the filing of formal charges the Commission receives and considers various documents supplied by staff, including press articles. Commission procedures do not permit an accused judge to obtain copies of all the materials the Commission receives, and may consider, prior to the filing of formal charges.<sup>4</sup> CJC Rule 11(b)(2) provides that: “Investigative files and records shall not be disclosed unless they formed the basis of probable cause.” The Commission determines what portion of the record forms the basis for a finding of probable cause and makes that information public at the time of hearing. CJC Rule 17(d)(4)(c). Justice Sanders sought to discover information the Commission considered in his case, so that he could respond to it. He also wanted to determine whether any Commission member should be challenged for bias.<sup>5</sup> His discovery requests were denied.<sup>6</sup>

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<sup>3</sup> The record indicates the Commission may have received information from staff about this case after formal charges were filed, however, the nature of this information is not of record since Justice Sanders’ request for discovery on this issue was denied.

<sup>4</sup> CJC Rule 11(b)(2) provides that: “Investigative files and records shall not be disclosed unless they formed the basis of probable cause.” The Commission determines what portion of the record forms the basis for a finding of probable cause and makes that information public at the time of hearing. CJC Rule 17(d)(4)(c).

<sup>5</sup> Justice Sanders challenged the Commission’s impartiality. His challenge was denied, although one member of the Commission did recuse on other grounds raised by Justice Sanders.

<sup>6</sup> CJC Rule 22(a)(1) provides the record identified by the Commission as forming the basis of probable cause is to be disclosed to the accused judge. CJC Rule 22(a)(2) requires the Commission and the respondent to disclose the names and addresses of expected witnesses, a summary of the expected testimony, witness statements, and documenting evidence that may be offered. Under CJC 22(b)(1)

(Cont’d)

Although the Commission filed formal charges against Justice Sanders five months before he was up for reelection, he was reelected by the voters. The case then proceeded to hearing. Commission members who had participated in the investigatory stage and had determined that probable cause for charges existed, also acted as the adjudicators. The Commission held that the general conversations Justice Sanders had with residents did not violate Canon 3(A)(4) of the CJC, prohibiting ex parte communications.

Nevertheless, the Commission found that Justice Sanders violated Canons 1 and 2(A), because the conversations had the appearance of impropriety. Although there were no impermissible ex parte communications, the Commission determined someone could subjectively believe that something improper occurred. The Commission imposed a sanction of admonishment. The Commission's decision was not unanimous. Four of the eleven members concluded that sanctions were not appropriate.

Justice Sanders appealed to the Washington Supreme Court, which heard the case using justices pro tempore. The standard of review was de novo, both for findings of fact and conclusions of law. The court affirmed the Commission. *In re Disciplinary Proceeding Against Sanders*, 159 Wn.2d 517, 145 P.3d 1208 (2006) (*Sanders II*). Like the Commission, the Washington Supreme Court found that Justice Sanders did not engage in impermissible ex parte contact with residents of the Center under CJC Canon 3(A)(4). Even though Justice Sanders was exonerated of any actual improper ex parte contact under Canon 3(A)(4), the Washington Supreme Court found he violated Canons 1 and 2(A) and upheld the sanction of admonishment. *Id.* at 1211, 1213. On March 7, 2007, the court denied reconsideration, without giving any reasons for its ruling. It did not modify any portion of its earlier decision.

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(Cont'd)

depositions are not allowed without the stipulation of disciplinary counsel or order of the presiding officer. Discovery disputes are decided by the Commission and are not appealable prior to the final order.

Justice Sanders raised federal First, Fourth, and Fourteenth Amendment issues in his answer and in his hearing memorandum to the Commission. Appendix F. The Commission did not address the constitutional issues. Justice Sanders specifically preserved these constitutional issues in his notice of contest to the Washington Supreme Court. Appendix G. The briefing in that court by Justice Sanders and by amici discussed the constitutional issues at length. Appendix H, I, J. The Washington Supreme Court touched briefly on some of the constitutional issues but did not analyze them in depth. Appendix A at 6a-11a. The court did not address the First Amendment issues at all.

## **REASONS FOR GRANTING THE PETITION**

### **A. Summary of Reasons**

The Court should grant certiorari to resolve the most important constitutional issues surrounding professional ethics, particularly judicial ethics, and disciplinary procedures. A decision here will resolve decades-long conflicts in case law and commentary, and correct a state court decision inconsistent with this Court's established precedent.

The principal issue in this case is whether a judge who ethically exercises his First Amendment rights can be sanctioned solely because some might subjectively perceive his conduct to be improper. Historically, violating the appearance of impropriety standard has required a concurrent violation of some other provision of the CJC. Here, the Washington Supreme Court ignored years of established jurisprudence by disciplining a sitting supreme court justice for an appearance of impropriety while finding he did not engage in the specific charged misconduct.

The appearance of impropriety standard, standing alone as a basis for discipline, is vague and violates due process. The significance of the Washington court's decision transcends this

case.<sup>7</sup> This issue has been at the center of the debate over ethical standards for lawyers and judges for forty years.<sup>8</sup> The vast majority of judges in the United States serve in state court or administrative systems subject to the CJC. In February 2007, the American Bar Association (the “ABA”) adopted a revised Model Code of Judicial Conduct (the “Model CJC”). The new Code contains an expanded version of the appearance of impropriety standard, and transforms it from a hortatory standard into a rule that is the basis for discipline.<sup>9</sup> If past is prologue, almost all states will adopt it. Before other judges are trapped by the vagaries of a questionable “appearance” standard, and public confidence in the judiciary is eroded by accusations of unethical conduct based upon ill-defined ethics rules, this Court should decide whether the appearance of impropriety standard meets constitutional due process requirements.

This case implicates a sitting, elected judge’s First Amendment rights to meet with members of the public and to discuss issues of legal and political importance. Previously, this Court offered guidance on these important First Amendment issues in the campaign context. Most judges have occasion to give speeches or interact with the public to discuss important

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<sup>7</sup> Vague disciplinary standards threaten more than the judiciary. Doctors, CPAs, lawyers, and many other regulated professionals have cause for concern when they may be sanctioned under fuzzy ethics rules that impose discipline based on the specter of negative public perception alone.

<sup>8</sup> See Ronald Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 Hofstra L. Rev. 1337 (2006) (“Rotunda”).

<sup>9</sup> The former CJC made clear that Canons 1 and 2 were aspirational, not mandatory. ABA, Annotated Model Code of Judicial Conduct 4 (2004). The new Model CJC provides that Canons (where the appearance of impropriety standard was formerly situated) are not enforceable for discipline purposes, only a Rule violation is. Amended Rule 1.2 now provides: “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

legal issues. Whether a judge can be disciplined for exercising his First Amendment rights based on a vague disciplinary standard is an issue of utmost importance. In the absence of a ruling from this Court, the only safe course is for a judge to say nothing and meet with no one. The chilling effect on the speech and conduct of America's judges is obvious.

This case also raises important constitutional issues about the structure of most judicial disciplinary bodies. Here, the record suggests the adjudicators may have been involved in some aspects of prosecution as well as investigation and adjudication. Judges, particularly elected judges, have a natural concern about the fairness of disciplinary proceedings and what will happen to their reputations if they are accused of ethical lapses. The Commission's rules and rulings precluded Justice Sanders from ascertaining what information his investigators, and eventual adjudicators, actually received. An accused judge must have the right to learn what his adjudicators have considered inside and outside the formal public proceedings.

These issues have persisted since this Court ruled 30 years ago on the propriety of a one-tier disciplinary system for administrative professionals in the executive branch. Since then numerous states have created judicial disciplinary agencies utilizing this one-tier system. The ABA has rejected as inappropriate the structure utilized by Washington and most other states. This Court has never spoken to whether this model is appropriate for the judicial branch of government. Nor has this Court spoken on what procedural rights an accused judge in such a system has to ensure that it operates fairly and constitutionally. Deciding these important issues is vital to the interests of thousands of dedicated judges.

There are also vital public policy issues at stake. Public confidence in the judiciary requires public confidence in its institutions of accountability. The public must have confidence that those who judge the judges do so fairly and constitutionally. The ethical standards and procedures by which the judiciary is charged and judged go to the heart of judicial independence.

Some, like the Washington Supreme Court in this case, assert in a conclusive manner that the appearance of impropriety standard sets a high benchmark for the conduct of its judges. In reality, it provides those who would undermine respect for the judiciary and its independence a vehicle to do so. As Professor Rotunda recognized:

Ill defined and fuzzy ethics rules give detractors a green light to hurl too easily the accusation of ethics violations, and over time, this overuse will demean the seriousness of the charge of an ethics violation, or it will demean the judiciary itself.

*Rotunda*, 34 Hofstra L. Rev. at 1377. The dangers outlined by Professor Rotunda can be avoided if states receive clear guidance from this Court.

**B. Canons 1 and 2(A) Contain Broad, Imprecise “Standards” of Conduct**

Canon 1 of the Washington CJC provides:

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.

The Canon title uses the word “shall,” as does the 1990 ABA Model Code.<sup>10</sup> Unlike the drafters of the 1990 ABA Code,

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<sup>10</sup> In 1924, the ABA adopted the first judicial code of ethics entitled the Canons of Judicial Ethics. The Canons remained in place until 1972, when the ABA significantly revised and replaced them. ABA, Annotated Model Code of Judicial Conduct 4 (1972). The 1972 ABA Model Code, which is the basis of the current Washington CJC, primarily used the word “should” in enunciating guidance for judicial conduct. In 1990,  
(Cont’d)

however, the Washington Supreme Court declined to change “should” to “shall” in the text portion of Canon 1 when it amended the CJC in 1995. Yet even the 1990 ABA drafters who used the mandatory “shall” throughout Canon 1 confessed by “its very general nature [Canon 1] does not establish a bright line for purposes of discipline.” ABA, Annotated Model Judicial Code 13 (2004). The Model CJC also states that both Canons 1 and 2 are “aspirational” *id.* at 4, and goes on to note:

Even those jurisdictions that view the directions of Canon 1 as mandatory have implicitly acknowledged this difficulty by a reluctance to impose discipline solely on the basis of a Canon 1 violation. In most instances, where Canon 1 is cited as a basis for imposing discipline, other Canons are also cited.

*Id.* at 13.

Both the Commission and the Washington Supreme Court expressly found that Justice Sanders did not violate the specific

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(Cont’d)

the ABA revised the Model CJC. In the time between the two codes, questions and litigation arose concerning the enforceability of various provisions. To help address this problem, the 1990 Code paid particular attention to the use of language to capture the difference between mandatory conduct (“shall”) and hortatory conduct to be encouraged (“should”). In 1995, the Washington Supreme Court revised the CJC working with the 1990 Model Code. Yet it never adopted the 1990 code in total. The Washington court retained the structure and format of the then Washington CJC, which was essentially the 1972 ABA Model Code, however, the court extensively amended it, particularly in regard to the use of “should” and “shall.” It initially amended the code to make clear that “shall” was mandatory and the basis for discipline, while “should” was hortatory. A few months later, the Washington Supreme Court (before Justice Sanders joined) issued an emergency order striking that terminology. Thus, what is mandatory and what is hortatory is particularly unclear in the Washington CJC, especially since Washington case law in other contexts makes clear the words should be given their plain and ordinary meaning. *State v. Garrett*, 80 Wn. App. 651, 910 P.2d 552, 553 (1996); *Scannell v. City of Seattle*, 97 Wn.2d 701, 648 P.2d 435, 438 (1982).

provision of the Code with which he was charged: Canon 3(A)(4), which prohibits ex parte communications. Prior to this case, there were no Washington cases finding a Canon 1 violation standing alone. In a previous case involving Justice Sanders, the Washington Supreme Court implicitly held that Canon 1 is not independently enforceable for disciplinary purposes. *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 955 P.2d 369, 372 (1998) (*Sanders I*).<sup>11</sup> There, the Washington Supreme Court stated that Canon 1 “sets the conceptual framework for constraints on judges.” *Id.* That construction comports with the ordinary meaning of the main text of Canon 1 and the structure of the Code: the Preamble notes that the Code consists of “broad statements” called “Canons,” and “specific rules” set forth in the Sections under each Canon. The Preamble implies that only specific rules (the Sections under the Canons if mandatory in nature) can form the basis for discipline. The Preamble draws a distinction between mandatory and hortatory language noting: “The use of permissive language in various sections of the Code does not relieve judges from the other requirements of the Code that apply to specific conduct.”

Under the Federal Code of Conduct, Canons are not the standard for judicial discipline. Instead, Canons are aspirational goals designed to provide guidance to judges and nominees for judicial office. *See In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995).

Here, the Washington Supreme Court acknowledges that Canon 1 alone cannot be the basis for discipline and again holds that Canon 1 is merely a “conceptual framework.” But it relies upon a violation of Canon 2(A) to provide the “specific” basis for a Code violation. *Sanders II*, 145 P.3d at 1212. This is error, because that Canon is also constitutionally flawed. Canon 2(A) provides “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.”

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<sup>11</sup> In *Sanders I*, Justice Sanders was acquitted of all charges by the decision of the Washington Supreme Court.

This provision is the “appearance of impropriety” standard, although that term is only used in the title provision of Canon 2. Canon 2(A) contains two aspects: (1) Judges should respect and comply with the law; and (2) act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. There is no allegation or finding that Justice Sanders failed to respect and comply with the law. The Commission and the court found Justice Sanders violated the second aspect of the Canon 2(A) test, that he failed to act in a manner that “promotes public confidence in the impartiality of the judiciary.”<sup>12</sup>

Yet there was no finding that Justice Sanders was not, in fact, impartial.<sup>13</sup> Therefore, the decisions of the Commission and the Washington Supreme Court are entirely predicated upon what someone might *think* about Justice Sanders’ visit to the Center. The Washington Supreme Court acknowledged this when it stated: “[T]here was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants . . . and that this contact would be viewed as improper.” *Sanders II*, 145 P.3d at 1212.

There is no rule or provision in the CJC that states it is improper for a judge simply to come into contact with possible litigants before the court. *See Smith v. Behr Processing Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) (judge not required to recuse himself after realizing he had eaten Easter dinner at the home of a person later appearing before him). If that were the rule, then judges would have to avoid almost all contact with the public, enshrining judicial monasticism as a mandatory standard of conduct.

The Washington Supreme Court attempted to cure the inherently vague appearance of impropriety standard by equating the discipline standard under Canon 2(A) with the standard for

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<sup>12</sup> There are no findings relating to Justice Sanders’ integrity, so the only possible issue relates to his alleged impartiality.

<sup>13</sup> See also discussion in Section D, *infra*, as to why the type of impartiality relied upon to convict him is not a compelling state interest.

disqualification:<sup>14</sup> “The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that ‘a reasonable person knows and understands all the facts.’” *Sanders II*, 145 P.3d at 1212 (quoting *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355, 378 (1995)).

Defining the standard in that way does not resolve the vagueness problem. Professor Rotunda explains why:

So what is an “appearance”? Apparently it is something that is not itself an impropriety but appears to be so to “a reasonable person with knowledge of the circumstances.” But if this reasonable person *knows what it going on* – the person has “knowledge of the circumstances” – then one would think that he or she would already know whether it really is an impropriety or not.

*Rotunda*, 34 Hofstra L. Rev. at 1360. Professor Rotunda is correct as the result here demonstrates: although no improper ex parte contact occurred, a reasonable person would conclude that Justice Sanders would not be able to decide cases impartially. This conclusion defies reason, and cannot be the basis for discipline.

The Commission’s case and the Washington State Supreme Court’s opinion rest on nothing but “appearances.” By its nature, the standard of conduct to which Justice Sanders was expected to conform is not objective, it is inherently subjective. No reasonable judge can glean what is and is not prohibited. The “appearance of impropriety” standing alone cannot be a basis for discipline when a judge is found to have acted properly, whether that judge is exercising his First Amendment rights or is simply engaging in a leisure activity such as hunting.

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<sup>14</sup> Justice Sanders recused himself from *Thorell*, and cannot be accused of violating the disqualification rules.

### C. The Canons Are Vague Facially and As Applied<sup>15</sup>

As this Court has observed, standards of conduct must be clearly defined if they are to pass constitutional muster:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined . . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.

*Grayned v. City of Rockford*, 408 U.S. 104, 108, (1972). Washington CJC jurisprudence prior to this case followed the same constitutional standard. *In re Disciplinary Proceedings Against Blauvelt*, 115 Wn. 2d 735, 801 P.2d 1235, 1238 (1990) (quoting *American Dog Owners Ass'n v. Yakima*, 113 Wn.2d 213, 777 P.2d 1046, 1047 (1989)). A vague state statute offends the Due Process Clause. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

A statute is vague if (1) it is worded such that it does not notify ordinary persons of the conduct it prohibits, or (2) those charged with enforcement may do so arbitrarily and capriciously. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). In a facial vagueness challenge, allowed in cases where First Amendment freedoms are implicated, the statute is examined with respect to hypothetical citizens and enforcement officers. *See Morales*, 527 U.S. at 56-60. In an as-applied vagueness challenge, the language of the statute is applied to the facts of the case at bar to see if the proscribed conduct is clearly defined so as to provide notice to that specific defendant and guidance for the specific enforcement officers involved. *See Posters 'N' Things, Ltd. v. U.S.*, 511 U.S. 513, 525-26 (1994).

As explained in section D, *infra*, Justice Sanders' First Amendment rights were infringed by this disciplinary action,

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<sup>15</sup> The first threshold for constitutional scrutiny, state action, is not in dispute here. The Commission is a judicial body, a subdivision of the Washington State government.

therefore a facial challenge to the constitutionality of the Canons is allowed. On its face, Canons 1 and 2 fail constitutional scrutiny. They also cannot withstand an as-applied challenge.

This Court held an attorney disciplinary statute void for vagueness as applied in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991). In *Gentile*, a lawyer representing a criminal defendant spoke to the press and claimed that his client was a “scapegoat” for “crooked cops.” *Id.* at 1034. He was privately reprimanded under a disciplinary statute prohibiting attorneys from making an extrajudicial statement “if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” *Id.* at 1033. This Court reversed the private reprimand because the rule had a vague caveat: it allowed “general” statements on the nature of the proceeding provided that the attorney did not “elaborate.” *Id.* at 1048. Such language is a matter of degree, this Court concluded, and “[t]he lawyer has no principle for determining when his remarks pass from the safe harbor of the general to the forbidden sea of the elaborated.” *Id.*

In *U.S. v. Wunsch*, 84 F.3d 1110 (9th Cir. 1996), the Ninth Circuit Court of Appeals held that a disciplinary statute exhorting attorneys to “abstain from offensive personality” was facially void for vagueness. The court concluded that the statute could be read to prohibit otherwise constitutionally protected conduct:

“As ‘offensive personality’ could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of the clients’ interests, it would be impossible to know when such behavior would be offensive enough to invoke the statute.

*Id.* at 1119.

Courts that have rejected vagueness challenges to disciplinary codes have done so only when the prohibited conduct was sufficiently specified in subsections of the code. *See, e.g., Halleck v. Berliner*, 427 F. Supp. 1225, 1240 (D.C.D.C. 1977); *Keiser v. Bell*, 332 F. Supp. 608, 613-15 (E.D. Pa. 1971);

*Sarisohn v. Appellate Division, Second Dep't, S. Ct. of New York*, 265 F. Supp. 455, 458-59 (E.D.N.Y 1967).

As applied here, Canons 1 and 2(A) meet both vagueness tests as enunciated in *Morales*, *Gentile*, and *Wunsch*. Justice Sanders was not notified of the conduct prohibited by these two canons. He was *absolved* of any improper conduct under the specific provisions of the CJC he was alleged to have violated. Apparently, Justice Sanders was tasked with knowing how others might perceive his actions and refraining from any action, however right and proper, that the public might incorrectly believe offended the impartiality of the judiciary. Yet there is scant evidence that there was any public impression of wrongdoing, particularly given Justice Sanders' subsequent reelection.

Facially, the Canons at issue provide no guidance to an accused judge or the disciplinary body. If the mere potential for public misperception of a judge's behavior is a basis for disciplinary action, then all judges are at risk. No judge can know, based solely on Canons 1 and 2(A), when his or her actions move from proper to improper. If the adjudicator may hypothesize about the public's perception of proper conduct, there is a high danger of arbitrary and capricious enforcement. No judicial enforcement body will have guidance as to when a judge's actions become sanctionable.

#### **D. Disciplining Justice Sanders Here Violates His First Amendment Rights**

The guarantee of free speech embodies "our profound national commitment to the free exchange of ideas." *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989)). Closely associated with the right of free speech are the rights of assembly and association. *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937).

Judges and those seeking judicial office do not surrender these important rights. Candidates have "a First Amendment right to engage in the discussion of public issues and vigorously

and tirelessly to advocate [their] own election.” *Buckley v. Valeo*, 424 U.S. 1, 52 (1976); *see also Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 228 (7th Cir. 1993). The Washington Supreme Court has held there is no reason why the same principle should not apply to a sitting judge. “If a person does not completely surrender his or her right to freedom of speech upon becoming a candidate, then we cannot expect the candidate to do so once elected to judicial office.” *Sanders I*, 955 P.2d at 375. The Washington Supreme Court held in *Sanders I* that Canons 1 and 2 may not be applied in a manner that infringes upon a judge’s First Amendment rights unless they are narrowly tailored to serve a compelling government interest. *Id.* at 372.

Here, too, violations of Canons 1 and 2(A) cannot form an independent basis upon which to impose sanctions. Justice Sanders was engaged in protected First Amendment activity in this case: meeting with members of the public and discussing issues of public concern. *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas”). Such activity is protected by First Amendment rights of speech and association. *Cf. Hudson v. Craven*, 403 F.3d 691, 696-97 (9th Cir. 2005). The very Canons the Washington Supreme Court previously found unenforceable because they infringed on First Amendment rights are the same Canons it claims were violated here, although the court engaged in no First Amendment analysis.

The court’s application of the Canons in this case must undergo the most exacting scrutiny. *Cf. Boos v. Barry*, 485 U.S. 312, 321 (1988). This Court must, therefore, balance Justice Sanders’s First Amendment rights against the interest the CJC is aimed at protecting. The competing interests at stake here are the government’s interest in an impartial judiciary and Justice Sanders’ right as an elected public judicial official, and a citizen, to freely engage in discussions with others on *issues* of public importance. The Commission bore the initial burden to establish

a compelling governmental interest and demonstrate that its restrictions are narrowly tailored to serve that interest. It did not do so, and enforcement of the Canons under these circumstances serves to chill a judge's exercise of First Amendment speech and association rights. Enforcing these vague Canons on the basis of a general discussion of a topical legal issue, when no impermissible ex parte communications occurred, creates a chilling effect on where other judges will go and what they will be willing to say.

**E. Canons 1 and 2(A) Serve No Compelling Government Interest**

Recent authority from this Court compels the conclusion that the government's purported interests in this case do not trump Justice Sanders' rights of expression and association. In *Republican Party of Minnesota v. White*, 536 U.S. 765, 768 (2002), this Court addressed whether the First Amendment permits a state supreme court "to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues." This Court held that such an "announce" clause in the Minnesota CJC "both prohibits speech on the basis of its content and burdens a category of speech that is 'at the core of our First Amendment freedoms.'" *Id.* at 774.

Minnesota offered two interests that it claimed were compelling "to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." *Id.* at 775. This Court held that under any definition of "impartiality," Minnesota's announce clause failed to withstand strict scrutiny. *Id.* at 775-84.

According to *White*, the term "impartiality" in the judicial context may mean lack of preconception in favor of or against the particular *legal* view taken by a party. But this sort of impartiality does not guarantee a judge's neutrality on a particular issue of law, rather guarantees litigants an equal chance to persuade the court on the merits of their cases. *Id.* at 775-76.

While “[i]mpartiality in this sense may well be an interest served by the announce clause, . . . it is not a *compelling* state interest as strict scrutiny requires.” *Id.* (emphasis in original); *see also, Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842 (1978). Avoiding judicial predispositions as to legal issues can no longer be considered a compelling interest after *White*. *See, e.g., N.D. Family Alliance, Inc. v. Baker*, 361 F.Supp.2d 1021, 1040 (D. N.D. 2005).

Promoting “impartiality” in the sense of “open-mindedness” is not a compelling state interest under *White*. This Court reasoned that “[b]efore they arrive on the bench . . . judges have often committed themselves on legal issues that they must later rule upon . . . . More common still is a judge’s confronting a legal issue on which he has expressed an opinion while on the bench.” *White*, 536 U.S. at 779. Therefore, the fact that a judge might have an opinion on a legal issue does not make impartiality in that sense a compelling state interest.

Washington’s purported compelling interest is the same as that advanced and rejected in *White*. Although Canons 1 and 2(A) are not identical to the “announce” clauses at issue in *White*, they have the same effect: prohibiting public discussion by a judge on an issue of public interest. Washington, like most other states, elects its judiciary. Wash. Const. art. IV, § 3; RCW 2.02.071. The First Amendment does not prevent elected state judicial officers from discussing relevant issues with the public. “If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.” *White*, 536 U.S. at 788, 792.

In enforcing Canons 1 and 2(A), the Commission cannot demonstrate a compelling interest sufficient to override First Amendment rights.

#### **F. Canons 1 and 2(A) Are Not Narrowly Tailored**

Even if a compelling state interest could be articulated, Canons 1 and 2(A) are not narrowly tailored to serve that interest. *White* is instructive. There, the first definition of impartiality examined by the Court was the “lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law . . . [and] guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party.” *White*, 536 U.S. at 775-76 (emphasis in original). This Court held that the announce clause was not narrowly tailored to serve impartiality in this sense. *Id.* at 776-77.

Canons 1 and 2(A), as applied in this case, also are not narrowly tailored to serve the appearance of impartiality to the parties to a proceeding. The Commission imposed sanctions based on Justice Sanders’ appearance of partiality on the *issue* of “volitional control,” not bias for or against any parties to the actual legal proceeding. Any argument that there was an appearance of impartiality in favor of parties involved in *Thorell* fails. Justice Sanders did not know that one resident he met, and had general discussions with, was involved in *Thorell*. Justice Sanders never even discussed with that particular resident whether the resident felt he could control his sexual urges. The finding by both the Commission and the Washington Supreme Court that Justice Sanders’ general inquiries on the subject of personal ability to control sexual urges did not violate Canon 3(A)(4) vitiates any argument about impartiality as it relates to any party.

If preserving the appearance of impartiality is important, a more narrowly tailored alternative than discipline and abridgement of First Amendment rights is available: disqualification. *See White* 536 U.S. at 794; *N.D. Family Alliance*, 361 F.Supp.2d at 1042. Canons 3(D) and 3(E) of the Washington CJC provide for disqualification. With a more narrowly tailored alternative available, curtailing First

Amendment rights using the CJC is constitutionally impermissible.

Canons 1 and 2(A), as applied, “reach[ed] far beyond speech that could reasonably be interpreted as committing the candidate to a way that would compromise his impartiality.” *Buckley*, 997 F.2d at 228. *See also, Family Trust Foundation of Ky., Inc. v. Wolnitzek*, 345 F.Supp.2d 672, 711 (E.D. Ky. 2004) (statute prohibiting judicial candidate from making promises, pledges or commitments not narrowly tailored under strict scrutiny). Indeed, under the decision of the Washington Supreme Court, the only safe bet for Justice Sanders was to *avoid any discussions on any topic*, legal or otherwise. Such “an overinclusive rule has the effect . . . of greatly curtailing an important part of the speech ‘market,’ the rule is deeply problematic.” *Buckley*, 997 F.2d at 229. The fact that “some of the statements forbidden by the rule . . . are within the state’s regulatory power cannot save the rule. A statute that forbids, or can fairly be read to forbid, privileged speech is not saved by the fact that it also forbids unprivileged speech and could in application be confined to the latter.” *Id.* at 230. No showing can be made that Canons 1 and 2(A), as applied, are narrowly tailored to serve a compelling governmental interest. Under the First Amendment, the finding of a violation of Canons 1 and 2(A) alone fails.

#### **G. The Commission’s Structure Violated Justice Sanders’ Procedural Due Process Rights**

To determine whether a procedure violates due process, this Court engages in a two-step analysis. The Court first determines whether a liberty or property interest exists entitling an individual to due process protections. *See Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). If there is a constitutionally protected interest, then the Court must employ a balancing test to determine what process is due. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). A license is a protected property interest while a person’s professional reputation is a protected liberty interest. *See Barry v. Barchi*, 443 U.S. 55, 64 (1979) (noting a person’s property interest in a professional license is

sufficient to invoke the protection of the Due Process Clause); *Paul v. Davis*, 424 U.S. 693, 723 (1976) (Brennan, J., dissenting) (recognizing that “the enjoyment of one’s good name and reputation has been recognized repeatedly . . . as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal ‘liberty.’”).

Procedural due process imposes constraints on governmental decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews*, 424 U.S. at 332 (citation omitted). The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This requirement applies to adjudicatory proceedings before administrative agencies as well as to courts. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). Not only is a biased decision-maker constitutionally unacceptable, but “our system of law has always endeavored to prevent even the probability of unfairness.” *In re Murchison*, 349 U.S. 133, 136 (1955) (judge who served as complainant, prosecutor, and judge in contempt proceeding was personally biased in favor of conviction). As this Court stated in *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 182 (1938):

The right to be heard implies a reasonable hope of being heeded. The right to be heard in a public hearing contemplates that, . . . , *the hearing must be conducted as to be free from bias and prejudice; it must not only be open-minded and fair, but must have the appearance of being so.* The word “hearing” in a statute shows a manifest purpose to afford due process of law.

(emphasis added). Accordingly, due process violations may be adjudged not only on the basis of actual harm, but also on the basis of *the risk that potential harm may occur* due to an inherent flaw in the process itself. *See Mayberry v. Pennsylvania*, 400

U.S. 455, 469 (1971) (Harlan, J., concurring) (“the appearance of evenhanded justice . . . is at the core of due process.”).<sup>16</sup>

Washington’s Commission combines the investigatory and adjudicatory functions. Wash. Const., art. IV, § 31.<sup>17</sup> This structure is commonly referred to as a “one-tier system.” Shaman, Lubet and Alfini, *JUDICIAL CONDUCT AND ETHICS* 433 (3rd ed. 2000). The Commission’s single panel of judges, lawyers, and non-lawyer members handles all phases of the process from investigation through adjudication and determination of sanction. In a two-tier system, the investigative and adjudicative functions are separated. *See id.* The Commission’s one-tier system, as it operated here, violated Justice Sanders’ procedural due process rights because the blending of investigatory, prosecutorial, and adjudicatory functions created a high risk of bias.

This Court upheld the constitutionality of an administrative disciplinary system which combined investigatory and adjudicative functions in *Withrow v. Larkin*, 421 U.S. 35, 54-55 (1975). There, the Court rejected the argument that bias automatically arises from a commingling of the investigatory and adjudicatory functions. Since *Withrow*, judicial conduct commissions have been established all across the nation, including Washington. This Court has never addressed whether the general administrative scheme for the executive branch addressed in *Withrow* is appropriate for the judicial branch. The

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<sup>16</sup> It is important to distinguish the necessity of an appearance of fairness as a standard for disqualification from the appearance of impropriety as a basis for *discipline*. Disqualification, unlike discipline, does not result in punishment. Moreover, the appearance of fairness standard requires that the proceedings before a tribunal be and appear fair, to the parties to the proceeding. By contrast, the appearance of impropriety standard as a basis for discipline goes well beyond actual parties to a proceeding. It concerns public perceptions generally, not just those of the litigants whose cases might be affected.

<sup>17</sup> Justice Sanders contends the Commission went a step further in his case by also mingling some prosecutorial functions with the investigative and adjudicative functions. *See, infra*.

propriety of a one-tier system in the judicial context has been a source of litigation through the years.

For more than 30 years, *Withrow* has been argued to reject the idea that the blending of adjudicative and investigative functions is a denial of due process. *See, e.g., In re Matter of Davis*, 129 Ariz. 1, 628 P.2d 38, 40 (Ariz. 1981); *In re Crooks*, 51 Cal.3d 1090, 275 Cal.Rptr. 420, 800 P.2d 898, 904 (Cal. 1990); *People v. Varallo*, 913 P.2d 1, 4-5 (Colo. 1996); *In re Zoarski*, 227 Conn. 784, 632 A.2d 1114, 1121 (Conn. 1993); *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 736 P.2d 639 (Wash. 1987). *Accord Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 33 (C.A.1 Me. 2001); *Calenda v. Rhode Island Bd. of Medical Review*, 565 F. Supp. 816, 820 (D.R.I. 983).

Courts facing such a constitutional challenge, however, have often skirted the issue by ignoring the second part of the *Withrow* court's decision, namely, that a court is not precluded from finding a denial of due process where the risk of unfairness from the commingling of functions is intolerably high based on the specific facts and circumstances present in the case before it. *See Withrow*, 421 U.S. at 47, 58. This Court should remind lower courts of this vital second step. What the Constitution requires, if more than one function is reposed in a single body, is that walls be erected between functions to eliminate the threat of bias and unfairness.

*Withrow* does not specifically address the unique quasi-criminal process by which a state's judicial branch disciplines judges. *See In re Ruffalo*, 390 U.S. 544, *modified on other grounds*, 392 U.S. 919 (1968) (recognizing that attorney disciplinary proceedings are neither criminal nor civil in nature but adversarial proceedings of a quasi-criminal nature). *See also, Tweedy v. Oklahoma Bar Ass'n*, 624 P.2d 1049, 1053 (Okla. 1981) (acknowledging *Withrow* but stating that in "contrast to the principles which affect administrative agencies, due process is offended when a judicial institution functions both as an organ of enforcement and adjudication"); *In re Disciplinary*

*Proceeding Against Ritchie*, 123 Wn.2d 725, 870 P.2d 967, 970 n.1 (1994) (noting judges are entitled to the same procedural due process protections as lawyers facing disbarment).

Unlike the Commission's overlapping one-tier system, an acceptable division of functions can be found in the ABA's Model Rules for Judicial Disciplinary Enforcement (MRJDE). The MRJDE require that the membership of a judicial conduct commission be divided into separate investigative and hearing panels. MRJDE, Section 1, Rule 3(1). Under this rule, no commission member can be involved both in deciding whether to file formal charges and in hearing the case on those charges. The Commentary to the rule states why:

The Rules seek to separate the investigative and the adjudicative functions of commission members. No matter how fair individual members can be, the system cannot convey the appearance of fairness when members have full access to investigative materials, formulate their decisions to file charges in reliance on the investigative files and then make adjudicative decisions based on the evidence presented in formal proceedings. This process is in conflict with the fundamental division of investigative and adjudicative responsibilities that is a hallmark of our judicial system.

Comment, MRJDE to Rule 3.1.

Other courts have found the commingling of investigative and adjudicatory functions to be a denial of due process. For example, in *Lyness v. Comm., State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992), a physician's license to practice medicine was revoked by the Pennsylvania Board of Medicine. He appealed, arguing his right to due process was violated because the Board acted as both prosecutor and adjudicator. *Id.* at 255. In reversing the Board's licensing decision, the Pennsylvania Supreme Court noted the procedures followed by the Board created an unconstitutional commingling of the prosecutorial and adjudicatory functions into a single entity. Whether actual bias existed as a result of the Board acting as

both prosecutor and judge was inconsequential; the potential for bias and the appearance of non-objectivity was sufficient to create a fatal defect under the Pennsylvania due process clause. *See also In re Ross*, 99 Nev. 1, 656 P.2d 832, 840 (Nev. 1983) (procedure by which board of bar governors functioned as fact finder in disciplinary proceeding against attorneys, involving costs which were substantial and recoverable by state bar only upon finding of misconduct, violated due process); *See Tweedy*, 624 P.2d at 1054-55 (finding due process violation where adjudicatory and executive functions were combined during attorney disciplinary proceedings).

As applied here, the rules and statute governing the Commission impermissibly blur the lines between the investigative, prosecutorial, and adjudicatory functions. There is no wall between the three, and the risk of unfairness is intolerably high.

#### **H. Due Process Permits an Accused Judge to Learn What Information His Judges Received and Whether They Were Biased As a Result**

Even if this Court finds that Washington's one-tier system does not violate due process, it needs to address the rights of an accused judge to obtain information his or her adjudicators received about the case inside and outside the formal proceedings. It is necessary to do so to give vitality to the second, and equally important, aspect of *Withrow*. There, this Court recognized due process rights could be violated if there was something "more" at issue than the mere existence of a one-tier system. *Withrow*, 421 U.S. at 58.

Like the illustrative cases referenced above, Justice Sanders' constitutional challenge to the Commission's one-tier system is distinguishable from the challenge in *Withrow* because there is something "more" occurring here that creates the impermissible risk of actual bias or prejudice. In *Withrow*, a licensed physician sought to enjoin a disciplinary hearing to be conducted by the Wisconsin Medical Examining Board, the same Board that had investigated the charges against him. *Id.* at

39. The district court agreed such a procedure would constitute a denial of due process and issued a restraining order. In reversing the decision of the district court, this Court held the procedure suffered no constitutional infirmity. In particular, this Court noted the investigative proceedings were closed to the public but the physician and his counsel were present throughout; counsel actually attended the disciplinary hearings and knew the facts presented to the Board. *Id.* at 55. No specific foundation was presented for suspecting the Board had been prejudiced by its investigation or was disabled from hearing and deciding the case on the basis of the evidence presented at the contested hearing. *Id.*

Here, the Commission has constructed rules of procedure designed to preclude a judge from ascertaining if there is something “more” at issue than just a combination of functions. The Commission decides what information an accused judge may receive, and what witnesses it will disclose. There is no discovery without disciplinary counsel or its consent. With no analysis, the Washington Supreme Court says this is constitutionally sufficient. The accused judge, unlike the doctor in *Withrow*, has no ability to know what his adjudicators considered.

Justice Sanders was not present during the Commission’s investigative proceedings nor was he permitted to learn what facts were presented to the Commission. Pursuant to the Commission’s rules, Justice Sanders sought discovery to defend himself. In particular, he sought to determine if any Commission member should be challenged for bias. Justice Sanders specifically asked for copies of the newspaper articles Commission members considered in relation to his case. He also sought to discover what other information may have been communicated to the Commission by its staff and disciplinary counsel. Such information is vital to his due process rights. His discovery requests were denied.

The importance of being allowed to inquire is illustrated by the fact that after Justice Sanders obtained independent

information about one commission member and challenged her, she recused. This is exactly the type of bias Justice Sanders sought to uncover, and which the Commission prevented him from pursuing. In resolving this case, this Court does not need to delve into the details of discovery requests. Instead, this Court needs to decide the broader issue of whether discovery is allowed to determine if there is something “more” at issue, as the *Withrow* analysis requires.

There is an added dimension here to the something “more” required by *Withrow* because the Commission may have also commingled the prosecutorial function with the investigative and adjudicative functions. Commission members were not only aware of possible settlement discussions, but directed them to occur. The Commission’s disciplinary counsel met with its Executive Director to discuss such negotiations. The Commission asked for and received legal briefings from staff regarding the potential charges it was being asked to file against Justice Sanders. Disciplinary counsel wrote an op ed about the case while it was pending, identifying herself as “Commission Counsel.” Straying into prosecution and settlement clearly should be addressed by this Court in determining whether Washington’s one-tier judicial disciplinary system is unconstitutional. The Commission strayed from the accepted bounds of due process.

### CONCLUSION

The Washington Supreme Court overlooked serious constitutional infirmities in the Canons, as well as its entire judicial disciplinary system, in reaching its result in this case. The court’s decision reaches far beyond the Washington state borders. It condones the severe curtailment of the free speech and association rights of judges. It allows prosecutors and investigators to sit in judgment over the soundness of their own case. It allows secret evidence to sway potentially biased adjudicators, with no hope of access, reply, or redress for the accused judge. This Court should accept review to preserve the constitutional rights of all judges and professionals.

Respectfully submitted,

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## **APPENDIX**



**APPENDIX A — OPINION OF THE SUPREME  
COURT OF THE STATE OF WASHINGTON  
FILED OCTOBER 26, 2008**

**IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

No. 200,271-4

EN BANC

In the Matter of the Disciplinary Proceeding Against

RICHARD B. SANDERS,

Justice of the Supreme Court of the State of Washington.

Filed October 26, 2006

**GROSSE, J.\*** — A visit by a judicial officer to a special facility for sexually violent predators is not in itself inappropriate conduct under the Code of Judicial Conduct. However, conversations with the residents of the facility concerning the reasons for their confinement, particularly when one or more of these residents has a matter or matters pending before the court on which the judge sits, can violate the Code of Judicial Conduct. By asking questions of inmates who were litigants or should have been recognized as potential litigants on issues currently pending before the

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\* Judge C. Kenneth Grosse and each member of the en banc court are serving as justices pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a) and Discipline Rules for Judges 13.

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court, Justice Richard B. Sanders violated the Code of Judicial Conduct. His conduct created an appearance of partiality as a result of ex parte contact.

The Washington Commission on Judicial Conduct (Commission) received a complaint on March 18, 2003, regarding Justice Sanders' conduct while visiting the Special Commitment Center (SCC) on McNeil Island. The Commission conducted an independent investigation of the allegations, determined that sufficient evidence existed to support the complaint, and sent a Statement of Allegations to Justice Sanders on October 8, 2003. In April 2004, the Commission determined that probable cause existed to believe that Justice Sanders violated Canons 1, 2(A) and 3(A)(4) of the Code of Judicial Conduct.<sup>1</sup> After a fact-finding

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1. **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.

**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.

(Cont'd)

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hearing, the Commission issued its decision holding that Justice Sanders violated Canons 1 and 2(A), but did not violate Canon 3(A)(4). The Commission found 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. The Commission imposed the sanction of admonishment. Under Discipline Rules for Judges 3, Justice Sanders filed a notice of contest.

It is well established that disciplinary proceedings are reviewed de novo.<sup>2</sup> Accordingly, this court must make its

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(Cont'd)

**CANON 3**  
**Judges Shall Perform the Duties of Their**  
**Office Impartially and Diligently**

....

(A) Adjudicative Responsibilities.

....

(4) Judges should accord to every person who is legally interested in a proceeding, or that persons 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.

2. *In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 245-46, 970 P.2d 731 (1999) (“[D]e novo review means we are not  
 (Cont'd)

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own determination of the facts and the law as required in a de novo review.<sup>3</sup> The Commission bears the “burden of proving factual findings by clear, cogent, and convincing evidence.”<sup>4</sup>

Justice Sanders embarked on a tour of the SCC despite warnings from his colleagues on the Supreme Court about potential ex parte contact with litigants. During the tour of this facility, Justice Sanders accepted documents on two separate occasions from the inmates. Moreover, in meetings

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bound by the Commission’s findings and conclusions. We must independently evaluate the evidence in the Commission’s record to determine if the judge violated the Code and to determine the proper sanction. In so doing, we necessarily give ‘considerable weight’ to the credibility determinations of the Commission, as the body that had the opportunity directly to observe the witnesses and their demeanor. [*In re Disciplinary Proceeding Against Deming*, 108 Wn.2d [82,] 110[, 736 P.2d 639 (1987)]. We also give ‘serious consideration’ to the Commission’s recommendation on the appropriate sanction. *In re Disciplinary Proceeding Against Ritchie*, 123 Wn.2d 725, 731, 870 P.2d 967 (1994).”

3. *See also Deming*, 108 Wn.2d at 87 (1987) (emphasis omitted) (alteration in original) (footnote omitted) (quoting *In re Cieminski*, 270 N.W.2d 321, 326 (N.D. 1978)):

“With this responsibility and power comes the concomitant obligation to conduct an independent inquiry into the evidence to determine whether or not the evidence merits the imposition of any penalty as recommended by the [Commission] or otherwise.”

4. *Turco*, 137 Wn.2d at 246.

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with the residents, some of whom had cases pending before the court, he directly asked them about the issue of volitional control.

At the time of the visit, the Supreme Court was in the process of deciding *In re Detention of Thorell*.<sup>5</sup> Drafts of both a majority opinion and a dissent by Justice Sanders were circulating among the justices at the Supreme Court. *Thorell* was a seminal case in which separate actions by six petitioners were combined, including at least one of the SCC residents with whom Justice Sanders met. A pivotal issue before the Supreme Court in *Thorell* was volitional control. The court was weighing whether the “fact finder must determine that the person facing commitment as a sexually violent predator (SVP) has serious difficulty controlling behavior and, if so, whether this determination must be a separate finding based upon a jury instruction.”<sup>6</sup> Thus, the factual record was before the court in each of the consolidated six cases.

The Commission held, and we agree, that the record established through clear, cogent, and convincing evidence that Justice Sanders violated Canons 1 and 2(A). In support of that holding, the findings reference two of the three letters from resident Andre Brigham Young inviting the justices to visit McNeil Island. Those letters indicate that the residents were looking for something more than just a tour of the facility. In fact, Young suggested that others (opposing

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5. *Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004).

6. *Thorell*, 149 Wn.2d at 730.

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counsel and defense attorneys) should be asked to attend to avoid “the appearance of partiality.” The letters in and of themselves should have given sufficient notice to Justice Sanders that this visit had the potential of being more than an institutional tour. Additional warning flags were also raised by three justices who expressed concerns about the visit and potential problems. Moreover, a simple computer check would have revealed that Rickey Calhoun and Andre Brigham Young, two people mentioned in the prior communication with Justice Sanders, had cases pending before the Supreme Court. When Justice Sanders met with the residents in small groups, he warned the residents that he could not hear their particular case issues. However, these warnings were followed by specific questions asking the residents about their confinement and what they thought of volitional control.

The Commission justifiably found that Justice Sanders, with full awareness of the potential for situations that could conflict with the Code of Judicial Conduct, embarked on the tour and met with litigants who had pending cases before the court. Further, by raising such critical issues as volitional control with these litigants, Justice Sanders created a situation that clearly violated both the letter and the spirit of the canons and created serious concern for both counsel and fellow jurists about the appearance of partiality.

Justice Sanders claims that a violation of Canons 1 and 2(A) cannot be found without a concomitant violation of a proscribed act or canon and thus the Commission’s failure to find a direct violation of Canon 3(A)(4) precludes it from finding a violation of the other canons. We disagree.

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In our view, *Turco*<sup>7</sup> is dispositive. There, the court found that the judge's act of striking his wife in public had a sufficient nexus to the judicial role, particularly when the judge heard domestic violence cases. If extrajudicial tortious conduct can provide a nexus to the judicial role, then *a fortiori*, judicial conduct can provide a basis for a violation of Canons 1 and 2(A). In the instant case, Justice Sanders' actions were not simply undertaken as a private citizen, but rather within the context of his judicial duties. Our conclusion is underscored by the decision in *In re Disciplinary Proceeding Against Ritchie*.<sup>8</sup> In that case, Judge John G. Ritchie argued that Canons 1 and 2(A) of the Code of Judicial Conduct, together with the statute regulating the behavior, were too vague to give him adequate notice of the prohibited behavior. In denying the claim, the court stated:

It is true the conduct pursuant to which he was disciplined is

not clearly proscribed by RCW 3.58.040, insofar as the statute does not expressly prohibit judges from combining business and pleasure trips, and does not define "reasonable traveling expenses" or "business of the court".

Judge Ritchie's vagueness challenge is ultimately immaterial, however, because he was not disciplined for violating the statute. Rather,

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7. *Turco*, 137 Wn.2d 227.

8. *Ritchie*, 123 Wn.2d 725.

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he ‘was censured for violating [C]anons 1 and 2(A) of the Code of Judicial Conduct which hold judges to a higher standard of integrity and require avoiding even the appearance of impropriety.[<sup>9</sup>]

As noted in the Commission’s decision, there are a number of facts in this case that, when taken together, clearly demonstrate that a predictable appearance of partiality could be foreseen.

Where a judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.<sup>10</sup> Under Canon. 3(D)(1), “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.”<sup>11</sup> In *Sherman*<sup>12</sup> the court found that where a trial judge “may have inadvertently obtained information critical to a central issue

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9. *Ritchie*, 123 Wn.2d at 735.

10. *State v. Graham*, 91 Wn. App. 663, 670, 960 P.2d 457 (1998).

11. Justice Sanders eventually disqualified himself from deciding these inmates’ cases involving the issue of volitional control. A judge’s subsequent recusal may remove the “suspicion of partiality” and satisfy Canon 3(D)(1) in specific cases, but it does not necessarily erase violations of other canons of the Code of Judicial Conduct. See *Sherman v. State*, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995).

12. *Sherman*, 128 Wn.2d 164.

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on remand, . . . a reasonable person might question his impartiality.”<sup>13</sup> The court set the test for determining impartiality:

[I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating . . . . The test for determining whether the judge’s impartiality might reasonably be questioned is an objective test that assumes that “a reasonable person knows and understands all the facts.”<sup>[14]</sup>

This court in *In re Disciplinary Proceeding Against Sanders*<sup>15</sup> noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one.<sup>16</sup> In *Sanders*, this court balanced that interest against Justice Sanders’ First

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13. *Sherman*, 128 Wn.2d at 206.

14. *Sherman*, 128 Wn.2d at 205-06 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

15. *In re Disciplinary Proceeding Against Sanders*, 135 Wn.2d 175, 187-88, 955 P.2d 369 (1998).

16. See *In re McCully*, 942 P.2d 327, 332 (Utah 1997), where the court upheld a reprimand for a judge who had given her opinions to a family court regarding an issue before it. There the court stated  
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Amendment rights and found that an independent basis for finding a violation of Canon 1 under those circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: “Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper.<sup>17</sup> We concur with the Commission’s finding that it was clearly

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(Cont’d)

that statutory language “conduct prejudicial to the administration of justice which brings a judicial office into disrepute” while broad, is not so vague that it, does not have any meaning. *McCully*, 942 P.2d at 332 (quoting former Utah Code Ann. § 78-7-28(1)(e), *recodified as* 78-8-103(1)(e) (2000)); *see also In re Parro*, 847 So. 2d 1178, 1181 (La. 2003). There the Louisiana Court held that even though an appellate judge did not intentionally violate the Code of Judicial Conduct, his interventions upon the behalf of his niece were improper. The canons were devised to promote a high standard for judicial conduct. Judges are the symbol of the law, and as such their actions reflect upon the judicial system.

17. *See Papa v. New Haven Fed’n of Teachers*, 186 Conn. 725, 744-46, 444 A.2d 196 (1982) (footnotes omitted):

(Cont’d)

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reasonable to question the impartiality of the justice under the circumstances of this case.

Justice Sanders also raises the issue of whether he was denied due process because of the failure to grant his discovery requests. He bases this claim on his characterization of the proceedings as criminal in nature.

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The defendants are correct, however, when they question the standard by which the court evaluated their first motion for recusal. The standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. In Connecticut, the disqualification of judges is governed by General Statutes § 51-39 and Canon 3 (C) of the Code of Judicial Conduct. Under Canon 3 (C) (1) of the Code of Judicial Conduct "[a] judge should disqualify himself [or herself] in a proceeding in which his [or her] impartiality might *reasonably* be questioned . . . ." (Emphasis added). "Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification. Thus, an impropriety or the appearance of impropriety . . . that would reasonably lead one to question the judge's impartiality in a given proceeding clearly falls within the scope of the general standard . . ." Thode, Reporter's Notes to Code of Judicial Conduct (1973), pp. 60-61. "The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his [or her] impartiality, on the basis of all of the circumstances." *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978).

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However, this court has consistently held that judicial disciplinary proceedings are civil in nature.<sup>18</sup>

It is well settled that the scope of discovery is a matter best left to the trial court's discretion.<sup>19</sup> in cases such as this, that discretion initially lies with the Commission. Justice Sanders was provided with a list of the residents with whom he had conversations, a list of the cases they were involved in as well as the essence of the conversations. Names of witnesses were also provided under Commission on Judicial Conduct Rules of Procedure (CJCRP) 22(a)(2). Justice Sanders also had access to all of the testimony and cross-examined all of the witnesses at the contested hearing. There is no basis to find that Justice Sanders was denied due process.

Finally, we turn to the question of whether the sanction imposed by the Commission was proper. After a thorough review of the record, we find that the Commission correctly applied the 10 nonexclusive factors as set forth in CJCRP 6(b) and in *Deming*.<sup>20</sup> The sanction of admonishment is appropriate and sufficient in this case.

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18. *Deming*, 108 Wn.2d at 102-03.

19. *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 232, 654 P.2d 673 (1982), *aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

20. *Deming*, 108 Wn.2d at 119-20.

**APPENDIX B — CORRECTED AMENDED  
COMMISSION DECISION DATED MAY 27, 2005  
AND FILED JULY 13, 2005**

**BEFORE THE COMMISSION ON  
JUDICIAL CONDUCT  
OF THE STATE OF WASHINGTON**

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,  
Washington Supreme Court

**CORRECTED AMENDED  
COMMISSION DECISION**

This matter came on for a fact-finding hearing before the Commission on Judicial Conduct sitting in Kent, Washington on December 6 - 10, 2004. The Commission members participating as the fact-finding panel for this matter were Wanda Briggs; Harold D. Clarke, III; Marianne Connelly; Antonio P. Cube; Judie Fortier; Joel Penoyar; John A. Schultheis; Mike Sotelo; Josephine Townsend; Betsy Wilkerson; and Gregory R. Dallaire, Presiding Officer.

Katrina C. Pflaumer of Seattle appeared as Disciplinary Counsel. Respondent was present and represented by Kurt M. Selmer.

The Commission heard and considered the testimony of witnesses, the stipulation of the parties regarding admissions, the exhibits admitted into evidence, and the briefs and arguments of counsel.

*Appendix B***PROCEDURAL HISTORY**

This matter commenced when a complaint was filed with the Commission on March 19, 2003. On May 29, 2003, the Respondent wrote a letter to the Commission in response to a news article that his tour may have prompted a complaint to the Commission.

After preliminary investigation, a confidential Statement of Allegations was sent to the Respondent on October 8, 2003. The Respondent replied on October 29, 2003. The original filing of the Statement of Charges was held pending settlement negotiations until April 5, 2004. Respondents Answer to the Statement of Charges was received on April 28, 2004. By an order filed June 17, 2004, in a ruling on motions brought by the Respondent, the Presiding Officer denied certain discovery requests. By an order filed August 27, 2004, in a ruling on Motion for Summary Judgment brought by the Respondent, the Commission dismissed certain affirmative defenses as a matter of law. By an order filed October 7, 2004, the Washington State Supreme Court (pro tem) denied Respondent's Request for Discretionary Review of the June 17, 2004, Order.

At the commencement of the fact-finding hearing, the Commission accepted into the record a Stipulation and Witness List filed December 6, 2004. After the fact-finding hearing, the Commission's Decision was filed on April 8, 2005. Thereafter, Disciplinary Counsel and Respondent's Counsel filed various motions, responses and replies related thereto. The Commission amended its decision by order dated May 27, 2005.

*Appendix B***FINDINGS OF FACT**

By letter dated December 17, 2002, the Respondent, along with the other Supreme Court Justices, was invited to visit the McNeil Island Special Commitment Center for sexually violent predators. (ex. 200) The invitation was extended on the letterhead of the African American Collective, a group of persons who were committed at the Center. A resident, Andre Brigham Young, was identified as the contact person for the Collective. (ex. 200) At the time of the letter and subsequent tour, Andre Brigham Young had a matter filed in the Washington State Supreme Court. (ex. 180) The letter requested that the Justices “evaluate and calculate” the application of RCW 79.01, et seq. through an on-site tour of the facility by conversing with the residents and staff. (ex. 200) Subsequently, the Respondent replied to Andre Brigham Young (Sanders’ testimony, p. 1034) and, through his staff, initiated contact with the superintendent of the facility to make the arrangements for touring the Center. (Sanders’ testimony, p. 915) January 27, 2003, was established as the date for the visit (ex. 203) On January 8, 2003, the Respondent sent a memorandum to the other Supreme Court Justices indicating that he had made arrangements for the visit He requested anyone interested in attending to get back to him with certain information required by the facility for visitors. (ex. 203) The visit to the Center was discussed by the Justices en banc on January 9, 2003. (ex. 204)

At the meeting, Justice Mary Fairhurst expressed her concern about the Respondent accepting an invitation from residents of such an institution. After further discussion

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among the Justices, it was concluded that her concerns could be addressed and a number of the Justices, including Justice Fairhurst and Justice Faith Ireland, expressed an interest in attending the tour. (Fairhurst testimony, pp. 66-67)

The following day, January 10, 2003, Justice Ireland wrote the superintendent of the Center (copying the Respondent and Andre Brigham Young) noting her interest in touring the Center and visiting with residents. The letter also stated the visit would not be an evaluation, but would be “informational only”. (ex. 205) On January 13, 2003, Andre Brigham Young again wrote to the Respondent informing him that three members of the African American Collective, including Rickey Calhoun, would be meeting him at the main gate inside the visiting room. At the time of the letter and subsequent tour, Rickey Calhoun had a matter filed in the Washington State Supreme Court. (ex. 155) After identifying specific areas that should be toured, the letter stated as follows:

There are areas the SCC Administration would rather you didn't see. That is why we make the request of you to insist that representatives of the African American Collective be there to not only greet you upon your arrival, but also to be part of escorting you to the many different areas listed above. After all, the Collective was responsible for inviting you here, not the SCC Administration.

Attached to the letter, was the Third Quarter 2002 Report from the SCC Ombudsman. The first sentence of the report's conclusion states as follows: “SCC is further than ever from creating a constitutionally adequate facility.” (ex. 206)

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The January 13, 2003 letter and attachment generated further interest and concern among the Respondent's colleagues on the Supreme Court. After reviewing the letter, Justice Fairhurst wrote to the Respondent on January 21, 2003 indicating that Andre Brigham Young's letter had caused her to reconsider her decision to tour the facility. She reiterated her issue about responding to the specific request of a resident or group of residents. She also provided the Respondent with a list of published and unpublished cases brought by Andre Brigham Young in both federal and state courts on various issues. (ex. 210)

Chief Justice Alexander's testimony also reflects concern:

The red flag that went up for me is I thought that he, Andre Brigham Young, was under a misunderstanding that was not consistent with Justice Sanders' memo or Justice Ireland's email, that we were really making an official visit through the auspices of the staff there and not accepting Andre Brigham Young's invitation, and I was concerned that the misunderstanding might lead to difficulties, and so that was the red flag, if you will, that went up for me. (Transcript p. 138)

Approximately a week after seeing the January 13, 2003 letter, Justice Ireland determined that she would not participate in the tour. She informed the Respondent and warned him about the differing expectations and her concern that dialogue with the residents about their conditions of confinement would be raised in issues being later presented

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to the Supreme Court. She testified to a second discussion with the Respondent:

We had another conversation later on about the trip and whether the trip should be made and, again, in the same sort of thing across the table from one another where I said, Richard, don't do this, and it was, you know, I was saying, making a warning statement to him, don't do this, and you know, this is a mistake, don't do this, but I think that was probably a week or so after that 13<sup>th</sup> letter. (Transcript p. 242)

Shortly thereafter, Justice Ireland bowed out of the tour in a January 22, 2003, letter to the superintendent of the Center. She noted concern about the expectations of the visit as expressed by Andre Brigham Young as well as the high volume of litigation the residents have in the Supreme Court. (ex. 211)

On January 23, 2003, the Respondent wrote the superintendent of the Center. The letter stated in part:

Please advise the residents that it is not my role to factually investigate particular legal circumstances of any individual and that discussion of same might be grounds to seek my recusal in any pending or future proceeding. That would be my only ground rule and should any discussion lead in that direction I will reiterate what I just said.

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Further in the letter, the Respondent cautions:

Although I have received correspondence from some of the residents regarding the upcoming tour, that correspondence was neither solicited nor responded to, although I agree with its general tenor that the SCC is an important state institution which should be recognized and understood. If there are any particular legal problems, however, they must be dealt with fairly and impartially in the context of appropriate litigation upon which this tour shall and must have no influence whatsoever. (ex. 215)

Between the date of the invitation, December 17, 2002, and the date of the tour, January 27, 2003, a case involving sexually violent predators was in the process of being decided by the Washington State Supreme Court, *In re Thorell*. *Thorell* consolidated the appeals of Bernard Thorell, Kenneth R. Gordon, Roger C. Bishop, Gordon Michael Strauss, Charles Lee Johnson and Casper William Ross.

At the time of the visit, a dissent authored by the Respondent was being circulated for consideration by the other justices. One of the major issues in *Thorell* was whether a separate jury finding is required on the issue of volitional control in sexually violent predator cases. This is commonly referred to as the “*volitional control*” issue.

Andre Brigham Young also had an appeal filed with the Supreme Court. (ex. 180) That appeal also raised the issue of volitional control. In addition, at the times of the invitation

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and subsequent tour, there were several other matters filed in the Washington State Supreme Court by residents of the Center. (ex. 101) The Respondent read no cases nor made any effort to ascertain if a case was pending in the Supreme Court before he went on the tour. (Sanders' testimony, pp. 1017-1018) Further, the Respondent did not notify counsel of the planned tour, i.e., prosecutors or defense for any of the parties who had cases filed in the Supreme Court at the time of the tour.

Sometime before the Respondent visited the facility, lawyers involved in the *Thorell* case and some of the other matters referenced above, (prosecutors in King County and the Attorney General's Office) became aware of the planned visit and communicated among themselves regarding what actions, if any, they should take. (Hackett testimony, p. 823, ex. 607) The visit took place as scheduled on January 27, 2003.

Upon his arrival at McNeil Island, the Respondent was met by Center staff. After a short motor-tour conducted by staff, the Respondent visited a recreation center where he had a brief discussion with one resident. He was then taken to a day room where he was introduced to a large group of residents. After that, the Respondent was directed into a small classroom where he initially met with six to seven residents. After he had an opportunity to engage in discourse with the initial group, other residents entered into the classroom one-by-one to replace a corresponding number of residents who exited the room. Upon leaving the classroom, the Respondent was led upstairs by staff to another dayroom where he talked with some other residents. (testimony of McLaughlin, Harris

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and Sanders). In total, the Respondent had individual communications with approximately 20 residents. (ex. 410; Sanders' testimony, p. 951) Four of the persons with whom the Respondent spoke (Calhoun, Johnson, Peterson, and Young), had pending cases filed in the Washington State Supreme Court at the time of the tour.

At the beginning of his discussions with the first group of residents, the Respondent warned them that he could not talk about their personal cases as that might prevent him from hearing matters in the future. (testimony of Farr, Harris, Mahoney and Sanders) Periodically, thereafter, the same caution was mentioned. (testimony of Farr, Harris, Mahoney and Sanders) Addressing the initial group of approximately six residents; the Respondent requested that each of those present tell him about their respective treatment experiences and whether they thought they had lost "*volitional control*" when they committed their crimes. (Sanders' testimony, pp. 948 and 1044; also Farr testimony re "controlling sexual urges" and testimony of Harris, Mahoney and McLaughlin re volitional control.)

Sometime during the tour, the Respondent accepted a "butcher paper" document from Ralph Spink, a resident of the Center. (ex. 406A, ex. 410 and McLaughlin testimony) At the time he handed the document to the Respondent, Ralph Spink had a matter filed in the Washington State Supreme Court. The list was a compilation of twenty-nine concerns created by various residents at the Center. There were several references to treatment and statutes. (ex. 406A) The list had no attribution to a specific resident. The Respondent also accepted a manila folder containing an article regarding

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treatment and recidivism of sex offenders from Keith Rogers, another resident of the Center. (ex. 606; Rogers testimony)

The Respondent reviewed the first two to three items listed on the “butcher paper” document after he returned to his office in Olympia. He then placed it in a file cabinet. Without reading it, he also filed away the article contained in the manila envelope he had received from Keith Rogers. (Sanders’ testimony, p. 942)

The Respondent made no effort to ascertain the names of the residents with whom he met during the tour. Sometime after the visit, the Respondent was provided with a letter from the Attorney General’s Office containing a list of the names of the residents who met with him and short summaries of what was said. (ex. 402; Sanders’ testimony, p. 977) The letter that accompanied the list was also sent to counsel representing the residents on the list. (Sanders’ testimony, p. 979) The Respondent made no effort to determine whether the individuals on the list had cases before the Supreme Court. (Sanders’ testimony, p. 977)

On or about March 18, 2003, a Motion for Recusal was filed in the case of *In re Thorell*. Citing the January visit to the Center, the Motion concluded with the following:

In order to preserve public confidence in the judicial system, Justice Sanders should no longer participate in deciding this case. (ex. 400)

On April 8, 2003, three Assistant Attorneys General, including the Chief of the Criminal Justice Division, wrote

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the Clerk of the Supreme Court, C.J. Merritt. The letter requested that the document given to the Respondent by Ralph Spinks and the content of the conversations on the issue of “*volitional control*” be disclosed and filed with the Clerk’s office. (ex. 402) The Respondent gave the “butcher paper” document to the Clerk shortly thereafter. The Respondent granted the Motion for Recusal on May 12, 2003, and removed himself from any further proceedings in the case of *In re Thorell*.

**ALLEGED CANON 3(A)(4) VIOLATION**

On April 5, 2004, the Commission determined that probable cause existed to believe that the Respondent violated Canon 3(A) (4) of the Code of Judicial Conduct which reads as follows:

**CANON 3**

**Judges shall perform the duties of their office impartially and diligently.**

**(A) Adjudicative Responsibilities.**

. . . .

(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.

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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.

The standard of proof required to sustain this violation is clear, cogent and convincing. The record does not meet this high standard. Although there was testimony from witnesses, including the Respondent, that he raised the issue of volitional control during the tour of the Center, the record does not establish that the responses to his general inquiry on the subject were sufficient to sustain a Canon 3(A)(4) violation.

**ALLEGED CANON 1 AND CANON 2 VIOLATIONS**

On April 5, 2004, the Commission determined that probable cause existed to believe that the Respondent violated Canons 1 and 2 of the Code of Judicial Conduct.

These Canons read as follows:

**CANON I**

**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

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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**

**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.

**(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.

There is no evidence on the record to support a violation of Canon 2(B).

The record establishes by clear, cogent and convincing evidence that before, during and after the visit to the Special Commitment Center the Respondent violated Canons 1 and

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2(A). 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.

The following examples illustrate this conclusion:

The letters of December 17, 2002, and January 13, 2003, put the Respondent on notice that some confusion existed about the purpose of the invitation and the expectations of the visit. It was clear that the authors of the letters wanted something akin to an investigation, rather than an informational tour. Concerns about this issue were raised by some of his colleagues on the Supreme Court. The Respondent dismissed their warnings and placed the burden of notifying the residents about the nature of his visit on the Superintendent of the institution.

The Respondent failed to make any inquiries about the people with whom he would be meeting. A cardinal rule in legal ethics is that lawyers do not represent opposing parties or get involved in matters where there is an appearance of a conflict of interest. To avoid such conflicts, lawyers routinely run conflicts checks. The January 13, 2003 letter included the names of four persons who were likely to interact with the Respondent during the visit. A simple computer check of Supreme Court filings would have revealed that Rickey Calhoun and Andre Brigham Young had cases pending before the Supreme Court. By not doing so, Respondent created a situation where it was likely he would interact with these individuals.

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The Respondent raised the subject of “*volitional control*” with some of the residents during the tour. He introduced the topic at a time when the Justices were circulating draft opinions in *Thorell*, a case dealing with the “*volitional control*” issue. The subtle distinctions offered by the Respondent as a defense to his actions do not cure this lapse of judgment. It is reasonable that lawyers handling appeals that involve “*volitional control*” issues would have concerns about the Respondent’s objectivity and impartiality based on this conduct.

The Respondent met with Charles Johnson, a litigant in the *Thorell* case. *In re Thorell* had been pending before the Court for several months. This was an appeal involving confinement issues for sexual predators. The Respondent was visiting an institution that confined convicted sexual predators. He should have realized that it was likely that he might interact with a litigant in that case, especially if he was going to inquire about “*volitional control*.” At a minimum, the Respondent, upon his arrival at the Center, should have inquired if the Superintendent or anyone on his staff had taken any action regarding his request that the residents be instructed about the limitations of the visit.

On two occasions during the visit, the Respondent accepted unknown material from two different residents. While he was testifying, the Respondent made a point of referring to SCC residents as “prisoners” and that he views the SCC as a prison. (Transcript p. 915) It is elementary that a visitor to a correctional facility should not accept packages or other material from an inmate. Even assuming such materials were involuntarily thrust upon him, the Respondent

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should have immediately turned the documents over to the people responsible for running the institution. Instead, he took them to Olympia and filed them away in his office. Upon returning to Olympia, the Respondent made no initial effort to cure any of his mistakes. He took no further action until he learned that counsel in *Thorell* became aware of his conduct during the visit. On March 18, 2003, a Motion for Recusal was filed. A few days later on April 8, 2003, the Respondent was provided with the names of the residents with whom he interacted. Even with this notification of concern, the Respondent did not run a computer check of the names on the list to ascertain if there might be a problem.

The actions of the Respondent that are cited in the examples above violated the Code of Judicial Conduct. Specifically, this 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.

The Respondent takes the position that judges should visit correctional institutions and that he should not be disciplined because he took advantage of the opportunity to have an educational experience. He further offers as a defense the certification from the Mandatory Continuing Judicial Education Committee as proof he did nothing inappropriate.

This proceeding is not about whether judges should visit correctional institutions. The Commission strongly encourages judges to visit correctional institutions. Normally such undertakings are tours sponsored by judicial education organizations that make arrangements with the authorities

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at the institution. If 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.

On any institutional visit (other than a court inspection pursuant to a specific case over which the judge is presiding), a reasonable judge:

- considers the likelihood that during such a tour, the judge will come into contact with inmates who presently have or are likely to have a matter pending before the judge. If such a likelihood exists, the judge establishes clear parameters of an institutional visit beforehand and notifies counsel when appropriate;
- avoids legal discussions with or accepting documents from inmates concerning legal matters while on a tour; and
- undertakes special efforts to notify the authorities and counsel if inadvertent interaction occurs between the judge and an inmate.

The Respondent's failure to exercise good judgment resulted in the ethical violations cited above. By not heeding the warnings of others and by not taking precautionary steps to ascertain if problems existed, the Respondent created legitimate concerns from counsel involved in certain cases

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before the Court. The Respondent's testimony sums up his state of mind:

Well, I believed that the prisoners at this facility would welcome a visit from a state Supreme Court justice to their facility or the Court to their facility. I didn't have any reason to believe that the staff would feel otherwise about it. Beyond that, I didn't —you know, I wasn't thinking about how everybody else in the world would think about it. (Transcript p.1004).

Finally, the Respondent claims that the complaints giving rise to this proceeding were brought by prosecutors who disagree with his judicial philosophy. He contends the complaints are politically motivated and therefore without merit. This argument is unfounded. The Statement of Charges in this proceeding was filed only after a thorough and independent investigation which included consideration of the Respondent's answers to the complaints.

**FACTORS**

Under both the Rules of the Commission and case law, there are ten non-exclusive factors the Commission must consider in determining the appropriate sanction for a violation of the Code of Judicial Conduct:

**1. Whether the conduct was an isolated event or a part of a pattern of conduct.**

The violations are all related to one event. The record reveals no pattern of conduct.

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**2. The nature, extent and frequency of the occurrence of the acts of misconduct.**

Although this was an isolated event, as noted above, there were several acts which gave rise to the violations.

**3. Whether the misconduct occurred in or out of the courtroom.**

The misconduct did not take place in a courtroom; however some of the lapses occurred in the Justice's chambers.

**4. Whether the misconduct occurred in the Justice's official capacity or his private life.**

All of the misconduct took place in the Justice's official capacity.

**5. Whether the Justice has acknowledged or recognized that the acts occurred.**

The Justice does not acknowledge or recognize that his actions were inappropriate. Even though he was warned by other Supreme Court justices and has recused himself from a significant Supreme Court case, he remains insensitive to the perceptions of others in the legal community and the general public. His position is that he knows when he is influenced by something and only then does it matter. He also attempts to divert the blame for his conduct by contending that he is a political victim of lawyers who do not share his judicial philosophy. The Respondent's testimony is revealing in that regard. During his testimony, the

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Respondent was asked if he was concerned with how lawyers perceive his conduct:

Q. Are you concerned with how lawyers see your actions as the—

A. I am concerned with the activities of certain lawyers. I don't think that lawyers have any misconception about what this tour was about and how the tour was conducted. I don't think that any lawyer, any lawyer, who has testified here or hasn't testified here, ever thought for a second that anything I did on any of these — that anything I did or heard or saw during the course of this tour would ever influence my decision on any case that came before me, not Mr. Hackett, not Mr. Bowers, not Mr. Norm Maleng, not any of them.

Q. And that's really the issue for you, isn't it?

A. It's the issue for them. (Transcript p. 1052).

A follow up question from another Commissioner:

Q. Now, I'd like to read a sentence from the preamble to the Code of Judicial Conduct. It says, "Intrinsic to all sections of this code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." Now how do you reconcile what you said, that it's not an issue for

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you on these perceptions, but its an issue for them, and how do you reconcile that with what's stated in the preamble of the Code of Judicial Conduct?

A. Well, this requires a little further explanation. An issue for me would be prejudging a case, an issue for me would be engaging in activity contrary to the code or otherwise which would lead to a legitimate perception that I was less than impartial and that I could not be trusted as a judge to perform my duties impartially. I do not believe that the people that are complaining about this visit had any effect whatsoever on my views about how to adjudicate these cases. I think their agenda is a completely different one. (Transcript p. 1080)

Other testimony in response to a question from a Commissioner at the end of the proceeding:

Q. Thank you. One last question from me. I know that you have read the canons before the proceeding. Do you today believe that you have an affirmative duty to avoid the perception of impropriety as a Supreme Court justice, sir?

A. Yes, but then again, what is the perception of impropriety and what is the basis for that perception? I would hope that the perception would be based upon a full knowledge of the facts and the law, because there's a lot of people out there in society that think things are improper because they really don't understand what it's all about, and there's different points of view, so I just try to do the best I can. (Transcript p. 1068)

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**6. Whether the Justice has evidenced an effort to change or modify his conduct.**

As noted in 5 above, the Respondent does not recognize any problems with his conduct, thus it is unknown if the Respondent would repeat similar conduct in the future.

**7. The Justice's length of service on the bench.**

The Respondent has been a Supreme Court Justice since January 1996.

**8. Whether there have been prior complaints against the Justice.**

There have been no prior sustained complaints against the Respondent.

**9. The effect the misconduct has upon the Integrity of and respect for the judiciary.**

With the exception of the Respondent's former law clerk, all of the lawyers who testified expressed concern about the Respondent's conduct. It is further evidenced by recusal motions filed against the Respondent by Snohomish County prosecutors. A state Supreme Court Justice is expected to be a model citizen. The expectations of lawyers are similar, especially those who practice before the Court, i.e., justices of the Supreme Court should be model jurists. The actions of the Respondent and his refusal to acknowledge the perceptions of others in the legal community reflect poorly on the Supreme Court and the judiciary in general.

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**10. The extent to which the Justice exploited his position to satisfy personal desires.**

There is no evidence in the record to show that the Respondent exploited his position for personal desires.

**SANCTION**

Considering all of the factors above, the Commission must determine an appropriate sanction. The Commission concludes that admonishment is appropriate for this first violation of the Code of Judicial Conduct. Further, consistent with RCW 4.12.040, the Respondent is encouraged 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.

Dated as of the 27th day of May, 2005.

s/ Gregory R. Dallaire  
Gregory R. Dallaire

s/ Betsy L. Wilkerson  
Betsy L. Wilkerson

s/ Josephine Townsend  
Josephine Townsend

s/ Harold D. Clarke, III  
Harold D. Clarke, III

s/ Wanda L. Briggs  
Wanda L. Briggs

s/ Judith E. Fortier  
Judith E. Fortier

s/ Marianne Connelly  
Marianne Connelly

**APPENDIX C — MINORITY OPINION  
DATED MARCH 22, 2005  
AND FILED APRIL 8, 2005**

**BEFORE THE COMMISSION ON  
JUDICIAL CONDUCT  
OF THE STATE OF WASHINGTON**

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,  
Washington Supreme Court

**MINORITY OPINION**

We agree with the majorities' Finding of Fact in this case. We do not agree these circumstances warrant any sanctions for Justice Sanders.

The preamble to the CJC reads in part as follows:

“It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether the activity was inadvertent, unintentional or based on a reasonable but mistaken interpretation of obligations under the Code, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system”.

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Here it is unlikely that Justice Sanders' actions have created a general public perception that he would not be impartial in cases involving the SCC. The crux of the problem is that he personally met with persons who were likely to have cases before him and asked some of them to make comments *related* to a legal issue pending before his court. This conduct was inappropriate and would raise reasonable concerns for the attorneys involved in these cases. On the other hand, there is no indication that Justice Sanders solicited or received comments *directly* on the legal issues before the Supreme Court or that Justice Sanders' position on Supreme Court cases was affected by his visit.<sup>1</sup>

Thus, we would find that Justice Sanders' conduct in this case was inappropriate consistent with the majorities' findings. However, we recognize that Judges are and should be encouraged to visit institutions and that little in the way of ethical guidelines have been available for such visits. We also recognize that Justice Sanders' mistakes here were arguably minimal. We would therefore not support any sanctions for this conduct.

Dated this 22 day of March, 2005.

s/ Joel Penoyar  
Joel Penoyar

s/ Antonio P. Cube, Sr.  
Antonio P. Cube, Sr.

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1. Justice Sanders also unexpectedly received written materials from inmates. These documents should have been returned to prison staff. If they weren't returned, Justice Sanders should have reviewed them or had them reviewed so that he could make appropriate disclosure to any counsel involved.

**APPENDIX D — DISSENT  
DATED MARCH 11, 2005**

**BEFORE THE COMMISSION ON  
JUDICIAL CONDUCT  
OF THE STATE OF WASHINGTON**

No. 4072-F-109

In re the Matter of

RICHARD B. SANDERS, Justice,  
Washington Supreme Court

**DISSENT**

We agree with the Findings of Fact set forth in the Majority Opinion.

However, the majority overlooks and does not set forth certain other facts that are of great importance in arriving at a decision in this matter.

Justice Richard Sanders is charged with having improper *ex parte* contacts with residents at Washington's Special Commitment Center (SCC) and creating an appearance of impropriety by doing so.

It is important to keep in mind that the burden is placed upon the Commission on Judicial Conduct to prove a violation of the Code of Judicial Conduct by "clear, cogent and convincing" evidence. The record here falls far short of this standard. On the contrary, the evidence shows that Justice Sanders appropriately addressed all issues of *ex parte* contact as they arose.

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In response to the Commission Decision, we consider the following facts:

On January 23, 2003 Justice Sanders wrote the superintendent of SCC a letter (Exhibit 215) (see Commission Decision page 4) setting forth the “ground rule” regarding any discussions with residents of the facility.

Prior to the tour, concerns were raised by members of the Supreme Court about Justice Sanders going on the tour. Chief Justice Alexander, in a conversation with Justice Sanders, testified:

I indicated to him that I did not intend to go personally. . . . And then I indicated to him that I felt that there were elements in the legal profession and in the law enforcement community that were not kindly disposed to Justice Sanders, and I felt that his activities would be more closely scrutinized than other justices, and I thought I should let him know that I had that belief, but that ultimately, it was his decision. (Testimony page 203)

Disciplinary counsel, in cross-examination of Justice Sanders, asked:

Chief Justice Alexander testified that he spoke to you and he warned you that going on this tour would be problematic for you specifically. And do you recall him saying that to you, that this would be problematic for you, Justice Sanders?

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Justice Sanders replied:

I think that Justice Alexander said, ‘People are gunning for you, Justice Sanders.’ That’s the reason it would be problematic for me rather than other justices.

This question then followed: “And forgive me, but what was your reaction to that?” Justice Sanders answered:

You know, I can’t let others determine when I go on or don’t go on a tour, . . . I have to be responsible for my own conduct and if some want to go after me, I simply can’t live in a life of fear. I have to do what I think is right. (Testimony page 1064)

Alan McLaughlin, a staff member at SCC, accompanied the visitors on the tour and later made notes of what occurred during the tour. He testified:

Justice Sanders introduced himself. He indicated that he was here to tour and to hear about the facility, he was interested in hearing their reactions to living in the facility. He prefaced that he would like to hear a little bit about what got them to the facility and where they were within the treatment process at the facility and their thoughts about it.

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Mr. McLaughlin was then asked whether Justice Sanders gave any warnings at the beginning. Mr. McLaughlin responded:

Yeah, actually, and then as he went on, he indicated that he wouldn't go into their personal lives and personal issues as there is a possibility that if he did and had [gone] into that too far for information, that he may have to recuse himself from their cases if their cases ever came before him. . . . That was really right at the beginning. . . . Actually, he said that a number of times throughout the course of those meetings of the residents in the classroom. (Testimony pages 405-406)

Sometime before the tour, Mr. McLaughlin had a conversation with Tim Lang, of the Attorney General's Office, and with David Hackett, of the King County Prosecuting Attorney's Office. During those conversations it was suggested that Mr. McLaughlin take notes, or reduce his observations to writing.

In e-mail messages prior to the tour, Mr. Hackett received this question from one Ms. Sappington: "What's wrong with someone from defense and prosecution going?" Mr. Hackett replied:

If we send attorneys with Sanders, then it is no longer an *ex parte* tour of questionable purpose but a legitimized tour where the attorneys were present. I think it also smacks of interference and

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looks like we are keeping an eye (on) him. He's already paranoid. Why make it worse? I'd send him around with some slick media guy and serve him lunch in the inmate kitchen. (Testimony pages 829-830)

It is also interesting to note that, upon cross-examination of Justice Sanders, disciplinary counsel elicited from him that Bernie Friedman, a state attorney, had signed up for the tour, and in a subsequent conversation Mr. Friedman told Justice Sanders that "his superiors had waived him off." (Although this was later objected to by disciplinary counsel, and sustained by the chair, it is a matter opened up by the commission on cross-examination.) (Testimony pages 1110-1111)

With regard to the materials that were handed to Justice Sanders by unknown residents—he took them to his chambers, glanced at one of them, and placed them in a file. They had nothing to do with any matter before the court.

Subsequent to the tour, a complaint was filed with the Commission on Judicial Conduct by the King County Prosecuting Attorney, and a motion to recuse was filed by the Snohomish County Prosecuting Attorney. Justice Sanders did, in fact, recuse himself from a matter that was then pending in the Supreme Court.

It should be noted that Justice Sanders did not know any of the residents of SCC, any of their names, or that any of those he visited with had matters before the Supreme Court.

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The Commission, in its decision, is critical of Justice Sanders's "refusal to acknowledge the perceptions of lawyers who practice before the Supreme Court on this issue and his belief that there is a political agenda underlying their concerns" because he does not believe he violated the Code of Judicial Conduct. We cannot find fault with his so called refusal.

Judges are encouraged to visit state institutions to become educated about the legal system and to seek improvements to that system, as well as to improve themselves, and they are given continuing judicial credit for such tours.

In light of the Commission Decision, any judicial officer who hereafter visits a state institution does so at his or her peril and, in fact, may be violating the provisions of the Code of Judicial Conduct.

Justice Sanders did not violate any provision of the Code, and it is unfortunate that he has been subjected to the ordeal of being placed "on trial" for performing a proper judicial function.

We would dismiss the complaint, upon finding no violation of the Code of Judicial Conduct.

Dated this 11th day of March, 2005

s/ John A. Schultheis  
John A. Schultheis

s/ Mike Sotelo  
Mike Sotelo

**APPENDIX E — ORDER OF THE SUPREME  
COURT OF WASHINGTON DENYING  
MOTION FOR RECONSIDERATION  
DATED AND FILED MARCH 7, 2007**

**THE SUPREME COURT OF WASHINGTON**

NO. 200,271-4

In the Matter of the Disciplinary Proceeding  
Against

RICHARD B. SANDERS,

Justice of the Supreme Court of the State of Washington.

**ORDER DENYING MOTION  
FOR RECONSIDERATION**

Justice Richard B. Sanders has filed a motion for reconsideration herein. The Court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED at Olympia, Washington this 7th day of March,  
2007.

For the Court:

s/ [illegible]  
CHIEF JUSTICE PRO TEMPORE

**APPENDIX F — EXCERPT FROM JUSTICE SANDERS’  
HEARING MEMORANDUM TO THE WASHINGTON  
COMMISSION ON JUDICIAL CONDUCT**

\* \* \*

*CJC 3(A)(4) Is Overbroad and Void for Vagueness*: Under the 1<sup>st</sup> and 14<sup>th</sup> Amendment to Constitution of the United States and applicable Washington Constitutional provisions, CJC 3(A)(4), as it is being applied in this case is unconstitutional:

A statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Luvane*, 118 Wn.2d at 844 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). A vagueness challenge is rooted in principles of due process: “the need to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid, and the need to prevent arbitrary and discriminatory law enforcement.” *Id.* (citing *Webster*, 115 Wn.2d at 642-43; *State v. Smith*, 111 Wn.2d 1, 4-5, 759 P.2d 372 (1988)).

*State v. Glas*, 147 Wn.2d 410, 421 (2002).

A statute is overbroad “[I]f it sweeps within its prohibitions constitutionally protected free speech activities.” *City of Seattle V. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990).

In this case a person of common intelligence would have to guess that it was a violation of the Canon to visit the Center.

*Appendix F*

There is no way from the face of the Canon to know that having discussions with prisoners who were not known to the Justice who may have had cases he did not know about in the court system would be considered a violation of CJC 3(A)(4). Furthermore, Justice Sanders has a free speech right to discuss matters with the prisoners under the circumstances of this case. CJC 3(A)(4) cannot be applied to him in this case since such application is unconstitutional.

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**APPENDIX G — EXCERPT FROM JUSTICE SANDERS’  
NOTICE OF CONTEST TO THE WASHINGTON  
STATE SUPREME COURT**

\* \* \*

Justice Sanders contests the denial of his Challenge for Cause and preserves for argument on appeal the issues raised by him in the Challenge for Cause including but not limited to the lack of impartiality of the Commission members, the refusal of the Commission to answer questions concerning Commission members including what documents concerning Justice Sanders the Commission members had already seen prior to the Statement of Charges being filed and the refusal to recuse when those documents were not provided.

(h) Justice Sanders specifically preserves for argument on appeal the issue raised in the Challenge for Cause concerning the validity of the process by which the Commission conducts its business including but not limited to the validity of a system which allowed the Commission members to receive secret information including facts and legal argument concerning Justice Sanders and to then sit in judgment without disclosing the information received.

(i) Justice Sanders specifically preserves for appeal the validity of the Washington “one tier” system of judicial discipline. This issue was raised in connection with the Challenge for Cause, in Justice Sanders’ Answer to Statement of Charges and during the proceedings.

(j) Justice Sanders specifically preserves for appeal the constitutionality under both the State and Federal Constitution of the CJC provisions he was found to have

*Appendix G*

violated as well as the constitutional failure of Commission procedures. These issues are raised by the Amended Commission Decision including the references to CJC sections allegedly violated, the procedural steps referenced in the Amended Commission Decision and otherwise reflected in the files and records in this matter. The constitutional arguments preserved include but are not limited to the lack of due process, the lack of equal protection, the failure to provide fair notice, restraints on free speech and restraints on freedom of association.

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**APPENDIX H — EXCERPT FROM JUSTICE SANDERS’  
OPENING BRIEF TO THE WASHINGTON  
STATE SUPREME COURT**

\* \* \*

**2. JUSTICE SANDERS WAS DENIED DUE PROCESS**

In this proceeding, Justice Sanders was denied due process under the Fourteenth Amendment to the United States Constitution and Art. 1, § 3 of the Washington State Constitution.

**(a). Canons 1 and 2(A) Are Void for Vagueness:** Canons 1 and 2(A) as applied by the Commission in this case was overbroad and resulted in a sanction based on an unconstitutionally vague rule.

To withstand a vagueness challenge, the canon must give adequate notice of prohibited activities. “Adequate notice requires the law to be sufficiently definite so that a person of ordinary intelligence can reasonably tell what is prohibited.” (Citing *American Dog Owners Ass’n v. Yakima*, 113 Wn.2d 213, 215, 777 P.2d 1046 (1989)).

*In re Blauvelt*, 115 Wn.2d 735, 741, 801 P.2d 235 (1990). Neither Canons 1 or 2(A) provide any definition so that a person of ordinary intelligence can reasonably tell what is “prohibited.” The result is imposition of an “implied” violation. This is exactly what the court cautioned against in *Discipline of Stoker*, 118 Wn.2d 782, 799, 827 P.2d 986 (1992):

*Appendix H*

While we must hold judges and judicial candidates to the highest standards of conduct, we must, at the same time, avoid, without a clear factual basis, reading into proper conduct “implied” results which constitute violations of the Code of Judicial Conduct.

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**APPENDIX I — SECOND EXCERPT FROM JUSTICE SANDERS’ OPENING BRIEF TO THE WASHINGTON STATE SUPREME COURT**

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Due process challenges to the one-tier system have largely been denied. *See Keiser v. Bell*, 332 F. Supp. 608 (E.D. Pa. 1971); *Roy v. Jones*, 349 F. Supp. 315 (W.D. Pa. 1972); *In re Brown*, 512 S.W.2d 217 (Tex. 1974). However, all these cases as well as the cases following them provide that while the “mere” showing that the investigatory and adjudicatory functions are combined is not per se a denial of due process where it can be shown that this combination resulted in the risk of actual bias, it would be a denial of due process: In its only pronouncement on the “one-tier” system, *In re Deming*, 108 Wn.2d 82, 106 - 107, 736 P.2d 639 (1987), the court stated with approval “Last, the investigation and prosecution of this case was conducted by staff personnel who should not participate in the decision making process and who, from the record, did not do so.” The court went on to state “The record supports the conclusion that here the adjudicator function was separated from the investigatory and prosecutorial function.” The record does not do so in Justice Sanders’ case.

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**APPENDIX J — EXCERPT FROM THE BRIEF OF  
AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON TO THE WASHINGTON  
STATE SUPREME COURT**

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**IV. ARGUMENT**

**A. Canons 1 and 2(a) Infringe on Speech and Association Rights.**

The United States Constitution guarantees the right of an individual to free speech. *See* U.S. Const. amend. I. Similarly, Washington’s Constitution guarantees that “[e]very person may freely speak, write and publish on all subjects.” Wash. Const. art. I, § 5. These guarantees embody “our profound national commitment to the free exchange of ideas.” *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (quoting *Harte-Hanks Commc’ns Inc. v. Connaughton*, 491 U.S. 657, 686, 109 S.Ct. 2628, 105 L.Ed.2d 562 (1989)). Closely associated with the right of speech are rights of assembly and association. *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937). “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .” *Nat’l Assn for Advancement of Colored People v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (citations omitted).

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**APPENDIX K — EXCERPT FROM JUSTICE SANDERS’  
ANSWER TO THE BRIEF OF AMICUS CURIAE TO THE  
WASHINGTON STATE SUPREME COURT**

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The free speech issue is a natural extension of the vagueness issue, since it is raised in the pleadings below and in the Notice of Contest. A part of the free speech argument is that Canons 1 and 2(A) are indeed vague as to free speech restraints. Judges are not free from restraints on their speech but such restraints must be clearly defined. *Discipline of Sanders*, 135 Wn.2d 175, 189, 955 P.2d 369 (1998). Here, as argued by the amicus curiae, Canons 1 and 2(A) do not provide a justice with the clearly defined strictures required for a restraint on speech and, therefore, they are unconstitutionally vague.

Since the issues of vagueness and free speech have been in this case from the beginning, were reserved in the Notice of Contest and are either directly argued by Justice Sanders in his briefing or are a logical extension of his arguments, the arguments of the amicus curiae should be accepted and considered by this court. The opportunity for the Commission to respond to these matters and present contrary authority is found in the answer it is authorized to file in response to the amicus curiae.

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