

ISLAND COUNTY PROSECUTING ATTORNEY

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June 3, 2005

To The Citizens Of Island County:

An article in the June 1, 2005 [South Whidbey Record](#) ran the inflammatory headline “Court fines assistant prosecutor for lying under oath.” You can see the article [here](#).

The case discussed in the article was extremely complicated. Although the article did an admirable job of trying to explain the finer points, the headline completely undermined the neutrality of the article. I criticized The Record in a [letter to the editor](#), but omitted a complete explanation of the case, placing it here for those who really wanted to dig deeper. Here it is:

I was extremely disappointed to read the erroneous and irresponsible headline in the article about the Nichols Brothers lawsuits. (*South Whidbey Record*, June 1) The sub-headline said: “Court fines assistant prosecutor for lying under oath.” The choice of the word “lying” to describe the actions of one of my deputies was inaccurate and libelous. Webster’s defines “lie” as “to make an untrue statement with intent to deceive.” My deputy, Josh Choate, did no such thing. The use of tabloid-style headlines may sell more newspapers, but in this case, it unfairly smears the reputation of one of the most ethical and even-handed attorneys I know.

The entire affair, and Judge Hancock’s curious decision to sanction Josh, is an example of the principle that “No Good Deed Goes Unpunished.” Allow me to try to clarify the lawsuit, and expose the questionable rationale for imposing sanctions on my deputy.

To begin, two families who live in the vicinity of Nichols Brothers boat yard, filed a lawsuit against Nichols Brothers Boat Builders (NBBB), Island County, and the Department of Ecology, challenging a permit that was issued to NBBB. That suit was filed before the Shorelines Hearings Board. As Island County’s attorney, my office was obligated to defend the County. However, in suits of this nature, our policy is to allow the private parties to control the litigation without substantial work or involvement by my office. We simply do not have a strong interest in the outcome of their private battle. However, as named defendants, we still have to perform some level of work.

Two days after the families filed their suit, the Puget Sound Metal Trades Council (MTC), a labor union, filed its own lawsuit, challenging the same permit on environmental grounds. Island County was again named as a defendant. The two lawsuits were then combined into a single case.

To sue over a land use permit, a person or group must have “standing” to sue. That means the person or group must be harmed somehow by the issuance of the permit. I do not believe a labor union, an organization dedicated to protect workers’ rights, has legal “standing” to challenge the issuance of a permit, regardless of the validity of the permit.

Island County has a strong interest in keeping junk lawsuits from being filed against it. My duty is to protect the County from illegal precedents allowing anyone to sue us anytime, anywhere, over any decision made by the County. So, we took an active role in the lawsuit *as to the single issue of who can sue us, and over what*.

When the Shorelines Hearings Board ruled that the MTC had “standing” and could proceed with their lawsuit, Josh, with my approval, determined that the County should go over the Hearings Board, and get a definitive answer from a court of law. We wanted to resolve the issue of “standing” more authoritatively than the Shorelines Hearings Board could. If a Superior Court judge ruled in our favor, it could prevent the filing of similar lawsuits in the future by unaffected groups like the MTC.

The Hearings Board sent out a letter on Friday, February 18, 2005, explaining that it determined MTC had standing. Since the trial before the Hearings Board was scheduled to begin on March 3, 2005, Josh had to act quickly to do the research, prepare the legal pleadings, and get the matter in front of a Superior Court judge before the trial date. His plan was to get a court order to stay, or postpone, the Hearings Board trial until the Superior Court could rule on the standing question. He needed to get a hearing in a hurry to get that “stay” before the trial.

Island County’s local Superior Court rules require all parties be given nine days notice before any hearings. This is unusual in Washington; the statewide rule is five days notice. Our local rules also allow a judge to waive the nine-day notice period, if there is a good reason to do so. Josh did a thorough and speedy job, and by Wednesday, February 23, had prepared all of the necessary paperwork. He filed the case in Superior Court on that day, and asked a judge for permission to hold a hearing about the “stay” on February 28, sooner than the usual nine days notice, but necessary because of the up coming Hearings Board trial.

Also, on February 23, Josh had all 65 pages of the legal paperwork faxed to all of the attorneys representing all of the parties. In an abundance of caution, Josh also arranged for hand delivery of all of the paperwork to the individual parties, in case they chose not to use the attorneys they had used before the Hearings Board.

Recognizing the potential for inconvenience to the other parties, Josh also sent them copies of Island County’s rule regarding telephone appearances, since the other attorneys all were based in Seattle and Olympia. They all took advantage of that rule, and appeared in court by phone on the 28th.

If you're thinking, "Gee, it looks like Josh bent over backwards to be fair, and give the other side as much of an opportunity to prepare as possible," you are right. So what did he do wrong, that got him penalized by Judge Hancock and labeled as someone who "lies under oath" by The Record?

Island County's local court rules require that we give verbal and written notice "as soon as possible" when asking a judge to shorten the nine-day notice rule. Josh neglected to do that. To be sure, that was a technical violation of court rules, albeit a minor one. But that was not why he was sanctioned.

When he asked a judge for permission to have a hearing on short notice, Josh wrote, in a sworn affidavit, that he had given all parties and attorneys copies of the legal paperwork in the case. Unfortunately, the paperwork was not faxed to the other attorneys until after the judge had already been given that affidavit. Technically, Josh's affidavit was untrue when the judge read it. This was the "false statement under oath" that your paper cast as intentionally deceitful – "lying under oath." There was no intent to deceive, and no harm caused to anyone by his neglect.

To make matters even murkier, Judge Hancock erroneously interpreted Josh's sworn affidavit to mean he had faxed advance notice of his original request to hold a hearing on short notice. Josh's affidavit clearly makes no such statement. Even if Josh had done what Judge Hancock thinks he did, the judge punished Josh because he "failed to make a reasonable inquiry as to whether his statement was well grounded in fact." The Judge *never* asserted that Josh "lied." Had Josh lied, the matter would have been far more serious and Josh would be looking for a job.

It should be noted that Judge Hancock originally ruled that sanctions were not appropriate, that the County's claim was not frivolous, and that the other parties had a reasonable opportunity to defend against the County's request for a stay of the Hearings Board decision. Remember, that's what the case was actually about.

Only after the respondents' Seattle attorneys pushed him to reconsider his decision, did Judge Hancock change his mind and imposed sanctions. Even then, Judge Hancock found that there was a need to shorten the nine-day rule, and it would have been done even if the attorneys were there to argue they deserved the full nine-day notice. In fact, the other attorneys never asked for more time to respond. In other words, there was no harm done by neglecting to call the attorneys before getting a waiver of the nine-day rule.

Perhaps the cruelest insult is not the sanctions, or the tabloid style headline, but the irony of the fact that Josh was trying to give everyone as much of an opportunity to respond as he could, under the tight timelines in which he had to work. In hindsight, had Josh not tried so hard to accommodate the other parties, he would not have been sanctioned. He could have ignored the rule requiring that he get permission to hold a hearing on short notice. Or he could have simply stated that he did not have time to find and serve the parties before getting permission. Or, he

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could have waited until Friday, February 25 to ask for permission to shorten the nine-day rule, giving people even less notice. That is why I say that this good deed did not go unpunished.

If you're still reading, you should know that Island County was also sanctioned for continuing to pursue the question of MTC's standing, after Nichols suddenly withdrew its permit applications. While I disagree with the judge's decision to impose sanctions, we will not appeal it. I anticipate that the issue of MTC's standing to challenge land use issues will arise again, and it can be resolved at that time in the appropriate forum.

I've known Josh since he first started practicing law. He has definitely earned his excellent reputation of being fair, honest, and ethical in all of his professional activities. I stand by him, and his conduct in this case.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. M. Banks', written in a cursive style.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY