

Superior Court of the State of Washington
For the County of King



King County

Judge Michael J. Heavey
Department 20

Maleng Regional Justice Center
Kent, Washington
98032-4429

January 3, 2013

Washington State Supreme Court
415 12th Ave SW
PO Box 40929
Olympia, WA 98504-0929

Attention: The Honorable Barbara Madsen
Chief Justice of the Washington State Supreme Court

Subject: Report of Misconduct by the Washington State Commission on Judicial Conduct and its
Executive Director.

Dear Chief Justice Madsen and Associate Justices,

I. GENERALLY

The Washington State Commission on Judicial Conduct (Commission) has been poorly served by its Executive Director, Ms. Reiko Callner. Commission powers have been usurped by Ms. Callner and have been wrongfully used to campaign against a sitting judge running for re-election. The Members of the Commission have acquiesced in this highly unprofessional action.

More than any other office, the people who judge the judges must be above reproach, acting according to their authority, and not beholden to the staff who serve them – especially if the staff have become crusading advocates who have abandoned objectivity.

The observations which lead to these allegations began in January of 2009 when I self-reported writing three letters to Italy on court stationery on behalf of Amanda Knox. In 2011 there was a second complaint and investigation against me. Details of misconduct directed at myself are outlined at the conclusion of my two major complaints alleging malfeasance in situations regarding Judge Judith Eiler and Judge John Wulle.

COPY

After reviewing the record, talking to people involved, and analyzing the consequences, I find a pattern of inappropriate behavior and a deliberate appropriation of the Commission's power by its executive director. This appropriation continues with the apparent acquiescence of the Commission's members.

Ms. Callner, the Executive Director of the Commission has:

- A. Usurped the powers of the Commission to campaign against a judge running for re-election and attempted to influence an election by issuing unauthorized orders and contacting the press **(Allegations 8, 11 and 15)**;
- B. Invited unnecessary press and public scorn of a judge, thereby diminishing public confidence and respect for the judiciary **(Allegation 10)**;
- C. Vilified a judge by accusing him in the press of "bullying," in an apparent effort to have the judge defeated at the polls **(Allegations 11 and 12)**;
- D. Likely conspired with the political opponents of a judge to use the Commission as a tool to defeat the judge at the polls **(Allegation 8)**;
- E. Usurped the executive police power of the Commission and appears to have carried on a many-year investigation of a sitting judge without any authority from the Commission **(Allegation 3)**;
- F. Violated the sanctity of the deliberating Commission by interrupting Commission deliberations in an attempt to influence a Member of the Commission to change his vote **(Allegation 1)**;
- G. Violated the Washington State Constitution (Constitution) by requiring the investigative counsel of the Commission to report directly to her **(Allegation 4)**;
- H. Abused her power to write an unfair summary of a Commission case **(Allegation 15)**;
- I. Withheld from the Commission law and fact, resulting in the malicious prosecution of a judge **(Allegation 17)**;

Furthermore, members of the Commission have:

- J. Failed to exercise the diligence of a judicial officer as required under the Code of Judicial Conduct (Code) by knowing and exercising their Constitutional duties **(Allegations 14 and 16)**;
- K. Ceded their Constitutional duties, *de facto* and *de jure*, by vesting Ms. Callner with their executive police power to investigate and their judicial power to deliberate **(Allegation 13)**;
- L. Failed to perform their mandatory Constitutional duty to first investigate and require that investigative counsel of the Commission report directly to the Commission **(Allegation 6)**.

And finally, the investigative counsel of the Commission has:

- M. Violated the Constitutional requirement of confidentiality in the investigative stage of a judge **(Allegation 7)**;
- N. Failed to perform their mandatory Constitutional duty by reporting directly to a non-member of the Commission **(Allegation 5)**.

II. REQUEST

I request this Honorable Court investigate these allegations of misconduct, and upon completion of the investigation take action that the Supreme Court deems necessary.

III. JURISDICTION

Under Article IV, Section 4 of the Constitution this Supreme Court has original jurisdiction in writs of *quo warranto*¹ and *mandamus*² as to all state officers. The Commission is a state office established by Article IV, Section 31 of the Constitution. Much of this report concerns the executive director usurping the powers of this state office (*quo warranto*) and members of the Commission failing to perform duties mandated by the Constitution (*mandamus*).

As a Superior Court Judge, I am not making an application for a writ, but submit that the misconduct might also be answerable by an ethics complaint. Under judicial Canon Rule 2.15 judges should report misconduct to the "appropriate authority," *i.e.* the authority having responsibility for initiation of disciplinary process in connection with the misconduct reported. This report alleges misconduct against members and employees³ of the "appropriate authority" itself. It would not be fruitful to complain to the Commission.

¹ RCW 7.56.010 'quo warranto' provides that an information may be filed against any person who shall usurp, intrude upon, or unlawfully hold or exercise any public office.

² RCW 7.16.160 state a writ of mandamus may be issued by any court...to an inferior tribunal, corporation or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office.

³ RCW 42.52.370 (Ethics in Public Service Act) provides that ethical complaints against employees of the judicial branch shall be enforced by the Commission.

This report involves allegations of misconduct concerning fundamental judicial functions. A report of misconduct concerning the Commission should not be subject to review by another branch of government, a subordinate judicial agency, or the Commission itself.⁴ I request this Honorable Court assert exclusive jurisdiction over this matter.

IV. JUDGE JUDITH EILER, CJC No. 5198-F-136

A fact-finding hearing concerning Judge Judith Eiler was conducted by the Commission November 18 – 21, 2008 at the King County Maleng Regional Justice Center in Kent, Washington. At the beginning of Commission deliberations Ms. Callner attempted to participate. She was asked to leave by Commission Member Judge John McCarthy. Ms. Callner complied and left the deliberations.

Commission Members Joseph G. Bell, Wanda Briggs, Marianne Connelly, Wayne Ehlers, Candace Kalish, Hubert G. Locke, John A. McCarthy, Tom L. Morris, and Presiding Officer Michael Pontarolo were present. Towards the end of the deliberations it became known to Ms. Callner that there was a dissenting vote. Ms. Callner entered the jury room and informed the deliberating Commissioners that it was important for purposes of appeal to the Supreme Court that the Commission be unanimous. Judge McCarthy asked her to leave, stating he did not need her help. She left the deliberation room.⁵

No member of the Commission who witnessed the event took action to have Ms. Callner disciplined, reported her to the Washington State Bar Association (WSBA), or reported her to the King County prosecutor.

Allegation 1 - RCW 9A.72.140 defines the crime of jury tampering. This statute provides that a person who attempts to communicate with a deliberating juror with the intent to influence a juror's vote is guilty of jury tampering, a gross misdemeanor. While it is not a crime to attempt to influence a deliberating Commissioner, it is unethical. Ms. Callner violated the sanctity of the deliberating Commission and raised a substantial question as to her fitness as a lawyer by attempting to influence a Commission member's vote.

⁴ Other agencies with possible jurisdiction are: a) the Commission on Judicial Conduct; b) Washington State Bar Association; c) Thurston, King and Clark County Prosecuting Attorneys; d) Washington State Auditor, RCW 42.40.040 – State Employee Whistleblower Act; and e) Attorney General's office under RCW 42.52.450 and WAC 292-09-050(3).

⁵ Judge McCarthy is not the source of this information. Judge McCarthy's lone dissent essentially became the majority decision of the Supreme Court. See *In re Eiler* 169 Wn.2d 340 (2010).

Allegation 2 - The Commission is an independent agency of the judicial branch. Therefore, I would submit the Commissioners (lay, attorney and judge members) are judicial officers and subject to the Code of Judicial Conduct (Code).⁶ The deliberating Commissioners observed the misconduct of Ms. Callner and under Canon 3(C), in effect in 2008 at the time of the proceedings, were required to take "appropriate action." They failed to do so.

Note - Ms. Callner's attempt to influence a deliberating Commission and the failure of the Commission to see anything improper in her conduct is illustrative of this group's inability to assert itself over this overzealous staffer. The Commission has ceded its executive power to investigate and prosecute to Ms. Callner. The Commission has also ceded its judicial power to adjudicate, at least in part, to Ms. Callner.

V. JUDGE JOHN WULLE, CJC No. 6707-F-154⁷

Article IV, Section 31, Subsection (2) of the Constitution provides:

"(2) Whenever the commission receives a complaint ... the commission shall first investigate⁸ the complaint or belief and then conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint or belief."

On August 7, 2012 Judge John Wulle, a 16-year judge, was defeated at the polls in his re-election bid. The negative publicity in the press surrounding his Commission Case No. 6707 was widely thought to be the primary reason for his defeat. Much of this negative press was unnecessarily and unprofessionally created by Ms. Callner.

Usurpation of Executive Investigative/Prosecutorial Power - Commission case numbers are assigned when a complaint is first brought to the Commission's attention. Case No. 6707 was assigned in July 2011 when the complaint first came to the Commission's attention. However, Commission Investigative

⁶ The Commission is a judicial agency and the members of the Commission perform judicial functions. Under the Code of Judicial Conduct, "A judge, within the meaning of this Code, is anyone authorized to perform judicial functions..." (Application I.(A))

⁷ The undersigned does not represent Judge Eiler or Judge Wulle, nor did he consult with them in the preparation of this report. The undersigned has no opinion on the merits of their underlying cases.

⁸ Underlining throughout is the undersigned's, unless otherwise noted.

Counsel Kurt Twitty had apparently been investigating Judge Wulle since as early as March of 2009, almost two and a half years earlier. March 2, 2009 is the date of one of the four videos of hearings used to support the charge of inappropriate judicial decorum against Judge Wulle.

Investigative counsel, Kurt Twitty and Michele Slotemaker, report directly to Ms. Callner during initial investigations; they continue to report to her until a Statement of Charges is issued. It is the undersigned's experience, as well as that of former Commissioners, and others, that every action of investigative counsel is supervised by Ms. Callner. She is the *de facto* chief investigative officer, negotiator and prosecutor.

In an email to the undersigned dated November 20, 2009, Ms. Callner stated:

"The role of Executive Director, prior to entry of an agreed stipulation or the filing of a statement of charges, is to attempt to resolve allegations in a manner consistent with the evidence of the investigation, the response of the judicial officer, a reasoned analysis of the Code consistent with case law and informed by prior history."

There is no constitutional or statutory support for Ms. Callner to be part of a Commission investigation. Nor is there any authority for Ms. Callner to initiate investigations of judicial officers or resolve allegations. There is no authority for Ms. Callner to make a "reasoned analysis" concerning an investigation.

The Commission is a body composed of distinguished citizens, lawyers and judges. Much consideration is taken in their appointment by the Governor, the judicial organizations and the Washington State Bar Association. The Commission should be neutral and impartial.

Constitutional duties are not delegable. A judge cannot delegate the review of a search warrant application to the judge's bailiff. Likewise, the Commission cannot delegate their Constitutional duty to "first investigate" to a non-Commissioner.⁹ The Commission has the sole authority to bring the weight of a government investigation upon a judge.

Allegation 3 - Ms. Callner has abused her position by first initiating the investigation against Judge Wulle. The investigation of a judge is a Constitutional power reserved solely for the Commission. It

⁹ At a minimum, the Commission should first receive and review a complaint, and then direct counsel to investigate.

appears that the investigation of Judge Wulle went on for years before being brought to the attention of the Commission. It is a violation of state law to usurp the powers of the Commission.

“RCW 42.20.030 provides, “Every person ... who shall willfully exercise any of the functions or perform any duties of such officer... shall be guilty of a gross misdemeanor.”

Allegation 4 - Ms. Callner has abused her position by requiring investigative counsel to report directly to her. The Constitution requires investigative counsel to report directly to the Commission; the Constitution Article IV, Section (9), states in part,

“The legislature shall provide for commissioners’ terms of office and compensation. The commission shall employ one or more investigative officers with appropriate training and experience. The investigative officers of the commission shall report directly to the commission. The commission shall also employ such administrative or other staff as are necessary to manage the affairs of the commission.”

Allegation 5 - Mr. Twitty violated the Constitution by directly reporting to Ms. Callner. Mr. Twitty investigated Judge Wulle for many months, possibly years, without first being ordered to do so by the Commission. RCW 42.20.100 provides that employees who neglect to perform a duty proscribed by law are guilty of a misdemeanor.

Allegation 6 - Members of the Commission have surrendered their duty under the Constitution to first investigate a complaint or belief. The Constitution is unequivocal and mandates that “Whenever the commission receives a complaint...the commission shall first investigate the complaint ...”

A statute provides:

“RCW 42.20.100 Failure of duty by public officer a misdemeanor. Whenever any duty is enjoined by law upon any public officer ... their willful neglect to perform such duty ... shall be a misdemeanor.”

Violation of Confidentiality Provisions - Article IV, Section 31 of the Constitution states in part,

“The investigation and initial proceedings shall be confidential.”

State ethics law RCW 42.52.050 provides in part, “(3) No state officer or employee may disclose confidential information to any person not entitled to receive the information.”

This Honorable Court stated in 1987,

“During the investigatory (pre-charging) stage of an inquiry into alleged misconduct confidentiality is mandated.” See *In re Deming*, 108 Wn2d 82 (1987).

RCW 2.64.113 provides that any person violating the confidentiality provisions of the Commission may be subject to contempt proceedings in superior court.

Mr. Twitty has admitted in a sworn declaration that a complainant knew of the allegations and investigation during the pre-charging stage of Judge Wulle.

Allegation 7 - Mr. Twitty violated the statutory, case law and constitutional mandates that the investigation and initial proceedings be confidential. Mr. Twitty’s declaration confirms that a complainant was informed of the allegations and investigation of Judge Wulle during the investigatory stage. An investigation may well show that others knew of the investigation of Judge Wulle prior to the issuance of a Statement of Charges on February 22, 2012.

The De Facto Negative Campaign against the Judge - On Monday, April 9, 2012, Josephine Townsend, attorney for Judge Wulle, filed four motions for the consideration of the Commission. One of the motions was to delay the setting of the adjudicative fact-finding hearing until Judge Wulle’s Public Records Act request had been complied with.

Ms. Callner did not inform the presiding Commissioner Kathleen O’Sullivan of the motion.¹⁰ Despite the motion to delay the hearing, two days after Judge Wulle’s motions were filed Ms. Callner set a hearing date of June 18, 2012, and filed a Notice of Hearing, posting it on the Commission’s website. Ms. Callner did not seek the approval of Presiding Officer O’Sullivan prior to issuing the Notice of Hearing.¹¹

Despite a second motion that Ms. Callner be removed from further involvement in the matter, Ms. Callner took the actions described above.

¹⁰ In response to my declaration in Judge Wulle’s matter, Ms. Callner did not dispute this.

¹¹ Later the presiding officer changed the hearing date to August 27, 2012, 20 days after the primary election.

Despite a third motion that Steven Reisler be removed as Disciplinary Counsel, Ms. Callner appointed him as Disciplinary Counsel for the hearing.

Despite a fourth motion to impanel Commission members who had not sat during the finding of probable cause, Ms. Callner appointed the same Commissioners to sit for the adjudicative hearing.

All of Ms. Callner's actions were taken *without approval of the presiding judicial officer* and the actions were taken *with motions pending* before the Commission related to the specific actions she took after she received the motions.

On April 11, 2012, Ms. Callner set the unauthorized hearing date and informed Vancouver *Columbian* newspaper reporter Laura McVickers by email that Ms. McVickers should check out the Commission's website.¹² This is evidence that Ms. Callner's true aim was to use her powers and the Commission to defeat Judge Wulle at the polls.¹³

On Wednesday April 11, 2012, the Vancouver paper posted online a front page article regarding the charges and links to four videos. On Thursday April 12, 2012, the newspaper printed a front page article concerning Judge Wulle's charges. These articles were devastating to Judge Wulle's re-election chances.

Allegation 8 – It is a violation of state law to “use” the Commission on Judicial Conduct to influence a judicial election and seek to defeat a judicial candidate at the polls. Despite a pending motion to delay (and without having the permission of the presiding judicial officer), Ms. Callner abused her position by ordering a politically-influenced hearing in the Judge Wulle matter. Ms. Callner then informed reporter Laura McVickers. Judge Wulle was excoriated on the front page of the local newspaper. Ms. Callner's actions were hardly above reproach. It is widely thought in Vancouver that the Commission helped defeat a candidate for judge at the polls. Ms. Callner needs to be investigated regarding what communications she may have had with Judge Wulle's political opponents which resulted in the Commission being “used” as a tool to have him defeated at the polls.

Commission Malfeasance and Misfeasance – There were three videos¹⁴ of Judge Wulle hearings that were brought to the attention of the Commission at the July 8, 2011 meeting of the Commission. This

¹² See Ms. Callner's response to my declaration in Judge Wulle's matter which included her email.

¹³ On December 14, 2012 the Commission reprimanded Judge Wulle.

¹⁴ After the July 2011 Statement of Allegations, a fourth hearing video of October 25, 2011 was added.

was the first time the Commission knew there was an ongoing investigation into the alleged indecorous conduct of Judge Wulle. The hearing dates of the three videos were:

- 1) March 2, 2009 – criminal sentencing;
- 2) July 6, 2010 – juvenile matter;
- 3) March 11, 2011 – juvenile matter.

The second matter was one year and four months after the March 2, 2009 first incident.

What if the matter of the alleged indecorous conduct of March 2, 2009 had been brought to the attention of Judge Wulle in April of 2009? Judge Wulle may well have taken corrective action and the later alleged misconduct may well have never happened.

The many years of apparent unauthorized investigation of Judge Wulle, the timing with the election, the issuance of an authorized order of April 11, 2012, the contact with the press, and the vilification of Judge Wulle in the press are all evidence of using the Commission for political purposes.

The actions against Judge Wulle were undertaken without a single complaint from litigants or their attorneys. These actions were undertaken without a single Member of the Commission authorizing: a) the many-year investigation; b) the order setting a fact-finding hearing; c) the contact with the press on April 11, 2012; and d) the inference that Judge Wulle was a bully in the July 3, 2012 *Oregonian* article (see Allegation 11).

Allegation 9 – This is both malfeasance¹⁵ and misfeasance.¹⁶

Diminishment of Public Respect for the Judiciary. This Honorable Court commented on what happens when a judge is publicly charged with misconduct in 1987.

“...once it was decided that it would be held (the public hearing) the judge and the judicial system stood to be diminished regardless of the outcome of the hearing.” See *In re: Deming* 108 Wn.2d 82, 95 (1987).

¹⁵ Webster’s Seventh New Collegiate Dictionary (1971) defines ‘malfeasance’ as “wrongful conduct of a public official.”

¹⁶ Webster’s Seventh New Collegiate Dictionary (1971) defines ‘misfeasance’ as “the performance of a lawful action in an illegal or improper manner.”

When a judge is publicly taken to task for alleged misconduct the entire judicial system loses public confidence. What happened in Clark County concerning the Judge Wulle case was unnecessarily damaging to the judiciary. The conduct of Ms. Callner was not necessary to correct the alleged misconduct of a judge.

Allegation 10 – The wrongful acts of Ms. Callner have unnecessarily diminished public confidence in the judicial branch of government.

More campaigning by Ms. Callner - On July 3, 2012, just a month before Judge Wulle's August 7, 2012 election, Ms. Callner made comments that were printed in *The Oregonian*. Reporter James Mayer, in an article about the charges against Judge Wulle noted,

“Callner said angry outbursts from a judge can create significant ethical problems. For one thing they can create the impression that the judge is biased.

‘Judges have a basic obligation to promote the confidence in the integrity and independence of the judiciary,’ Callner said.

‘When a judge is angry or rude, the other people in the courtroom can’t respond in kind out of fear of losing their case,’ she said.

‘The stakes are pretty high. That makes it bullying,’ Callner said.”

In effect, Ms. Callner called Judge Wulle a bully on July 3, 2012 in *The Oregonian* newspaper, knowing there was a pending election. This is inappropriate.

Allegation 11 – Mr. Callner used her position as executive director to vilify Judge Wulle as a bully in the press. This is another example where Ms. Callner used the Commission to politically campaign and attempt to defeat a judicial candidate in an election.

Allegation 12 – On July 3, 2012, despite the pending election and adjudicatory hearing, Ms. Callner spoke to *The Oregonian* on behalf of the Commission as an advocate. Ms. Callner should have been neutral and impartial.

Usurpation of Judicial Power - In addition to allowing Ms. Callner *de facto* powers to initiate investigations, supervise investigations, negotiate resolutions, and have investigative counsel report directly to her, the Commission has adopted a formal *de jure* policy that allows deliberating

Commissioners to consult with her during deliberations. The Commission's Members' Policies Rule 4.5(b) provides in part,

"After the commencement of the public hearing, members shall not discuss testimony or evidence or the merits of the case with anyone, including other members, until deliberations in the matter have commenced, at which time they may, as a panel, have such discussions with one another and with Commission counsel."¹⁷

This is akin to having a prosecuting attorney sitting with a deliberating jury in a criminal matter.

In an email of November 20, 2009, to the undersigned, Ms. Callner explains her role during deliberations,

"If a complaint goes to a Statement of Charges, the Executive Director's role bifurcates from the Investigative Counsel's role. ... The panel and the ED¹⁷ do not discuss the merits of the case until the conclusion of the fact-finding hearing. "

The sole authority to deliberate on a judge's fate should be in the hands of the constitutionally appointed Members of the Commission. No other person should be in the deliberation room and certainly not a person who was the chief investigator of the judge.

Allegation 13 – Under Member's Policies Rule 4.5(b) the Commission has unconstitutionally vested Ms. Callner with the adjudicative judicial power to be involved in deliberations.

Allegation 14 – The members of the Commission have failed to exercise the diligence of a judicial officer under the Code¹⁸ by knowing their constitutional duties. Their nonfeasance¹⁹ and lack of diligence have allowed Ms. Callner to engage in malfeasance and misfeasance.

Note: As earlier stated in the overview of this request for investigation, the factors which led the undersigned to lose faith in this most important judicial agency came as the result of misconduct by Ms.

¹⁷ Ms. Callner acts as Commission counsel, chief administrative officer and chief investigative officer.

¹⁸ Code Canon Rule 2.5 provides, in part, "A judge shall perform judicial and administrative duties competently and diligently." The Comment to Rule 2.5 provides, in part, "Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties...and expeditious in determining matters under submission."

¹⁹ Webster's Seventh New Collegiate Dictionary (1971) defines 'nonfeasance' as "omission to do what ought to be done."

Callner directed at him. Two of those incidents of misconduct are offered to show a pattern of misconduct by Ms. Callner; *i.e.*, the misconduct in Judge Wulle's case is not innocent or isolated.²⁰

VI: JUDGE MICHAEL HEAVEY, CJC NO. 5975-F-145

On September 24, 2010, in an agreed order, the undersigned was admonished by the Commission. The reader can view the agreed order of admonishment if they go to www.cjc.state.wa.us, click on "Public Actions," click on "Year 2010" and go to *In Re: Michael Heavey*.

Summary of case - Shortly after the entry of the agreed order, the following summary of Case 5975 appeared on the Commission's website and in its written annual report,

"In re The Honorable Michael Heavey. From an agreed statement of facts, the Commission found that King County Superior Court Judge Michael Heavey violated Canons 1, 2(A), and 2(B) by using his status as a judge to attempt to influence a criminal proceeding in another country; thereby exploiting his judicial office for the benefit of another. The Commission admonished Judge Heavey."

The above summary concerning Judge Heavey is remarkably different than the 146 other summaries on the website.

National Report of Case – Please compare Ms. Callner's summary with the national judicial ethics expert Cynthia Gray's summary. Ms. Gray reported the following summary of Judge Heavey's case in the Fall 2010 edition of the *Judicial Conduct Reporter*:

"Use of Court Stationery. Pursuant to a stipulation and agreement, the Washington State Commission admonished a judge for writing three letters on official stationery to members of the Italian judicial system...Amanda Knox was arrested in 2007 in Italy...In his self-report to the Commission, the judge explained he had written to the Italian judiciary to attempt to improve the fairness of the proceedings in the Knox case, but he also recognized he had attempted to advance Knox' private interests..."

The above summary by Ms. Gray includes the facts, the code violation, mitigating information in the agreed order, Italy, Amanda Knox and self-report. The 146 other summaries on the Commission's website follow the same type of reporting as Ms. Gray's.

Ms. Callner likely wrote the unfair summary to lessen Judge Heavey's chances at re-election.²¹

²⁰ Canon Rule 2.15 urges Judges to report lawyer misconduct. In the Comments sections to Rule 2.15 it is noted, "An apparent isolated violation may indicate a pattern of misconduct only a disciplinary violation can uncover."

²¹ Judge Heavey decided not to run for re-election.

Allegation 15 – Ms. Callner abused her position by writing an unfair case summary about Judge Heavey’s case. She likely wrote the unfair summary to affect Judge Heavey’s re-election.

January 20, 2012, Complaint to Commission about Summary. On January 20, 2012 I wrote the Commission Chair John Sleeter complaining about the unfair summary. Also, pursuant to Commission Members’ Policies Rule 6.3, I complained about the Executive Director. Rule 6.3 provides that if you have a complaint against the Executive Director you should write the Commission Chair.

There has been no response.

Allegation 16 – Members of the Commission are judicial officers and are subject to the Code. Their delay in responding to the letter of complaint, dated January 20, 2012 violates the diligence required of judicial officers under the Code. (See footnotes 6 and 18.)

VII. JUDGE MICHAEL HEAVEY, CJC NO. 6699

I was involved in another Commission case in 2011.²² In July of 2011 the Commission issued a formal Statement of Allegations that stated,

“It is alleged that Michael Heavey, Judge of the King County Superior Court may have violated Rule 1.3 of the Code of Judicial Conduct by writing a letter on chambers stationery to the President of the United States on behalf of criminal defendant Amanda Knox in which he identified himself as a judge.”

Rule 1.3 of the January 1, 2011 adopted Code of Judicial Conduct provides in pertinent part:

“A judge shall not abuse²³ the prestige of judicial office to advance the personal or economic interest of the judge or others, or allow others to do so.”

Letter to President Obama. On May 16, 2011, I sent a letter on personal chambers stationery to President Obama complaining about Rome consular officials failing to protect the Italian rights of Amanda Knox.

²² The undersigned hereby waives any privilege of confidentiality that may protect him.

²³ The prior version of the rule provided that a judge should not “lend” the prestige of judicial office, former Canon 2(B). The substitution of “abuse” was intentional and highlights the gravity of the conduct that new Rule 1.3 seeks to address.

The letter was signed by “Michael Heavey” with my personal email and personal phone number. The letter was also signed by Dr. Mark Waterbury and Thomas Wright. The last sentence of the letter stated,

“This letter is written in my personal capacity only and not in my judicial capacity.”

Use of the Title of “Judge”. The printing at the top of the personal stationery did use the title “judge.” I was fully aware that I was using the title “judge.” In Washington State it is proper for a judge to use the title “judge” on personal stationery as long as: a) it could not be confused with the judge’s official stationery; b) it is not used to exploit the judicial office; and c) omits the judge’s official address. The personal residence address of Judge Heavey was used, his official address was not used.

Advisory Opinion 86-15. The Washington Courts’ Advisory Committee issued Opinion 86-15 on October 17, 1986. Ethics Advisory Opinion 86-15 states in pertinent part:

“A judge may have personal stationery printed which bears the title judge as long as such could not be confused with the judge’s official stationery and is not used to exploit the judicial office. The personal stationery should omit the judge’s official address and again, the use should be consistent with the above.”

In re: Moynihan – CJC No. 92-1427-F-40. In 1993 the Commission issued the Stipulation and Agreement and Order of Admonishment in the *Moynihan* case. The Commission’s order and decision stated in pertinent part:

“It would be proper for a judge to have personal stationery which bears the title ‘judge’ so long as it could not be confused with the judge’s official stationery and is not used to exploit the judicial office. The personal stationery should omit the judge’s official address.”

In re: Moynihan also cited Ethics Advisory Committee Opinion No. 86-15 (October 17, 1986) with approval. The *Moynihan* order may be read by going to www.cjc.wa.us, clicking on “Public Actions,” clicking on 1993.

Chambers Stationery email – On November 23, 2009, the undersigned, Judge Michael Heavey, sent an email to Ms. Callner and investigative counsel Michele Slotemaker concerning “chambers stationery.” This email was sent 20 months before the Commission issued its July 2011 Statement of Allegations in

Case No. 6699 against the undersigned. The November 23, 2009 email to Ms. Callner and Ms. Slotemaker read:

"I have been mulling over the question – would I write letters on my court stationery if I were presented with exactly the same circumstances again? The answer is "No." I have been made aware of 'chambers stationery' now and would utilize something like that. As I understand it, chambers stationery uses the title of 'judge' but no reflection of the office. Also like I did somewhat in the first letter, it would be appropriate to say this was written not in my official capacity but only in my personal capacity."

This understanding of November 2009 is consistent with *Moynihhan* and Ethics Advisory Opinion 86-15. It is proper to use the title "judge" on personal stationery if certain conditions are met. These conditions were met.

It is the undersigned's belief that at the July 2011 meeting Ms. Slotemaker and Ms. Callner aggressively went after me with the resultant issuance of the Statement of Allegations. I believe they were not aware, at that time, of the *Moynihhan* case and the email of November 2009.

In August of 2011 Ms. Slotemaker and Ms. Callner were given the following information in two separate letters by Judge Heavey's attorney:

- 1) Ethics Advisory Committee Opinion 86-15;
- 2) In re: *Moynihhan*, case No. 92-1427-F-40; and
- 3) The email concerning "chambers stationery" of November 23, 2009, to Ms. Callner from Judge Heavey.

At the September 10, 2011 meeting Ms. Slotemaker and Ms. Callner may have intentionally failed to bring the November 2009 email and the *Moynihhan* case to the attention of the Commission. This was clear authority contrary to the Statement of Allegations. As attorneys, they each have the obligation to bring such contrary authority to the attention of the tribunal, i.e. the Commission.

The Commission did not dismiss Case No. 6699 at their September 10, 2011 meeting. I respectfully submit that one of the two below alternatives applies.

Allegation 17 – At the September 10, 2011 meeting the Commission was not made aware of the November 23, 2009 email to Ms. Callner, the *Moynihan* case and Ethics Advisory Opinion 86-15. If so, this was a malicious prosecution perpetrated by Ms. Callner and Ms. Slotemaker against Judge Heavey.²⁴

Or in the alternative;

Allegation 18 – The Commission was made aware of the November 23, 2009 email, *Moynihan* decision and Ethics Advisory Opinion 86-15. If so, the Commission perpetrated a malicious prosecution against Judge Heavey.

Amanda Knox was found innocent²⁵ by an Italian judge and jury on October 3, 2011. On November 29, 2011, a letter was sent to my attorney from Ms. Slotemaker stating saying Case No. 6699 had been dismissed for “lack of sufficient evidence.”

VIII. AMERICAN BAR ASSOCIATION MODEL RULES OF JUDICIAL DISCIPLINE

In 1994, after four years of study the American Bar Association’s Joint Committee²⁶ on Judicial Discipline adopted Model Rules. The study included public hearings and the in-depth study of twelve states’ judicial discipline systems. Two of the recommendations are relevant here:

The ABA committee recommended that a rotating three member committee (one judge, one lawyer, and one lay person) would be delegated the duty of investigation of complaints and findings of probable cause. The three commissioners would then not participate in the adjudicatory hearing. The remaining Commissioners would preside at the adjudication hearing, arguably free from bias or prejudice that may have developed had they participated in the investigatory/probable cause phase.

Besides the procedural due process advantage of bifurcation, this procedure would bring the attention of the Commission to first investigate a complaint. They then can follow through on the investigation

²⁴ RPC 3.3 Candor Toward the Tribunal provides “(a) a lawyer shall not knowingly...(3)fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client...”

²⁵ There are two verdicts of acquittal in Italy. They are: 1) not guilty – there is not evidence beyond a reasonable doubt; and 2) innocent – the accused did not commit the crime. Amanda Knox’ verdict was innocent – she did not commit the crime.

²⁶ Seattle attorney Tom Fitzpatrick was a member of the ABA Committee.

until a determination of probable cause has been made. This would allow the Commission and investigative counsel to be compliant with the Constitution.

A second recommendation noted that it may be advantageous to have the chief administrator also involved in the investigatory/probable cause phase or serve as commission counsel during the adjudicative phase. But "never" should that person be involved in both functions because of the inherent conflict.

In 1994 only a few states had a bifurcated system of judicial discipline. As of the year 2007, twenty-two states had bifurcated systems. Our Commission is required to adopt rules that provide for due process. The ABA Model Rules would be a good start.

IX. CONCLUSION

A very unhealthy culture at the Commission has set in and grown without any restraint: it is unconstitutional, illegal and unethical. The business of the Commission is an essential judicial function established in the Constitution of the State of Washington. It has been compromised and corrupted. The Supreme Court should assert exclusive jurisdiction, investigate²⁷ and take action the justices deem appropriate.

The undersigned humbly suggests some solution to what has become an untenable situation:

- 1) The Commission should substantially adopt the ABA Model Rules for judicial discipline. This would include rotating three member committees that investigate complaints and determine probable cause when necessary.
- 2) Members of the Commission must be diligent. They should become experts on their Constitutional duties, powers, and the Code. The three member committee should review every complaint and be the sole authority to open an investigation of a judge. During the investigation they should manage the investigative counsel who report directly to them.

²⁷ Under the State Ethics in Public Service Act, RCW 42.52.470, an ethics board (executive, legislative, judicial) may refer a complaint to the attorney general's office or prosecutor for investigation and appropriate action. One option the Supreme Court may want to consider would be to refer this report of unethical conduct to the Commission with the direction that the Commission refer these allegations to the Attorney General for investigation and appropriate action.

- 3) The executive director should be purely administrative. The executive director should never be involved with an investigation.
- 4) The Commission should employ, as the Constitution requires, "investigative officers with appropriate training and experience." They should be experienced in investigations and findings of probable cause. They should report directly to the Commission. They should be aware of their duty to keep confidential their investigations.
- 5) This may involve increased *per diem* for Commissioners or even salaries for Commissioners. This is a Constitutionally created body and should be adequately funded.

The Commission should be returned to its true purpose and function.

Respectfully submitted,



Judge Michael Heavey

copy to:

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Members of the Commission

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