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April 28, 2004

Barry Althoff  
Executive Director  
Commission on Judicial Conduct  
PO Box 1817  
Olympia, WA 98507

Katrina Pflaumer  
Attorney at Law  
925 12<sup>th</sup> Ave. E.  
Seattle, WA 981092

RE: In Re Sanders, Commission Number 4072-F-109

Dear Mr. Althoff and Ms. Pflaumer:

I am faxing this letter and the Answer to Mr. Althoff for filing. Per prior discussion I am e-mailing the letter and Answer to Ms. Pflaumer.

I became aware last evening that there is an issue as to the timeliness of the response. I was devastated and dismayed to learn this. I called Mr. Althoff at his home where he was kind enough to take my call. As I advised him, I had intended to file the Answer today.

Given the faxing of the Statement of Charges on April 5, 2004 and adding the 21 days I certainly see the position that the Answer was due on Monday. As discussed below I am not certain that this position is correct but I cannot dispute that it is a possible reasonable interpretation of the situation.

My understanding of the filing date is this: I was aware of the requirement of CJCRP 13(d) mandating in person service of the Statement of Charges. I have always felt that "in person" meant making sure the judge or justice himself or herself actually got a copy so that later no argument could be made that he or she was not aware of it because their lawyer did not send it to them. I understood that we had agreed on behalf of Justice Sanders to accept service by fax so that someone from the Commission did not have to actually go to Justice Sanders to deliver a copy to him and so that the Commission did not have to wait to proceed until such event had happened. However, I did not believe that the faxing removed the need for the Commission, itself, to put a copy in the hands of the Respondent.

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This was confirmed for me when I received a copy of the April 5, 2004 letter from Mr. Althoff sending the Statement of Charges directly to Justice Sanders. If the "in person" requirement had already been met by the faxes to Mr. Strait and myself, such a letter would have been unnecessary and probably an improper contact with Justice Sanders since he was the represented party. However, because of the requirement that the Commission put a copy directly into the hand of Justice Sanders, I did not feel the letter was unnecessary or improper. When I got the letter, I thought that this was the "official" trigger for any time periods. I then dropped the day of mailing, added the 21-days and the additional three days for service by mail. This gave me a due date of April 29, 2004. I then backed this off one day to make sure I filed timely, hence my comment to Mr. Althoff that I had intended to file today. The three additional days for service by mail is supported by both the Civil Rules and the CJCRP.

Now that I have reviewed the history, I understand the argument that Monday was the filing date. I also believe my original interpretation was reasonable because of the mandatory requirement that a copy of the Statement of Charges be put in the hands of the Respondent and that the official timing began with the service by mail of the Statement sent directly to Justice Sanders.

The question at this point is what to do about this. This could be a long drawn out matter in which we fight over the procedural issue and the various due process and equity issues of using "default" to find misconduct against a judge under circumstances that would not comport with common standards for setting aside default judgments in a civil case. See CJCRP 8 and CR 55 regarding default motions. Given the historical preference of the courts for resolving matters on the merits rather than on technical defaults, the inherent unfairness to Justice Sanders and the possible appearance of overreaching by the Commission if Justice Sanders is not given his "day in court" it would seem that the most likely outcome of a motion to set aside any asserted default would put us right back on the track of heading towards a hearing should court review be required.

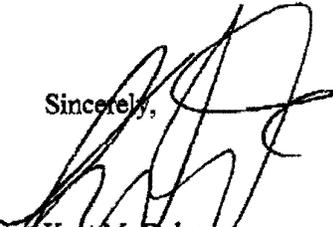
Fortunately, the Commission's own rules provides a solution short of that unnecessary litigation. CJCRP 19(a) anticipates that the time period to answer can be extended and does not require that such an extension be granted before the 21-days expire. CJCRP 3(f)(13) allows the Presiding Officer to waive any requirement of the rules applicable to a public proceeding unless a party shows that it would be prejudiced by such waiver. These sections provide the basic fairness and due process elements for setting aside non-jurisdictional, non-prejudicial defaults. There cannot be any possible prejudice to the Commission, its staff or Disciplinary Counsel. Ms. Pflaumer, Commission staff and the Commission itself have known for months of Justice Sanders intent to defend vigorously on the merits. There can be no surprise or reliance that would in any way be affected by an extension of two or three days to do precisely what everyone expected. In fact if I had filed the Answer by mail on Monday, under CJCRP 13, it would not even be deemed completed until tomorrow.

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Accordingly, I am asking Ms. Pflaumer to either agree that the Answer has been timely filed or to agree to submit an agreed order to the Presiding Officer extending the time for filing to today. I recognize that this issue has come up because of my interpretation of the filing deadline under the rules when I got the copy of the April 5, 2004 letter to Justice Sanders but this solution allows us to move on to resolving this case on the merits which, I assume, is everyone's goal rather than to obtain a sanction against a judge on a form over substance procedural basis.

Thank you for your consideration.

Sincerely,



Kurt M. Bulmer  
Attorney at Law  
WSBA # 5559

cc: Justice Richard Sanders  
John Strait

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**FILED**

APR 28 2004

COMMISSION ON JUDICIAL CONDUCT

BEFORE THE  
COMMISSION ON JUDICIAL CONDUCT

In Re the Matter of:	)	No.: 4072-F-109
HONORABLE RICHARD B. SANDERS,	)	ANSWER
Justice, Washington Supreme Court Judge.	)	
	)	

COMES NOW, the Honorable Richard B. Sanders, Respondent herein, answering the Statement of Charges filed in this matter. Any averments in the Statement of Charges not specifically admitted are denied.

**ANSWER TO STATEMENT OF CHARGES**

I. Background

1. Admitted that Justice Sanders is now and was at all times referred to in the Statement of Charges a justice of the Washington State Supreme Court.

2. Justice Sanders lacks sufficient information to form a belief as to the truth of the averment that a complaint was received by the Commission on March 18, 2003 and, therefore, it is denied. It is alleged by Justice Sanders that any such complaint was motivated by the hopes of potential impact on Justice Sanders' reelection efforts in 2004.

ANSWER - 1

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1           3. It is admitted that there was an investigation but Justice Sanders lacks sufficient  
2 information to form a belief as to the truth of the averment that the complaint resulted in the  
3 charges in the Statement of Charges so it is denied.

4           4. It is admitted that on October 8, 2003 the Commission first informed Justice  
5 Sanders that the Commission was commencing initial proceedings against him. This was  
6 apparently seven months after the complaint was received by the Commission and no reason  
7 was given for the unexplained delay by the Commission in its investigation. It is admitted that  
8 a Statement of Allegations was enclosed with the October 8, 2003 letter and that a response  
9 was invited. It is denied that the Statement of Allegations gave sufficient specific facts so as to  
10 invite specific responses to alleged facts pertinent to the alleged violations. It is admitted that  
11 nonetheless a response was filed by Justice Sanders on or about October 29, 2003.

12           5. It is denied that the response filed on or about October 29, 2003 was the only  
13 response filed by Justice Sanders as other information was provided by him to the Commission.  
14 The various responses filed provided full and complete information to the Commission which  
15 demonstrated that there was no basis in fact or law for finding any violations of the Code of  
16 Judicial Conduct.

17           6. Justice Sanders lacks sufficient information to form a belief as to the truth of the  
18 averment that based on his response the Commission staff engaged in further investigation so it  
19 is denied.

20           7. It is admitted that Disciplinary Counsel and counsel for Justice Sanders engaged in  
21 discussions regarding possible resolutions. Deny that any result other than dismissal was ever  
22 acceptable to Respondent.

23           8. Justice Sanders lacks sufficient information to form a belief as to the truth of the  
24 averment that at the Commission's executive session on the 2<sup>nd</sup> of April, 2004 a finding of  
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ANSWER - 2

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1 probable cause exists to believe that there were violations of provisions of the Code of Judicial  
2 Conduct so it is denied.

3 II. Conduct Giving Rise to Charges

4 9. It is admitted that Justice Sanders has been charged with violations of Canons 1, 2  
5 and 3(A)(4) of the Code of Judicial Conduct for allegedly engaging in ex parte conversations  
6 with people with cases pending or impending before the Washington State Supreme Court and  
7 that Justice Sanders is also charged with creating an appearance of impropriety on violation of  
8 CJC Canon 2. It is denied that there were any violations of any Canon of the Code of Judicial  
9 Conduct including the ones cited in the Statement of Charges.

10 10. It is admitted that on January 27, 2003 Justice Sanders visited the Special  
11 Commitment Center on McNeil Island, Washington. It is denied that he did so at the invitation  
12 of some of the residents or that any such persons had the legal capacity to invite anyone to tour  
13 the facility. It is admitted that prisoners at the facility had manifested an interest that every state  
14 court judge visit the facility, not just Justice Sanders. It is admitted that the Center is a secure  
15 facility for people committed as sexually violent predators pursuant to Chapter 71.09 RCW.

16 11. Justice Sanders agrees with the Commission of Judicial Conduct's admission that  
17 institutional visits by judges are appropriate.

18 12. Justice Sanders denies that the Statement of Charges are not premised on the mere  
19 fact of the visit. In fact, the actual premise of the Statement of Charges is that a mere visit is a  
20 violation.

21 13. It is denied that there were inappropriate communications with or inappropriate  
22 acceptance of documents from residents of the Special Commitment Center. All  
23 communications with prisoners were initiated by prisoners and concerned their lives at the  
24 institution, not any allegedly pending or impending judicial proceeding.

25 ANSWER - 3

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1           14. It is denied that residents at the Center are a unique population unusually likely to  
2 have cases pending in the appellate court system at all times. They are no different than any  
3 other incarcerated institutional population.

4           15. It is denied that residents "heavily" litigate many aspects of their detention at the  
5 facility as this implies that they do so in disproportion to prisoners incarcerated in other  
6 institutions. The prisoners at the Center do not litigate matters any more "heavily" than any  
7 other incarcerated persons.

8           16. It is denied that at the time Justice Sanders visited the Center some residents (plural)  
9 had cases "pending" in the Washington State Supreme Court. Unknown to him, one person at  
10 the facility did have a case that had been heard by the Court and an opinion was pending. When  
11 this was brought to his attention he recused himself which completely cured the situation.  
12 Furthermore, Justice Sanders lacks sufficient information to form a belief as to the truth of the  
13 averment that any other specific cases were pending so it is denied for this reason. The term  
14 "pending" is a legal term subject to differing interpretations and is not defined in the Statement  
15 of Charges. Only one case was pending as such term is used in the Code of Judicial Conduct.

16           17. It is denied that at the time Justice Sanders visited the Center some residents had  
17 cases impending in that their appeals were being processed in the state court system. The term  
18 "impending" is a legal term subject to differing interpretations and is not defined in the  
19 Statement of Charges. No cases were impending as such term is used in the Code of Judicial  
20 Conduct. Furthermore, Justice Sanders lacks sufficient information to form a belief as to the  
21 truth of the averment that specific cases were impending so the averment is also denied for this  
22 reason.

23           18. It is denied that cases "being processed in the state court system" were likely to be  
24 reviewed by the Washington State Supreme Court. In fact, statistics show that it is very  
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ANSWER - 4

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1 unlikely that a case "being processed in the state court system" will be reviewed by the  
2 Washington State Supreme Court. The chance of such review are less than one out of ten.

3 19. It is admitted that a statute provides for annual reviews by superior courts of each  
4 resident's continued custody.

5 20. It is denied that annual review cases are subject to review by the Supreme Court.  
6 Review is not mandatory and any review at the Supreme Court can be had only upon  
7 acceptance of discretionary review.

8 21. It is denied that Justice Sanders specifically anticipated discussions with residents at  
9 the facility. He anticipated that there might be discussions with residents who might desire it.

10 22. Admit that Justice Sanders' letter of January 23, 2003 (Attachment A) is a correct  
11 copy of that letter. Deny that the letter is evidence that Justice Sanders specifically anticipated  
12 discussions with residents at the facility as it only anticipated that there might be discussions.

13 23. Admit that the section of the letter quoted in the Statement of Charges has been  
14 accurately quoted. This statement envisioned that Justice Sanders would not initiate  
15 conversations with anyone, he would not communicate regarding a pending or impending  
16 proceeding and would not consider any such communication with respect to any pending or  
17 impending proceeding. This admonition was drafted in accordance with CJC 3(A)(4) and was  
18 strictly adhered to during the course of the visit.

19 24. It is admitted that at all times Justice Sanders recognized his ethical boundaries. The  
20 statements in his letter go beyond those ethical boundaries and demonstrate that he was not  
21 going to get even close to those boundaries.

22 25. It is denied that Justice Sanders overstepped any ethical boundaries or violated any  
23 ethics provisions.

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ANSWER - 5

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1           26. It is admitted that while at the Center Justice Sanders conversed with some  
2 residents. Justice Sanders lacks sufficient information to form a belief as to the truth of the  
3 averment that conversations occurred with more than 15 residents so it is denied.

4           27. It is denied that Justice Sanders initiated discussions on topics at issue in any  
5 pending or impending cases. No such discussions occurred.

6           28. It is denied that Justice Sanders initiated discussions with any prisoners. Prisoners  
7 desiring to communicate with Justice Sanders made themselves known to prison staff, not  
8 Justice Sanders. Justice Sanders made no request to speak to any particular prisoner or  
9 prisoners in general on the topics at issue on any alleged pending or impending cases. When  
10 there were discussions he did not recognize any of the names and did not have any reason to  
11 associate the names with any particular case. Any communication with a "pending or  
12 impending" litigant was inadvertent and the litigants status unknown to Justice Sanders.

13           29. During the discussion no allegedly pending or impending cases were mentioned nor  
14 was any other case discussed. Prisoners were specifically instructed before they said anything  
15 that Justice Sanders did not want to hear anything about their particular legal cases and none of  
16 the prisoners stated anything about their particular legal cases.

17           30. It is denied that Justice Sanders specifically asked residents individually to relate  
18 their criminal histories and acts that led to their detentions, to relate their treatment issues and  
19 their thoughts on the issue of volitional control over sexually violent behavior. It is admitted  
20 that some prisoners did relate their criminal histories and their impressions about their  
21 treatment at the Center, topics previously addressed by staff during the tour. It is admitted that  
22 some prisoners discussed whether treatment made them amenable to having volitional control  
23 over sexually violent behavior. There was no discussion about violation control as it related to  
24 any allegedly pending or impending case. Additionally, Justice Sanders did not recognize or  
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1 remember any of the names of the prisoners so there was no possible way for any discussions  
2 of any sort to be connected with any allegedly pending or impending case.

3 31. It is denied that Justice Sanders was "originally scheduled" to depart the facility at a  
4 1:30 p.m. ferry as no prior correspondence to him identified any particular return ferry which  
5 he should take to the mainland. The tour itself only commenced after 10:00 a.m. and Justice  
6 Sanders left the island before he had seen portions of the institution which he desired to visit  
7 such as the mess hall and some special detention cells. There were later ferries he could have  
8 taken.

9 32. It is denied that Justice Sanders did not advise any counsel representing the State's  
10 interests in commitment proceedings as a State Assistant Attorney General was well aware that  
11 the visit was going to occur. It is admitted that prior to the visit Justice Sanders did not advise  
12 any counsel specifically representing residents with alleged pending or impending cases that  
13 the visit to the Center was going to occur. It is denied that there was any duty to do so. It is  
14 denied that he intended to have discussions with residents with any allegedly pending or  
15 impending cases. It is denied that after the visit he did not advise counsel for any residents with  
16 any allegedly pending or impending cases that discussions had taken place.

17 33. It is denied that while at the Center, Justice Sanders accepted two documents from  
18 residents who allegedly had cases pending in the appellate court system. It is admitted that one  
19 resident did give Justice Sanders a document. Justice Sanders lacks sufficient information to  
20 form a belief as to the truth of the averment that any such document was from a resident who  
21 had a case allegedly pending in the appellate court system so it is denied. Justice Sanders does  
22 not know the name of the resident who gave him the document, did not read it at the time it  
23 was received and when he later read it he only skimmed the first three entries before he stopped  
24 reading and put it away. The document does not make reference to any allegedly pending or  
25 impending case. It is admitted that Justice Sanders did not provide counsel with information

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1 about the one document he received since he did not know who had given it to him so it would  
2 have been impossible for him to do so. It is denied that he had any duty to do so. It is admitted  
3 that at a later time he made the document available through an Assistant Attorney General.

4 34. It is denied that Justice Sanders communicated with residents about matters related  
5 to their allegedly pending or impending cases. It is admitted that no consent was obtained from  
6 any specific counsel since none was required and since he did not know who, if anyone, he  
7 might be talking to. It is denied that he did not give notice to counsel for the State since an  
8 Assistant Attorney General knew that the visit was going to take place.

9 35. It is denied that there was inappropriate ex parte communication concerning  
10 allegedly pending or impending proceedings.

11 36. It is denied that there was created any appearance of bias favoring particular parties  
12 in any alleged pending or impending proceedings.

### 13 III. Basis For Commission Action

14 37. It is denied that probable cause exists to believe that Justice Sanders violated  
15 Canons 1, 2 and 3(A)(4) of the Code of Judicial Conduct. The cited sections of the Code and  
16 Comments are accurately set forth.

### 17 IV. Right To File A Written Answer

18 38. The section of the Statement of Charges identified as "IV. Right To File A Written  
19 Answer" is procedural in nature and does not require either admission or denial.

### 20 DEFENSES

21 39. Justice Sanders alleges the following defenses but by doing so asserts that he is not  
22 required to do so by the rules and that failure to identify any defense does not constitute waiver  
23 of any additional defense which may be raised in the future.

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ANSWER - 8

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1 40. Presentation of the true facts will demonstrate that Justice Sanders did not commit  
2 any violations of the Code of Judicial Conduct and that at all time he conducted himself  
3 properly.

4 41. The burden of proof in a Commission hearing is "clear, cogent and convincing"  
5 which requires that it be "highly likely" that Justice Sanders violated the Code of Judicial  
6 Conduct. The Commission cannot meet its burden of proof in this matter.

7 42. Justice Sanders has been denied due process by the process in which this matter  
8 were investigated and ordered to hearing by the Commission. He was denied the reasonable  
9 opportunity to respond, was not provided all information known by the Commission to which  
10 he was being held accountable and was not given meaningful access to the Commission while  
11 it sat as a decision making body. During the decision making sessions Disciplinary Counsel  
12 had access to the Commission directly, either in person or through the Commission's  
13 investigator. The Commission has been given information independently and without  
14 knowledge of Justice Sanders and any member who received such information cannot now  
15 properly sit on any further consideration of this case once he or she voted for probable cause.

16 43. The cited provisions of the Code of Judicial Conduct are too vague to provide fair  
17 notice to Justice Sanders that his actions in visiting the Center and talking with prisoners might  
18 constitute a violation of the Code.

19 44. The alleged violations are without precedent in this state or nationally and,  
20 therefore, Justice Sanders was not reasonably on notice that any such visits and/or  
21 conversations might constitute a violation. Furthermore, such visits are encouraged by the court  
22 rules as part of the continuing education of judges.

23 45. Justice Sanders did not know any of the prisoners, did not recognize any of their  
24 names, did not have any knowledge of any allegedly pending or impending cases and the  
25 chances of any one case coming before him were remote. Under these circumstances there is no

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1 appearance of bias in favor of any party by going to the facility and having conversations of the  
2 type which occurred in this matter.

3 46. The cited Code provisions impermissibly restrict Justice Sanders' freedom of speech  
4 and right of association and sanctions for his conduct violate his constitutional rights.

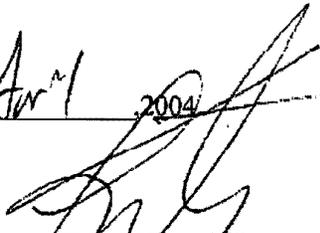
5 47. There has been no violation of ex parte rules since Justice Sanders did not initiate  
6 any contact, there was no "ex parte" communication as used by the rules, no conversation  
7 "concerning" any case occurred and none of the matters discussed involved pending or  
8 impending matters

9 48. Violations of the cited provisions required actual knowledge by Justice Sanders that  
10 a specific case was pending or impending before him for decision. There was no such  
11 knowledge.

12 49. One of the prisoners was one of a number of defendants named in a consolidated  
13 matter. At the time of the visit this case was pending issuance of an opinion. When Justice  
14 Sanders was later advised of this, he recused himself from the case. Recusal is the appropriate  
15 remedy in such situation and is a complete defense to any assertion of improper contact  
16 including inadvertent contact.

17 WHEREFORE, having answered the Statement of Charges, Justice Sanders asks that all  
18 charges against him be dismissed.

19  
20 Dated this 28<sup>th</sup> day of April 2004

21  
22   
23 Kurt M. Bulmer, WSBA #5559  
24 Attorney for Justice Sanders  
25