Maintaining Judicial Professionalism: Reflections from the Bar

Panelist Materials

from

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For

JUDICIAL PROFESSIONALISM: REFLECTIONS FROM THE BAR
CLE on July 18, 2024

CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

Maintaining Judicial Professionalism: Reflections from the Bar

Panelist Materials – Randy McGinley

It is human nature to want to talk about whatever it is you are working on, whether that is in your professional life or your personal life. Judges and attorneys are not immune from the desire to talk to others about what is going on in their lives. But as Judges and attorneys, we not only must follow respective ethical rules, we should also strive to not undermine the fairness of the legal system we are a part of.

The Supreme Court of Florida has said, "Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant . . . . The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal." Rose v. State, 601 So.2d 1181 (Florida Supreme Court 1992). Very recently, our own Supreme Court said, "engaging in or allowing ex parte communications presents to the public an image of a judge who covertly interacts with a party in order to unfairly advance that party's interests and jeopardizes the appearance of the independence, integrity, and impartiality of the judiciary." Inquiry Concerning Judge Peterson, S22Z0180 (decided June 25, 2024).

Judges had careers before moving to the bench. Inherently, judges will often have litigators (meaning attorneys that are actually in court often) practicing before them that the judge knew well prior to taking the bench. This may include colleagues, coworkers, mentors, mentees, law firm partners, and friends. Putting on the robe does not mean that the judge can never speak to those attorneys again. It just means that judges and attorneys must be diligent in ensuring that conversations do not cross the line into improper ex parte communications.

Some examples are obvious. If a judge learns that a prosecutor plans on pursuing misdemeanor charges instead of felony charges, that judge should not call the prosecutor and urge the prosecutor to seek a felony indictment. Ryan v. Commission on Judicial Performance, 45 Cal.3d 518 (1988). An ex parte meeting between a judge and defense attorney where the judges discussed defense procedural advantages without the prosecutor being present was clearly improper. In re Mosley, 102 P.3d 555 (Nevada 2004). These examples will likely not raise any questions as to where the line that should not be crossed is drawn.

Other examples may cause judges and attorneys to reasonably question where the line is. An Alaska judge was disciplined for telling a prosecutor, without the defense attorney present, that he should read new appellate opinions because the opinions involved legal issues before the court that the prosecutor was handling. In re Cummings, 292 P.3d 187 (2013). There, the Judge testified that he merely encouraged attorneys in his courtroom to read new appellate opinions. That Supreme Court did not just focus on whether this communication prejudiced the defendant, but also whether the communication could have the "appearance of aiding the prosecution."

For prosecutors, public defenders, and others who are in court all the time, often without all parties present, there are conversations with judges that often take place, this includes scheduling and logistics. These may be about things happening in the courtroom. All parties must be mindful that it is not just what the substance and intent of the conversation is, but what the appearance may be. *Cf* In re Mosley, 102 P.3d 555, 562 (Nev. 2004)(The Supreme Court of Nevada reversed a finding of the Nevada Commission on Judicial discipline based on the judge's ex parte communications in making an own recognizance bail determination and said "because of the custom and practice in Clark County, however flawed, with the acquiescence of the district attorneys, we reverse the Commission's finding."). *Compare* Rose v. State, 601 So. 2d 1181 (Fla. 1992)(The Florida Supreme Court ordered an evidentiary hearing on a judge's actions and said: "The judicial practice of requesting one party to a prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety.")(cleaned up).

So how do judges and attorneys best avoid situations where there is no intent to have an improper ex parte discussion? First, being mindful of not just the substance of any conversations, but also how others may perceive those conversations. The best route is to include all parties. In the Cummings case above, the judge could have emailed both attorneys to inform them that there might be new appellate opinions that are relevant to an issue and ask both sides to provide a letter brief regarding those new opinions.

We can also all better educate ourselves about these concerns. The Annotated Model Code of Judicial Conduct[1] has almost 30 pages of case cites on this issue. Those exist because there have been prior instances of judges having improper ex parte discussions. Learn from others past mistakes and strive to not repeat them.

[1] https://www.americanbar.org/products/inv/book/263035570/

Rose V. State

Rose v. State

Supreme Court of Florida

May 28, 1992, Decided

No. 74,248

Reporter
601 So. 2d 1181 *; 1992 Fla. LEXIS 977 **; 17 Fla. L. Weekly S 319

JAMES FRANKLIN ROSE, Appellant, vs. STATE OF FLORIDA, Appellee.

Prior History: **[**1]** An Appeal from the Circuit Court in and for Broward and Hillsborough County, M. Daniel Futch, Judge - Case Nos. 76-5036 (Broward) 77-2895 (Hillsborough)

Counsel: Larry Helm Spalding, Capital Collateral Representative; Gail E. Anderson, Assistant CCR and John S. Sommer, Staff Attorney, Tallahassee, Florida; and Billy H. Nolas and Julie D. Naylor, Special Appointed CCR, Ocala, Florida, Office of the Capital Collateral Representative, for Appellant.

Robert A. Butterworth, Attorney General and Celia A. Terenzio, Assistant Attorney General, West Palm Beach, Florida, for Appellee.

Judges: BARKETT, SHAW, OVERTON, McDONALD, GRIMES, KOGAN, HARDING

Opinion by: BARKETT

Opinion

[*1182] BARKETT, J.

James Franklin Rose appeals the trial court's denial of his motion for relief pursuant to *Florida Rule of Criminal Procedure 3.850*. [1] We reverse the trial court's order.

Rose was tried for the first-degree **[**2]** murder and kidnapping of eight-year-old Lisa Berry The facts of the case are fully set forth in the direct appeal. *Rose v. State, 425 So. 2d 521, 522-23 (Fla. 1982)*, cert. denied, *461 U.S. 909, 76 L. Ed. 2d 812, 103 S. Ct. 1883 (1983)*. Briefly stated, on October 22, 1976, Lisa Berry and her mother, Barbara, were at a bowling alley with family and friends, including Rose. Shortly after 9:30 p.m. Rose and Lisa went to the poolroom area of the bowling alley. Rose and Lisa were seen at the exit of the bowling alley by Lisa's sister, Tracy, between 9:30 and 10:00 p.m. At approximately 10:23 p.m. Rose called Barbara at the bowling alley to ask when she would be finished bowling; she said 11:30 p.m. Rose returned to the bowling alley at that time. The State argued that Rose killed Lisa sometime after 9:30 p.m. and before he returned to the bowling alley.

The jury found Rose guilty and recommended the death penalty. The trial judge imposed a sentence of death for the murder and a life sentence for the kidnapping. This Court affirmed the convictions and the life sentence, but vacated the death sentence and remanded for resentencing. *Rose, 425 So. 2d at 525*. **[**3]** On remand, the jury recommended death. The court found no mitigating circumstances. In aggravation, the court found that Rose was under sentence of imprisonment when he committed the murder because he was on parole at the time, [2] that he had previously been convicted of a felony involving the use or threat of violence, [3] and that the murder was committed during the commission of a kidnapping. [4] The death sentence was affirmed by this Court. *Rose v. State, 461 So. 2d 84, 88 (Fla. 1984)*, cert. denied, *471 U.S. 1143, 86 L. Ed. 2d 706, 105 S. Ct. 2689 (1985)*. Thereafter, Rose filed a petition for a writ of habeas corpus which this Court ultimately denied. *Rose v. Dugger, 508 So. 2d 321, 326* (Fla.), cert. denied, *484 U.S. 933, 98 L. Ed. 2d 267, 108 S. Ct. 308 (1987)*. Rose then filed a motion for postconviction relief pursuant to *rule 3.850* which was denied without hearing by the trial court. Rose now appeals the trial court's denial of that motion.

[4]** We confine our review to two issues. First, Rose

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[1] We have jurisdiction pursuant to *article V, section 3(b)(1) of the Florida Constitution.*

[2] *§ 921.141(5)(a), Fla. Stat.* (1975).

[3] Id. *§ 921.141(5)(b)*.

[4] Id. *§ 921.141(5)(d)*.

argues that he was denied due process of law because the trial court, without a hearing and as a result of an ex parte communication, adopted the State's proposed order denying relief without providing counsel notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents. Second, Rose asserts that he is entitled to an evidentiary hearing on the allegations contained in his motion.

Rose's 3.850 motion was originally filed by an assistant public defender who was later allowed to withdraw as counsel by the trial court. The State responded to Rose's motion and in its response agreed that an evidentiary hearing was required. Subsequently, the State submitted a proposed order, adopted in its entirety by the trial court, denying all relief. Rose's new counsel was not served with a copy of the proposed order or provided an opportunity to file objections. [5] Under these facts we must assume that the trial court, in an ex **[*1183]** parte communication, had requested the State to prepare the proposed order.

[5]** The judicial practice of requesting one party to a prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. See generally Steven Lubet, Ex Parte Communications: An Issue in Judicial Conduct, 74 Judicature 96, 96-101 (1990).

Canon 3A(4) of Florida's Code of Judicial Conduct states clearly that

A judge should accord to every person who is legally interested in a proceeding, or his 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.

Fla. Bar Code of Jud. Conduct, Canon 3A(4) (emphasis added). Nothing is more dangerous and destructive of the impartiality of the judiciary than a **[**6]** one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. As Justice Overton has said for this Court:

Canon [3A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.

In re Inquiry Concerning a Judge: *Clayton, 504 So. 2d 394, 395 (Fla. 1987)*. **[**7]**

We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. . . . The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

. . . The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Thus, a judge should not engage

[5] A copy of the proposed order was sent to Rose's former counsel.

in any conversation about a pending **[**8]** case with only one of the parties participating in that conversation. Obviously, we understand that this would not include strictly administrative matters not dealing in any way with the merits of the case.

In this case, the issue was compounded by the State's concession that an evidentiary hearing was required on some of the factual matters alleged. For example, the notion states that the case was tried based on the State's theory that Rose **[*1184]** killed Lisa Berry between the hours of 9:30 and 10:23 p.m. [6] Rose claims that there were five witnesses who saw Lisa at the bowling alley between 10:30 and 11:50 p.m.--after Rose had, under the State's theory at trial, committed the murder and returned to the bowling alley. The motion alleges that the statements and/or testimony of these witnesses were available to defense counsel but were not used at trial. We agree that this issue merits an evidentiary hearing.

Thus, we reverse the order denying Rose's motion **[**9]** for postconviction relief. We direct the trial court to reconsider Rose's motion and to hold an evidentiary hearing on the ineffective assistance of counsel claims and any other appropriate factual issues presented in the motion.

It is so ordered.

SHAW, C.J. and OVERTON, McDONALD, GRIMES and HOGAN, JJ., concur.

HARDING, J., concurs with an opinion.

Concur by: HARDING

Concur

HARDING, J., concurring.

I concur with the majority opinion and write only to emphasize that, in my experience as a trial judge, where more than one attorney or party has made an appearance in a case, I found that there were few administrative matters which would require or justify an ex parte communication with a judge. The most obvious administrative matter would relate to setting hearings on motions and other matters. Care should be exercised even in this regard.

In maintaining calendar control, many judges deem it appropriate to personally screen and approve the setting of cases which require more than a set period of time, that is, thirty minutes. If the judge must become personally involved, in any way, in the setting of a hearing, care should be given that all parties have equal opportunity to participate in the **[**10]** setting of that hearing. Judge's calendars and dockets are generally very crowded. Time on them is a precious commodity which should be distributed in a fair manner. It probably will be common knowledge that an explanation to the judge is required to set a hearing lasting longer than a set time. Thus, if all parties are not involved in setting the case, it will be assumed that there was an ex parte communication with the judge in order to obtain the time. Ex parte communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible.

The number of lawyers has grown significantly in recent years in most locations. It is impossible for lawyers to know each other and the judges with the same degree of familiarity that they did in the past. It is also more common for lawyers to appear in courts "away from home" than it was in the past. This growth in numbers and mobility places a greater burden on the judge to ensure that neutrality continues to exist. Judges should be ever vigilant that every litigant gets that to which he or she is entitled: "the cold neutrality of an impartial judge." **[**11]** *State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939)*.

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[6] The State does not contest this characterization.

Inquiry Concerning Judge Peterson

In the Supreme Court of Georgia

Decided: June 25, 2024

S22Z0180. INQUIRY CONCERNING JUDGE CHRISTINA PETERSON.

PER CURIAM.

We have explained before that "[t]he judiciary's judgment will be obeyed only so long as the public respects it, and that respect will not long survive judges who act in a manner that undermines public confidence in their judgment and integrity." *Inquiry Concerning Coomer* ("*Coomer II*"), 316 Ga. 855, 855-856 (892 SE2d 3) (2023). In this case, Douglas County Probate Court Judge Christina Peterson has been charged with a number of violations of the Code of Judicial Conduct ("CJC"), including a number of violations that the Judicial Qualifications Commission ("JQC") says exhibited a pattern of judicial misconduct while in office. The JQC Hearing Panel found that Judge Peterson violated multiple rules in the CJC and that

those violations warrant her removal from the bench.

We agree that removal is warranted here. As we explain more below, the Hearing Panel found that the Director proved by clear and convincing evidence 28 of 30 counts alleging that Judge Peterson violated the CJC, and that discipline is authorized under the Georgia Constitution for 20 of those 28 counts. With respect to all 20 of those counts, we conclude that the Hearing Panel's findings are not clearly erroneous. And we agree with, and affirm, the Hearing Panel's conclusion that Judge Peterson's misconduct warrants discipline with respect to 12 of them, because the Director met her burden of showing that Judge Peterson's conduct constituted willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute. See Ga. Const., Art. VI, Sec. VII, Par. VII (a).[1] The seriousness of certain of those violations, the pattern of misconduct the Director proved by clear and convincing evidence, and the

[1] As explained more in Division 2 (e) below, we pretermit whether other conduct by Judge Peterson, as set forth in eight other counts of the formal charges, constitutes violations of the CJC.

adverse demeanor and credibility determinations the Hearing Panel made after observing live testimony from Judge Peterson all contribute to the conclusion we reach today.

1. *Background and Procedural History*

Judge Peterson was admitted to the State Bar of Georgia in 2013, and on March 5, 2020, she qualified to run for the office of judge of the Douglas County Probate Court and therefore became a judicial candidate for purposes of the CJC. See *Inquiry Concerning Coomer* ("*Coomer I*"), 315 Ga. 841, 851 (885 SE2d 738) (2023). In June 2020, she won a contested primary election. She then won the general election, in which she was unopposed, and she was sworn in for a four-year term as the Douglas County Probate Court judge on December 29, 2020.

In September 2021, the JQC filed formal charges against Judge Peterson alleging several violations of the CJC. The JQC amended its charges in February 2022 and again in July 2022,

alleging 50 counts of misconduct.[2] The JQC Director dismissed 20 counts before and during the final hearing, which was held over the course of seven days beginning in September 2023 and concluding

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[2] In September 2021, the JQC Director filed a motion to suspend Judge Peterson pending the final outcome of its investigation. See JQC Rule 15 (C) (providing that this Court may suspend a judge with pay upon "receipt of sufficient evidence demonstrating that [the] judge poses a substantial threat of serious harm to the public or to the administration of justice"). We denied that motion in October 2021, concluding that although we were "concerned about the number and the escalation in seriousness of the allegations against Judge Peterson," there was not at that time "sufficient evidence to demonstrate that [she] pose[d] the 'substantial threat of serious harm to the public or to the administration of justice' necessary to support her interim suspension from office," in part given the passage of time since the alleged misconduct. The Director filed a second motion seeking interim suspension of Judge Peterson in July 2022. In August 2022, we denied the motion, noting that many of the charges against Judge Peterson were "quite significant" and "may well warrant severe discipline," but that she disputed the allegations; that it was "not at all clear that her alleged actions show[ed] that she 'pose[d] a substantial threat of serious harm to the public or to the administration of justice'"; and that although JQC Rule 15 (C) permitted suspension, it does not permit interim-suspension proceedings to be used as a substitute for a hearing on the charges. On June 21, 2024, the JQC Director filed a third motion for interim suspension of Judge Peterson based on alleged conduct that occurred on June 20, 2024. In it, the Director asked that this Court "immediately impose an interim suspension pending the Court's final determination in the above-styled matter; or in the alternative, direct the JQC's Hearing Panel to conduct a hearing on this Motion and file with this Court a record of the proceeding and a report setting forth findings of fact, conclusions of law, and a recommendation regarding interim suspension." The conduct alleged in that motion has not yet been the subject of any hearing, and in any event, we hereby dismiss that motion as moot because, as a result of this decision, Judge Peterson has now been removed from office. See Ga. Const., Art. VI, Sec. VII, Par. VIII ("Due process; review by Supreme Court. No action shall be taken against a judge except after hearing and in accordance with due process of law.").

in February 2024, leaving 30 counts remaining for the Hearing Panel's resolution.[3]

The Hearing Panel issued a Report and Recommendation on March 31, 2024, finding that the Director had proven 28 of the 30 counts by clear and convincing evidence, but that discipline was authorized pursuant to the Georgia Constitution for only 20 of those counts.[4] In so doing, the Hearing Panel concluded that Judge

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[3] Specifically, the Director dismissed Counts 5-12, 16-18, 20, 22-24, 27, 29, 36, 45, and 47. We note that the Director dismissed Counts 5-12 because they were premised on Judge Peterson's conduct before she became a judicial candidate, and as we concluded in *Coomer I*, the CJC "governs only those actions taken while a person is a judge or judicial candidate." 315 Ga. at 851 (emphasis omitted).

[4] The counts that the Hearing Panel found were not proven by clear and convincing evidence or for which discipline was not authorized under the Georgia Constitution included Counts 1-4 (related to social media posts Judge Peterson made; the Panel found that the Director proved by clear and convincing evidence violations of CJC Rules 1.2 (A), 1.2 (B), and 3.1 (A), but determined that no sanction was warranted because the Director failed to prove that Judge Peterson's actions, taken outside her judicial capacity, were done in bad faith such that discipline was authorized under the Georgia Constitution); Counts 25-26 (related to Judge Peterson's allegedly obstructing the JQC's access to public records; the Panel found that the Director failed to prove these counts by clear and convincing evidence); Counts 44, 46, and 48 (related to Judge Peterson's handling of a petition for letters of administration; the Panel found that the Director proved the counts by clear and convincing evidence but failed to prove that Judge Peterson acted in bad faith, such that discipline was authorized under the Georgia Constitution); and Count 49 (related to Judge Peterson's alleged practice of backdating judicial orders; the

Peterson had violated multiple rules in the CJC and recommended as a sanction that this Court remove her from office. Judge Peterson filed a Notice of Exceptions to the Report and Recommendation ("Exceptions"), see JQC Rule 24 (F), arguing that the Director had not sufficiently proven that she committed sanctionable conduct, and the Director filed a response to those Exceptions.

2. *Analysis*

As discussed more below, we agree with and affirm the Hearing Panel's conclusion that Judge Peterson's misconduct with respect to 12 of the 20 counts (Counts 13, 28, 30-35, 37, 39-40 and 42) at issue here was proven by clear and convincing evidence and warrants discipline.[5] Those counts relate to four separate matters, which

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Panel found that the Director proved this count by clear and convincing evidence but failed to prove that Judge Peterson acted in bad faith, such that discipline was authorized under the Georgia Constitution). The Director has not challenged the Hearing Panel's conclusions regarding these counts, so we do not address them. In addition, we note that Judge Peterson does not argue, and the record does not show, that any of the 20 remaining counts at issue here involved conduct that occurred before she became a judge or judicial candidate. See *Coomer I*, 315 Ga. at 851.

[5] As we also explain below, although the Hearing Panel's findings as to the eight remaining counts (Counts 14-15, 19, 21, 38, 41, 43, and 50) are not

include Judge Peterson's handling of a criminal contempt matter (Counts 31 to 34), certain aspects of her conduct toward county personnel (Counts 28 and 30), her conduct during a meeting of her neighborhood homeowner's association ("HOA") (Count 13), and her handling of a petition for year's support (Counts 35, 37, 39-40, and 42). We discuss each of these four matters in turn below, applying the following analytical framework.

First, we review the Hearing Panel's findings as to Judge Peterson's conduct with respect to each matter. "We generally review factual findings by the JQC Hearing Panel for clear error and defer to the Hearing Panel's credibility determinations." *Coomer II*, 316 Ga. at 860. See also *Coomer I*, 315 Ga. at 847 (explaining that "'we give substantial consideration and due deference to the [Hearing Panel's] ability to evaluate the credibility of the witnesses

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clearly erroneous, we need not decide whether the Hearing Panel correctly concluded that Judge Peterson's conduct as to those counts constituted violations of the CJC and warrants sanction, because affirmance of those counts is not necessary to reach our ultimate conclusion that Judge Peterson's removal from the bench is the proper sanction in this case.

who appear before it'") (citation omitted).[6] Judge Peterson's primary argument in her Exceptions to the Report and Recommendation is that the Hearing Panel's factual findings as to each of the matters at issue are clearly erroneous, because the Panel either failed to credit or to expressly mention in its Report and Recommendation evidence that Judge Peterson says supported different findings. In this respect, Judge Peterson devotes dozens of pages in her Exceptions to recounting this other evidence. But we need not and do not detail most of that evidence below; although Judge Peterson is correct that some of the evidence she notes (if credited by the Hearing Panel) could have supported different findings, the record in this case does not compel those different findings. To the extent the record contains evidence that could support findings in either direction, the Hearing Panel was authorized to make the findings

[6] As we explained in *Coomer II*, although we generally defer to the Hearing Panel's factual findings, "the broad and discretionary nature of our review in judicial discipline matters means that we need not always defer even in situations where we would defer to a factfinder in an ordinary appeal." 316 Ga. at 860 n.5. We reiterate that principle here, but also see no reason to depart from our general application of deference as articulated above.

that it did. See *Coomer II*, 316 Ga. at 860-861 (rejecting a judge's similar argument that evidence in the record could have supported different findings by the Hearing Panel, because the record did "not *compel* the different findings that he prefer[red]") (emphasis in original). After thoroughly reviewing the record and the parties' briefing, we conclude that the findings the Hearing Panel made that are material to our ultimate conclusion in this case are not clearly erroneous, and we defer to the findings that the Hearing Panel made, as outlined below.

Second, we consider whether these findings support the Hearing Panel's conclusions that Judge Peterson's actions, with respect to each matter, amounted to violations of the CJC rules the JQC charged. In considering whether the Director has proven violations of the CJC, "we employ a 'clear and convincing proof standard.'" *Coomer I*, 315 Ga. at 847 (citation omitted). And we review the Hearing's Panel's legal determinations de novo. See id. As explained below, we agree with the Hearing Panel's conclusions that Judge Peterson violated multiple rules in the CJC.

Third, our review of the Hearing Panel's findings and conclusions is necessarily conducted through the lens of the Georgia Constitution, and specifically the grounds for discipline that the Georgia Constitution authorizes. Article VI, Section VII, Paragraph VII (a) of the Georgia Constitution ("Paragraph VII (a)") sets out five grounds for discipline: "for willful misconduct in office, or for willful and persistent failure to perform the duties of office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute." Ga. Const., Art. VI, Sec. VII, Par. VII (a). See also *Coomer I*, 315 Ga. at 858. As detailed below, we agree with the Hearing Panel's conclusion that Paragraph VII (a) authorizes discipline against Judge Peterson for the counts discussed below because the Director has met her burden of proving that Judge Peterson's conduct with respect to each of the four matters at issue constitutes at least one constitutional basis that authorizes discipline: either willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial

office into disrepute. See Ga. Const., Art. VI, Sec. VII, Par. VII (a).

We then briefly review the Hearing Panel's findings as to the eight remaining counts (Counts 14-15, 19, 21, 38, 41, 43, and 50) that the Panel found were proven by clear and convincing evidence and warranted sanction. Although those findings are not clearly erroneous, we need not decide whether the Hearing Panel correctly concluded that Judge Peterson's conduct as to those counts constituted violations of the CJC and warrants discipline, because affirmance of those counts is not necessary to reach our ultimate conclusion that Judge Peterson's removal from the bench is the proper sanction in this case.

Finally, after reviewing all of the conduct underlying Judge Peterson's numerous violations of the CJC, we assess the proper sanction. On that point, we agree with the Hearing Panel that removal from office is the appropriate discipline here. See *Coomer I*, 315 Ga. at 847, 862 (explaining that "this Court is not well positioned to resolve the factual questions of intent that are crucial to determining whether discipline is constitutionally permitted," but

that we review "legal determinations and the ultimate outcome de novo").

We now apply the analytical framework described above, beginning with an evaluation of the counts that the Hearing Panel found were proven by clear and convincing evidence and with which we agree warrant discipline. We address first the most troubling allegation: Judge Peterson's handling of a criminal contempt matter.

(a) *Handling of a Criminal Contempt Matter (Counts 31 to 34)*

(i) *The Hearing Panel's Findings Are Not Clearly Erroneous as to the Material Facts Pertaining to Counts 31 to 34*

With respect to Counts 31 to 34, the Hearing Panel found the following facts pertaining to Judge Peterson's handling of a criminal contempt matter. On August 2, 2021, a petitioner, who is a naturalized United States citizen but born in Thailand, filed in the Douglas County Probate Court a petition to amend her marriage-license application, which she had filed with the court in May 2016. The petitioner sought to correct the name she had listed as her

father's name on the marriage-license application. In support of her petition, the petitioner attached a copy of her birth certificate, which had been translated from Thai into English. The copy said that the document was "not recommended as a legal document." After reviewing the petition to amend, Judge Peterson issued on August 12, 2021, a "Notice of Trial or Hearing," which informed the petitioner that she was required to attend an in-person hearing on her petition on August 24 and that court-reporting services would be provided only if the petitioner arranged for them. The notice made no mention of any charges of contempt and did not advise the petitioner that she was entitled to have counsel present.

At the hearing on the petition to amend (which was not transcribed), the petitioner presented the copy of the translated birth certificate, and Judge Peterson concluded that it was "fictitious," "fraudulent," and "forged." The petitioner explained to Judge Peterson that she previously had listed her uncle's name, rather than her father's name, on her marriage-license application in 2016 because her father was not involved in her life and her uncle

had raised her. Judge Peterson ultimately determined that the petitioner was trying to defraud the court and held her in contempt. The contempt order stated that the petitioner "willfully provided false information on the marriage application"; the court had been "alerted to the fraudulent misrepresentations on August 2, 2021 when [the petitioner] filed a Petition to Amend Marriage Record"; and the petitioner was "in blatant disregard of the laws of the State of Georgia and of this [c]ourt evidenced by her fraudulent misrepresentations to the [c]ourt via her filings with the [c]ourt."[7]

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[7] During her testimony before the Hearing Panel, Judge Peterson repeatedly referred to the allegedly fraudulent nature of the petitioner's translated birth certificate, a copy of which was admitted into evidence. When the Hearing Panel asked Judge Peterson what aspect of that document led her to conclude that the petitioner was defrauding the court, Judge Peterson said that at the hearing on the petition to amend, the petitioner "admitted under oath that this was not her birth certificate" and that she was trying to assist her mother in emigrating to the United States. The Hearing Panel then pointed out that Judge Peterson's contempt order appeared to refer only to the petitioner's marriage-license application as false (not the birth certificate), and Judge Peterson responded:

> It was the documentation. But when you have somebody coming into court, swearing under oath that I knew I lied; I lied; and the only reason I am changing this and updating the court is because I am trying to get my mother in the country; here is [a] copy version of something, a nonlegal document; so I want you to take this as true on who my father is, even though I swore under oath that my father was over here; that was an issue to the court. That was a

Judge Peterson sentenced the petitioner to the maximum allowable term of incarceration for contempt—20 days in jail—but allowed her to "purge" herself of the contempt order after serving two days if she paid a $500 fine. After the petitioner served two days in the Douglas County Jail and paid the $500 fine, she was released from custody.

The Hearing Panel found that Judge Peterson "provided neither a firm nor a proper basis when she held [the petitioner] in contempt and, without explanation or justification, imposed the *maximum* term of incarceration plus a fine." (emphasis in original). It determined that the petitioner, who testified before the Panel, was "in good faith trying to correct" what appeared to be "an innocent mistake borne out of ignorance rather than ill-intent." The Hearing Panel noted that Judge Peterson testified that the petitioner sought to amend the marriage-license application so that her mother could emigrate from Thailand to the United States (although Judge

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> decision that was made on the time. It appeared like it was a fictitious document, or what I thought as a fraudulent document, as well as the representations and the lies under oath, so I did hold her in contempt.

Peterson could not explain how the amendment would assist the petitioner in obtaining emigration documents for her mother), whereas the petitioner testified that she became aware of the mistake on her marriage-license application while she was completing emigration documents for her mother and believed she should correct the application so that it would not be inconsistent with her birth certificate. The Hearing Panel expressly credited the petitioner's testimony over Judge Peterson's.

In addition, the Hearing Panel expressly discredited Judge Peterson's testimony that she had not concluded that the petitioner made fraudulent representations before issuing the notice of the hearing on the petition. In this respect, the Hearing Panel found that Judge Peterson "predetermined that [the petitioner] had made a 'fraudulent misrepresentation . . . via her filings with the court on May 3rd of 2016' before ever conducting a hearing on the matter." The Hearing Panel noted that Judge Peterson denied making any such predetermination and testified before the Panel that she found the petitioner in contempt based on her submission of the

supposedly fictitious birth certificate at the hearing on the petition, but the Panel found that testimony to be false, because it "contradict[ed] the plain language of the order," which referred only to the alleged fraudulent misrepresentations in the marriage application.

Because evidence presented at the hearing supports the Hearing Panel's findings that are material to our ultimate conclusion, those findings, as recounted above, are not clearly erroneous. See *Coomer II*, 316 Ga. at 860-861.[8]

(ii) *Judge Peterson Violated CJC Rules 1.1, 1.2 (A), 1.2 (B), and 2.2*

The Hearing Panel concluded that the Director proved by clear

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[8] Judge Peterson correctly points out in her Exceptions that the Hearing Panel noted, among other things, that the petitioner's "father was such a remote actor in her life that [the petitioner] did not even know his name in 2016 when she completed the license application," which contradicts undisputed evidence that the petitioner possessed the translated copy of her birth certificate, which correctly listed her father's name, for several years before she completed the marriage-license application. But that error does not affect our ultimate conclusion on Counts 31 to 34 because the Hearing Panel expressly noted other reasons for crediting the petitioner's testimony, including her demeanor and motive in testifying, and because the Hearing Panel's finding that the petitioner did not know her father's name when she completed the license application is not material to our ultimate conclusions related to this incident. See *Coomer II*, 316 Ga. at 860-861.

and convincing evidence that Judge Peterson violated CJC Rules 1.1 (Count 31), 1.2 (A) (Count 32), 1.2 (B) (Count 33), and 2.2 (Count 34) in connection with the contempt matter.[9] We agree.

To begin, the Hearing Panel credited the petitioner's testimony over Judge Peterson's account and found that, in attempting to amend her marriage-license application, the petitioner was "in good faith trying to correct" an "innocent mistake." After affording proper deference to that credibility determination, see *Coomer I*, 315 Ga. at 847, it is clear to this Court that Judge Peterson's contempt ruling was baseless. In response to the petitioner's good-faith effort to amend her marriage-license application so that it would not be inconsistent with her birth certificate, Judge Peterson made an unsubstantiated finding that the petitioner was somehow

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[9] CJC Rule 1.1 says, "Judges shall respect and comply with the law." CJC Rule 1.2 (A) says, "Judges shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Rule 1.2 (B) says, in pertinent part, "An independent and honorable judiciary is indispensable to justice in our society. Judges shall participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe such standards of conduct so that the independence, integrity, and impartiality of the judiciary may be preserved." CJC Rule 2.2 says, "Judges shall dispose of all judicial matters fairly, promptly, and efficiently."

attempting to defraud the court, and then unjustifiably held her in contempt. Indeed, the Hearing Panel determined that Judge Peterson, in testifying before the Panel, lied about the basis for her contempt ruling when she repeatedly referenced her belief that the translated birth certificate was fraudulent, notwithstanding that her written contempt order focused only on the alleged fraudulent misrepresentations in the marriage-license application (not the birth certificate).

Judge Peterson's untruthful testimony in this respect underscores her conscious wrongdoing in determining that the petitioner had defrauded the court before issuing the notice of the hearing on the petition, because, as the Hearing Panel found, Judge Peterson purposely issued the notice without advising the petitioner that a criminal contempt charge on the allegation of fraud would be adjudicated at the hearing, so that the petitioner would be unprepared to defend herself when Judge Peterson summarily found her guilty of criminal contempt. As we explain below, these actions of misconduct evinced a willful disregard for the basic

requirements of due process.

It is well established that "'[c]riminal contempt is a crime in the ordinary sense,'" and "'criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.'" *Intl. Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826 (114 SCt 2552, 129 LE2d 642) (1994) (citations omitted).[10] In this respect, although a judge may announce punishment summarily and without further notice or hearing when "'contumacious conduct'" occurs in the judge's presence and "'threatens a court's immediate ability to conduct its proceedings, such as where a witness refuses to testify, or a party disrupts the court,'" when the "'alleged contumacious acts'" are committed outside the judge's presence, due process requires that the alleged offender is entitled to "'more

[10] Criminal contempt differs from civil contempt, which "seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do." *Turner v. Rogers*, 564 U.S. 431, 441 (131 SCt 2507, 180 LE2d 452) (2011) (citation omitted). Here, it is undisputed that the contempt was criminal (rather than civil), as Judge Peterson was not seeking to compel the petitioner to comply with a previous judicial order.

normal adversary procedures.'" *Ramirez v. State*, 279 Ga. 13, 14-15 (608 SE2d 645) (2005) (citations omitted). See also OCGA §§ 15-9-34 (a) ("The judge of the probate court shall have power to enforce obedience to all lawful orders of his or her court . . . by attachment for contempt under the same rules as are provided for other courts."); 15-1-4 (a) (1) (providing, as pertinent here, that "[t]he powers of the several courts to . . . inflict summary punishment for contempt of court shall extend only to cases of . . . [m]isbehavior of any person or persons in the presence of such courts or so near thereto as to obstruct the administration of justice").

Thus, a person being tried for contempt related to an act committed outside a judge's presence (also known as indirect contempt) "'must be advised of charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses,'" among other things. *Ramirez*, 279 Ga. at 15 (quoting *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-799 (107 SCt 2124, 95 LE2d 740) (1987)). See also, e.g., *Taylor v. Hayes*, 418 U.S. 488, 497-498 (94 SCt 2697,

41 LE2d 897) (1974) (explaining that although a judge may, "for the purpose of maintaining order in the courtroom," "punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him," "summary punishment always, and rightly, is regarded with disfavor" and "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence'") (cleaned up).

Here, Judge Peterson's contempt order shows that her ruling was based on the petitioner's allegedly providing fraudulent information on her marriage-license application—conduct that necessarily happened *outside* Judge Peterson's presence, since the petitioner filled out the application and submitted it to the court more than five years before being ordered to appear for a hearing—and as discussed above, the Hearing Panel discredited Judge Peterson's testimony to the contrary.[11] Even assuming for the sake

[11] Moreover, there is no allegation, let alone evidence, that the petitioner's conduct "'threaten[ed]'" or "'disrupt[ed]'" the "court's immediate ability to conduct its proceedings," see *Ramirez*, 279 Ga. at 14 (citation omitted), as would be required for summary punishment.

of argument that the information the petitioner initially supplied the court was fraudulent—and also assuming that filing such information could warrant a sanction of criminal contempt—the petitioner's alleged conduct constituted indirect contempt at most, such that the petitioner was entitled to the due-process protections generally afforded to other criminal defendants. Thus, before holding the petitioner in contempt, Judge Peterson was required to advise the petitioner of the contempt charges, provide her a reasonable opportunity to respond to them, and permit her the assistance of counsel and the right to call witnesses, among other processes and protections. See *Ramirez*, 279 Ga. at 15.

As the Hearing Panel determined, however, Judge Peterson provided the petitioner none of these foundational due-process protections before sentencing her to serve 20 days in jail. Even worse, the Panel concluded that Judge Peterson decided that the petitioner had committed fraud on the court before she issued the notice of the hearing on the petition and then purposely issued the notice in a way that failed to advise the petitioner that a criminal

charge would be adjudicated at the hearing. As the Hearing Panel pointed out, the contempt order stated that Judge Peterson "was alerted to the [petitioner's alleged] fraudulent misrepresentations on August 2, 2021[,] when [the petitioner] filed a Petition to Amend Marriage Record." Yet Judge Peterson's notice of the hearing on the petition, which was issued 10 days after Judge Peterson "was alerted to" the alleged fraud, provided the petitioner no notice of the contempt charge, such that the petitioner could obtain counsel or meaningfully defend against the charge before she was summarily found guilty and sentenced. Noting that Judge Peterson testified that she knew the difference between direct and indirect contempt because she had previously "research[ed]" the issue, the Hearing Panel determined that Judge Peterson "knew the procedures she employed failed to meet . . . due process requirements" when she "predetermined" that the petitioner committed criminal contempt; issued the notice of the hearing without informing the petitioner that the criminal contempt matter would be adjudicated; ambushed the petitioner at the hearing by alleging that she had committed a

crime; summarily found the petitioner guilty and sentenced her; and then lied about her actions in her testimony before the Panel.[12]

Given these circumstances, we have no difficulty concluding, as the Hearing Panel did, that the Director proved by clear and convincing evidence that Judge Peterson failed to "comply with the law," in violation of CJC Rule 1.1, by failing to provide the petitioner basic due-process protections in a criminal proceeding; acted in such a manner as to severely diminish "public confidence" in the "integrity" and "impartiality of the judiciary," in violation of CJC Rules 1.2 (A) and (B); and failed to adjudicate the contempt matter fairly, in violation of CJC Rule 2.2. See *In re Judicial Qualifications*

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[12] In this regard, the Hearing Panel found that Judge Peterson "predetermined" "before ever conducting a hearing on the matter" that the petitioner had committed fraud when she filed her marriage-license application; Judge Peterson then issued the notice of the hearing on the petition to amend the marriage-license application, which made "no mention of contempt (or the risk of being fined or sent to jail)"; the petitioner's "hearing lacked any meaningful due process protections and essentially amounted to summary punishment—and incarceration—for conduct that occurred outside the presence of [Judge Peterson], which is prohibited"; and that to the extent Judge Peterson denied in her testimony before the Panel that she had predetermined the petitioner's guilt before she issued the notice of the hearing on the petition, the Panel "d[id] not credit such testimony because it contradicts the plain language of the [contempt] order which is a more reliable contemporaneous record of the events."

Comm. Formal Advisory Opinion No. 239, 300 Ga. 291, 297 (794 SE2d 631) (2016) (explaining that former Canon 2 (A) of the CJC, which said that "'[j]udges shall respect and comply with the law,'" "is not implicated by 'mere decisional or judgmental errors'" but is violated by "[a] knowing and willful misapplication of the law") (citation omitted); *Inquiry Concerning Fowler*, 287 Ga. 467, 468 & n.1 (696 SE2d 644) (2010) (concluding that a judge violated former Canon 2 (A) and former Canon 1, which said "'[j]udges shall uphold the integrity and independence of the judiciary,'" in the prior CJC, because he improperly stated on a routine basis to criminal defendants that they had the burden of proving their innocence); *In re Inquiry Concerning a Judge*, 275 Ga. 404, 405-409 & n.4 (566 SE2d 310) (2002) (determining that a magistrate judge violated former Canon 2 and former Canon 3, which required judges "'to perform the duties of the judicial office impartially and diligently,'" of the prior CJC when he ordered a litigant to pay a fine without providing notice and a hearing, ordered another litigant to pay damages without notice and a hearing, and ordered a warrantless

search without determining whether probable cause existed); *Matter of Inquiry Concerning a Judge*, 265 Ga. 843, 848-851 (462 SE2d 728) (1995) (concluding that a judge's conduct in refusing to set appeal bonds to which two criminal defendants were entitled by law, issuing two bench warrants without probable cause, and forcing a criminal defendant to plead guilty without counsel violated former Canons 1, 2, and 3 of the prior CJC, and noting that the judge's "cavalier disregard of these defendants' basic and fundamental constitutional rights exhibit[ed] an intolerable degree of judicial incompetence, and a failure to comprehend and safeguard the very basis of our constitutional structure"); *Matter of Inquiry Concerning a Judge No. 94-70*, 265 Ga. 326, 329 (454 SE2d 780) (1995) (holding that a judge violated former Canon 2 (A) and other canons of the former CJC by "exercis[ing] [her] contempt power in order to intimidate and coerce other elected officials").

(iii) *Judge Peterson's Conduct Constitutes Willful Misconduct in Office, Such that Discipline is Authorized Under Paragraph VII (a) of the Georgia Constitution*

Having determined that Judge Peterson violated CJC Rules

1.1, 1.2 (A), 1.2 (B), and 2.2, we now turn to whether the Georgia Constitution authorizes discipline for these violations. In its Report and Recommendation, the Hearing Panel found that Judge Peterson's actions regarding this incident constituted willful misconduct in office because she acted in bad faith. See Ga. Const., Art. VI, Sec. VII, Par. VII (a). The Hearing Panel's factual findings that Judge Peterson's conduct involved bad faith are supported by the record and are therefore not clearly erroneous. See *Coomer II*, 316 Ga. at 866-873. Based on those findings, we agree that Judge Peterson's actions constituted "willful misconduct in office" and that discipline is authorized. Ga. Const., Art. VI, Sec. VII, Par. VII (a).[13]

"We interpret 'willful misconduct in office' to mean actions taken in bad faith by the judge acting in her judicial capacity."

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[13] The Hearing Panel alternatively concluded that additional constitutional bases existed that would warrant discipline: that Judge Peterson's conduct with respect to this matter constituted habitual intemperance and judicial conduct prejudicial to the administration of justice. See Ga. Const., Art. VI, Sec. VII, Par. VII (a). We need not decide whether those determinations were correct, because Paragraph VII (a) authorizes discipline on the ground that Judge Peterson committed willful misconduct in office.

Coomer I, 315 Ga. at 859 (citation and punctuation omitted). And as we recently explained, bad faith generally encompasses at least two characteristics: "that the duty breached by the actor was known to that actor, and that the actor was acting with some self-interest or ill will. It certainly 'must involve something more than negligence.'" *Coomer II*, 316 Ga. at 866 (citation omitted). "'[B]ad faith is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill will.'" Id. (citation omitted).[14]

Here, Judge Peterson was clearly acting in her judicial capacity when she found the petitioner guilty of criminal contempt and

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[14] We articulated these general characteristics in analyzing one of the other bases for judicial discipline under Paragraph VII (a) of the Georgia Constitution, "conduct prejudicial to the administration of justice which brings the judicial office into disrepute." As discussed more below, that disciplinary ground is implicated in two circumstances: when a judge's inappropriate actions outside her judicial capacity are taken in bad faith and when a judge's inappropriate actions in her judicial capacity are taken in good faith, but are "'unjudicial and harmful to the public's esteem of the judiciary.'" *Coomer I*, 315 Ga. at 859 (citation omitted). As we explained in *Coomer I*, both prejudicial conduct outside a judge's judicial capacity and willful misconduct in a judicial capacity require a showing of bad faith. See id. at 859-860. Thus, the general characteristics of bad faith that we set forth in *Coomer I* are applicable here.

sentenced her. And the Hearing Panel's findings that she was acting in bad faith are supported by the evidence presented at the hearing. The Panel determined that Judge Peterson knew about the basic due-process requirements for indirect contempt proceedings, a finding that is supported by Judge Peterson's testimony on that point. The Hearing Panel also concluded that Judge Peterson "predetermined" that the petitioner had committed criminal contempt well before she issued the notice of the hearing on the petition to amend the marriage record, yet she purposely issued the notice without informing the petitioner of any such criminal charge and then summarily sentenced the petitioner without providing her any of the fundamental due-process protections to which she was entitled. As the Hearing Panel noted, the plain language in the notice of the hearing and in the contempt order contradicts Judge Peterson's testimony that she had not predetermined the petitioner's guilt before she issued the notice, such that the Panel was authorized to conclude that Judge Peterson's testimony in this respect was false and indicated that she was attempting to conceal

her wrongdoing. This credibility determination by the Hearing Panel was based in significant part on its observations of Judge Peterson's (and the petitioner's) testimony during the hearing, and it is "the kind of finding to which we offer considerable deference." *Coomer II*, 316 Ga. at 866.

In sum, the Hearing Panel's finding of bad faith with respect to Judge Peterson's wrongful summary adjudication of the criminal contempt matter is authorized by the evidence presented at the hearing, particularly her dishonest testimony about her wrongdoing. As we have explained, although we do not expect judges to be perfect, "we can and do expect them to be honest. The judiciary has no place for dishonest persons," as "'[t]he judiciary's authority . . . depends in large measure on the public's willingness to respect and follow its decisions.'" *Coomer II*, 316 Ga. at 866 (citation omitted). Because Judge Peterson's actions were not merely negligent, but painted a picture of conscious wrongdoing motivated by ill will, we agree that her actions were taken in bad faith. Thus, Judge Peterson's conduct constitutes willful misconduct

in office, such that Paragraph VII (a) of the Georgia Constitution authorizes discipline for her actions with regard to this matter. See Ga. Const., Art. VI, Sec. VII, Par. VII (a). See also *Coomer II*, 316 Ga. at 866-873 (holding that a judge's violations of CJC "Rule 1.1 and/or Rule 1.2 (A)," which were not done negligently but with self-interest and showed that he could not "be trusted to handle judicial matters before him with honesty and integrity," amounted to bad faith); *In re Judicial Qualifications Commission Formal Advisory Opinion No. 239*, 300 Ga. at 297 (explaining that "[a] knowing and willful misapplication of the law, of course, would amount to bad faith and thereby implicate the Code of Judicial Conduct"); *Fowler*, 287 Ga. at 468-472 (noting that a judge's "ignorance of the law [wa]s inexcusable" where he "fail[ed] to grasp the basic tenets of criminal procedure to the extent that he d[id] not even understand the burden of proof in a criminal matter" and stemmed "not from unintentional mistakes or a lack of legal education, as [the judge] contend[ed], but from 'willful misconduct in office,'" among other things). Cf. *Bagwell*, 512 U.S. at 831 (explaining that the contempt power

"uniquely is liable to abuse," and in the context of civil contempt noting that "sanctioning the contumacious conduct . . . often strikes at the most vulnerable and human qualities of a judge's temperament, and its fusion of legislative, executive, and judicial powers summons forth . . . the prospect of the most tyrannical licentiousness") (citations and punctuation omitted).

(b) *Conduct Toward County Personnel (Counts 28 and 30)*

(i) *The Hearing Panel's Findings Are Not Clearly Erroneous as to Counts 28 and 30*[15]

With respect to Counts 28 and 30 (conduct toward county personnel), the Hearing Panel found as follows. By way of background, in April 2021, the Chief Judge of the Douglas County Superior Court limited Judge Peterson's after-hours access to the Douglas County courthouse following an incident in which she

[15] As explained more below in Division 2 (e), we review in this subsection only some of the conduct the Director charged with respect to Counts 28 and 30. And because we conclude that at least some of the charged conduct constitutes a violation of the CJC, we need not address the Hearing Panel's additional conclusions regarding other conduct the Director charged with respect to these counts.

allegedly improperly admitted public citizens to the courthouse without ensuring that they had undergone security screening by sheriff's deputies. During the days in which her after-hours access to the courthouse was limited, Judge Peterson submitted three "Event Worksheets," each of which requested three sheriff's deputies to be present at the courthouse after it was closed to the public so that she could have after-hours access. Specifically, she requested deputies to be present from 5:00 p.m. to 8:00 a.m. on April 22 to 23; 5:00 p.m. to 11:59 p.m. on April 23; and 12:00 a.m. to 8:00 a.m. on April 25 to 26. Although these requests would necessarily require taxpayer-funded deputies to work overtime, Judge Peterson was unable to provide a particular reason why she needed to be physically present in the courthouse at those times, most of which were overnight. Although Judge Peterson argues in her Exceptions that she often worked later than regular court hours and that her testimony on that point showed that her requests for after-hours access to the courthouse (and the presence of security) were legitimate, she also admits that the requests "might not have been

the most appropriate response." The Hearing Panel expressly noted Judge Peterson's testimony about these requests and found that Judge Peterson "never put forth a particular reason why she needed to be physically present inside the courthouse on the dates and times she requested."

In a separate event related to Judge Peterson's treatment of courthouse personnel, the sheriff's deputy who was scheduled to escort Judge Peterson from her chambers to her courtroom on May 11, 2021 did not arrive in Judge Peterson's chambers on time. Believing that she would be late for court, she pushed the panic button under her desk to summon the deputy. Thinking there was an emergency in Judge Peterson's chambers, sheriff's deputies hurried to her chambers. When they arrived, they realized that there was no emergency. At her hearing before the Hearing Panel, Judge Peterson testified that she did not know the button was a "panic button" that was to be used only in emergencies. The Hearing Panel expressly discredited Judge Peterson's testimony on that point.

After reviewing the record and considering Judge Peterson's Exceptions, we cannot say that the Hearing Panel's findings as to these incidents—which are supported by record evidence—are clearly erroneous. See *Coomer II*, 316 Ga. at 860-861.

(ii) *Judge Peterson Violated CJC Rules 1.2 (B) and 2.8 (B)*

With respect to Count 28, the JQC charged Judge Peterson with violating CJC Rule 1.2 (B), alleging that her requests for after-hours court access and her activation of the panic button when there was no emergency were not in accordance with the "high standards of conduct" necessary to preserve the "independence, integrity, and impartiality of the judiciary." And with respect to Count 30, the JQC charged Judge Peterson with violating CJC Rule 2.8 (B) by failing to demonstrate "patient, dignified, and courteous" conduct to the county personnel involved in the matters discussed above.[16] Based on the findings detailed above, the Hearing Panel determined that

[16] CJC Rule 2.8 (B) says, "Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and shall require similar conduct of all persons subject to their direction and control."

the Director proved by clear and convincing evidence that Judge Peterson violated Rules 1.2 (B) and 2.8 (B), because her actions were not consistent with the "high standards that Rules 1.2 (B) and 2.8 (B) require of members of the judiciary." The Hearing Panel determined that Judge Peterson "made multiple frivolous requests for middle-of-the-night courthouse access without any showing that she in fact intended to be in the building during these times—and plainly without consideration of the taxpayer expense that comes with paying multiple deputies overtime for each such demand," and that she "abused the courthouse panic button system when, losing patience after waiting only several minutes, she accelerated her deputy escort's arrival via that button rather than by phone or e-mail." The Panel found that Judge Peterson's actions "raise grave concerns about [her] general judicial demeanor and the manner in which she treats others."

We agree with the Hearing Panel that Judge Peterson violated

CJC Rules 1.2 (B) and 2.8 (B).[17] By requesting sheriff's deputies to work throughout the night so that she could have after-hours access to the courthouse (without any showing that she actually planned to be in the building, let alone work, during those wide-ranging timeframes) and using the panic button to summon a deputy to escort her to court, Judge Peterson did not demonstrate the decorum and temperament required of a judge. As discussed above, the Hearing Panel expressly found that Judge Peterson's testimony that she did not know the button was a "panic button" that was to be used only in emergencies was "unconvincing[]." We defer to that credibility finding. See *Coomer I*, 315 Ga. at 847. We therefore agree with the Hearing Panel's conclusions that Judge Peterson failed to maintain the "high standards" required to preserve the "integrity" of the judiciary and failed to demonstrate a "patient, dignified, and courteous" demeanor to county personnel.

(iii) *Judge Peterson's Conduct Constitutes Willful Misconduct in Office, Such that Discipline is Authorized Under*

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[17] Judge Peterson does not argue in her Exceptions that the Hearing Panel's findings of misconduct do not constitute violations of CJC Rules 1.2 (B) and 2.8 (B).

Paragraph VII (a) of the Georgia Constitution

With respect to Counts 28 and 30, the Hearing Panel concluded that Judge Peterson's conduct was in her judicial capacity and in bad faith, such that it constitutes willful misconduct in office. See Ga. Const., Art. VI, Sec. VII, Par. VII (a).[18] We agree. The Hearing Panel found that, with respect to Judge Peterson's requests for after-hours deputy coverage and her activating the panic button, she "knowingly acted discourteously and impatiently in order to advance her self-interest." This finding is supported by the evidence presented at the hearing, including Judge Peterson's inability to explain during her testimony why she needed to be present at the courthouse for extended periods of time in the middle of the night and her false testimony that she was unaware of the proper use of the panic button. The Hearing Panel also found that Judge Peterson

[18] The Hearing Panel alternatively concluded that two other constitutional bases existed that would warrant discipline: that Judge Peterson's misconduct constituted habitual intemperance and was prejudicial to the administration of justice which brings the judicial office into disrepute. See Ga. Const., Art. VI, Sec. VII, Par. VII (a). But because we conclude that Judge Peterson's actions stemmed from willful misconduct in office, we need not decide whether these alternate bases for discipline apply.

"summoned the deputy in bad faith" when she pressed the panic button because she "likely was motivated by ill will toward the Sheriff's Office" after the incident that led to her restricted after-hours access to the courthouse. Because the Hearing Panel found that Judge Peterson's actions were not merely negligent but were motivated by self-interest, and that finding is not clearly erroneous, we conclude that Judge Peterson's actions were taken in bad faith while she was acting in her judicial capacity, such that she committed willful misconduct in office. Thus, discipline is authorized for this conduct. See Ga. Const., Art. VI, Sec. VII, Par. VII (a); *Coomer I*, 315 Ga. at 859-860.

(c) *HOA Meeting (Counts 13 to 15)*

(i) *The Hearing Panel's Findings Are Not Clearly Erroneous as to Counts 13 to 15*

With respect to Counts 13 to 15, the Hearing Panel found the following pertaining to Judge Peterson's conduct during a meeting of her neighborhood HOA in March 2022. Judge Peterson, representing herself, filed a lawsuit against the HOA and members

of the HOA Board of Directors in July 2021. The lawsuit alleged, among other things, that the defendants had breached the HOA bylaws by holding an improper election to select the Board of Directors and sought an injunction to compel a special election in accordance with the bylaws. Judge Peterson knew that the defendants were represented by counsel.

On March 31, 2022, while her lawsuit was still pending, Judge Peterson attended an HOA meeting, over which two members of the Board of Directors presided. The meeting was video-recorded, and the recording showed that during the meeting, Judge Peterson asked the two members of the Board of Directors questions about her "lawsuit," urged them to "call a special election," and offered to "dismiss the lawsuit" if they did so. When other meeting attendees spoke out against Judge Peterson, she engaged in hostile exchanges and made sarcastic remarks toward them, such as, "You are in a low place." After the meeting, Judge Peterson told the members of the Board of Directors that their counsel was giving them bad legal advice.

The Hearing Panel's findings, as summarized above, are not clearly erroneous, because there was evidence presented at the hearing to support them. See *Coomer II*, 316 Ga. at 860-861.

(ii) *Judge Peterson Violated CJC Rule 1.1*

We agree with the Hearing Panel's conclusion that Judge Peterson's conduct in connection with this incident violated CJC Rule 1.1 (Count 13).[19] The Hearing Panel determined that Judge

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[19] As discussed more below in Division 2 (e), we do not address whether the Hearing Panel correctly concluded that Judge Peterson violated CJC Rules 1.2 (A) and (B), as alleged in Counts 14 and 15. In addition, we note that Judge Peterson briefly argues in her Exceptions that the Hearing Panel failed to address her contention, advanced in a motion for a directed verdict filed during her hearing, that certain CJC rules violated her right to free speech under the First Amendment to the United States Constitution and Article I, Section I, Paragraph V of the Georgia Constitution of 1983. Specifically, in her motion for a directed verdict, Judge Peterson claimed that Counts 1 to 4 (which charged violations of CJC Rules 1.2 (A), 1.2 (B), 3.1 (A), and 1.3, respectively, based on social media posts that Judge Peterson made) and 13 to 15 (which charged violations of CJC Rules 1.1 (premised on a violation of GRPC 4.2 (a)), 1.2 (A), and 1.2 (B), respectively, based on Judge Peterson's conduct at the HOA meeting) violated her right to free speech. The Hearing Panel rejected Judge Peterson's free-speech-violation claims in a section of its Report and Recommendation addressing its conclusion that the Director had not proven Counts 1 to 4 by clear and convincing evidence. It is not clear whether the Hearing Panel also rejected Judge Peterson's free-speech claims as to Counts 13 to 15 in its Report and Recommendation. But in any event, we note with respect to those counts that Judge Peterson's motion for a directed verdict focused on her contention that CJC Rules 1.2 (A) and 1.2 (B) (which require judges to preserve the "independence, integrity, and impartiality of the judiciary"), as alleged in Counts 14 and 15, violated her right to free speech.

Peterson failed to "respect and comply with the law," in violation of CJC Rule 1.1, when she violated Rule 4.2 (a) of the Georgia Rules of Professional Conduct ("GRPC") for lawyers, which says: "A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to

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She made no specific argument, however, about CJC Rule 1.1 (which requires judges to "respect and comply with the law" and which violation was premised on her failure to comply with GRPC 4.2 (a)), as alleged in Count 13. Instead, Judge Peterson implied in a single sentence in a footnote in her motion that the free-speech arguments related to alleged violations of CJC Rules 1.2 (A) and 1.2 (B) in Counts 14 and 15 were "applicable" to the Rule 1.1 violation alleged in Count 13. And in her Exceptions, Judge Peterson makes only the cursory assertion that "[a]s an individual, [she] has the right to associate with and debate with her chosen association that is constitutionally protected by the First Amendment."

Even to the extent Judge Peterson has preserved her free-speech claims as to Counts 13 to 15, we need not address her arguments that the alleged violations of CJC Rules 1.2 (A) and 1.2 (B) in Counts 14 and 15, violated her right to free speech because, as discussed more below, we do not address whether she violated those rules. And as to her free-speech argument about CJC Rule 1.1, as alleged in Count 13, we note that—contrary to the implication in her motion for a directed verdict—the legal analysis that applies to that claim is not the same analysis that applies to her free-speech claims regarding alleged violations of CJC Rules 1.2 (A) and 1.2 (B) in Counts 14 and 15. Compare *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-1074 (111 SCt 2720, 115 LE2d 888) (1991) (explaining that "lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be" and "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press" because lawyers "have special access to information through discovery and client communications," such that "their extrajudicial statements pose a threat to the fairness of a pending proceeding"). Thus, any such claim with respect to Count 13 fails.

be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order." By telling the two members of the HOA Board of Directors that she would dismiss her lawsuit against the HOA and the Board if they held a special election, Judge Peterson, who was acting as her own lawyer in the matter, communicated (and even attempted to negotiate) with parties to the lawsuit, even though she knew they were represented by counsel. As a result, she violated GRPC 4.2 (a). The "Terminology" section of the CJC defines "law" as "denot[ing] court rules as well as statutes, constitutional provisions, judicial emergency orders . . . and decisional law, including the Code of Judicial Conduct and Advisory Opinions of the Judicial Qualifications Commission." "The GRPCs are rules promulgated by this Court, which presumptively brings them within the scope of 'court rules,'" *Coomer II*, 316 Ga. at 862-863 (citation omitted), and Judge Peterson makes no argument that the GRPCs

are not "court rules."[20]

Noting her testimony at the hearing that her comment about dismissing the lawsuit was not meant to be a formal offer and that she did not actually believe that the two members of the Board of Directors had any actual authority to settle the lawsuit (because, as her lawsuit alleged, they were not properly elected), Judge Peterson asserts in her Exceptions that she did not violate GRPC 4.2 (a) because she was acting as a homeowner, not a lawyer, when she offered to dismiss the lawsuit. But the Hearing Panel rejected that version of Judge Peterson's testimony, expressly discrediting her "feigned ignorance" and instead finding that she was an "experienced" attorney who knew that the lawsuit she personally brought was still pending and that the defendants were represented by counsel. We defer to the Hearing Panel's credibility determination, see *Coomer I*, 315 Ga. at 847, and likewise conclude that Judge Peterson violated CJC Rule 1.1 for the reasons explained

[20] As we noted in *Coomer II*, "[b]ecause no such argument is before us today, we do not foreclose such an argument in a future case." 316 Ga. at 863 n.7.

above.

(iii) *Judge Peterson's Conduct Outside Her Judicial Capacity Was Undertaken in Bad Faith and Is Prejudicial to the Administration of Justice, Such that Discipline is Authorized Under Paragraph VII (a) of the Georgia Constitution*

As discussed more below, a judge may be disciplined for conduct undertaken "'in good faith'" in her judicial capacity, if that conduct "'appear[s] to be unjudicial and harmful to the public's esteem of the judiciary.'" *Coomer I*, 315 Ga. at 859 (citation omitted).[21] But "when a person who is a judge acts outside of that capacity, this Court's ability to discipline the judge is more limited. In order for actions taken outside of a judge's judicial capacity to constitute 'conduct prejudicial to the administration of justice' and

[21] It appears that we first used the term "unjudicial" when defining "conduct prejudicial to the administration of justice which brings the judicial office into disrepute" in 1995, see *Matter of Inquiry Concerning a Judge No. 94-70*, 265 Ga. at 328, and have since repeated that term in two other judicial discipline cases. See *Coomer I*, 315 Ga. at 859; *Matter of Inquiry Concerning a Judge*, 265 Ga. at 844 n.2. At least some of us are concerned that the word "unjudicial" is conclusory and does little in the way of articulating a standard of conduct that a reasonable judge would understand. But even if that is so, it does not affect our analysis in this case, because the definition of the word "unjudicial" is not central to any substantive analysis pertaining to whether it is within our constitutional power to discipline Judge Peterson.

thus within our constitutional power to discipline, those actions must be taken in bad faith." *Coomer II*, 316 Ga. at 861. Thus, as the Hearing Panel correctly noted in its Report and Recommendation, we may discipline Judge Peterson for her violation of CJC Rule 1.1 in connection with this incident only if her conduct was carried out in bad faith.

In this respect, the Hearing Panel found that Judge Peterson breached a known duty, because she testified that she was aware of GRPC 4.2 (a) and because the evidence showed that she was a prosecutor for several years (and then an elected judge) and was therefore familiar with the GRPC. The Hearing Panel also determined that Judge Peterson acted with self-interest and ill will, because she sought to exploit her specialized knowledge as a lawyer "in surprise settlement negotiations with laypersons on an unlevel playing field" to obtain the relief she wanted in her lawsuit. See *Coomer II*, 316 Ga. at 866 (explaining that the concept of bad faith "generally encompasses at least two general characteristics: that the duty breached by the actor was known to that actor, and that the

actor was acting with some self-interest or ill will"). The Hearing Panel also noted that Judge Peterson's violation of Rule 1.1 was "clear" and that her "feigned ignorance" and "attempts to avoid responsibility" for the violation in her testimony "bordered on the farcical, severely eroding her credibility with the Hearing Panel." This express finding of bad faith, which was based in significant part on the Panel's personal observation of Judge Peterson's testimony and the credibility determinations that flowed from it, is one to which we "offer considerable deference." *Coomer II*, 316 Ga. at 866. See also *Coomer I*, 315 Ga. at 862 (explaining that "this Court is not well positioned to resolve the factual questions of intent that are crucial to determining whether discipline is constitutionally permitted," and that the Hearing Panel, which has the opportunity to hear live testimony and observe the demeanor of witnesses, is best suited to make such findings). And because the Hearing Panel's finding of bad faith is supported by the evidence presented at the hearing, such that it is not clearly erroneous, we defer to that finding here. We likewise conclude that Judge Peterson's actions in

communicating with represented parties about the lawsuit she had filed against them paint a picture of a judge who will bend the rules when it serves her self-interest, such that we can discern that her actions were taken in bad faith and that discipline is authorized under Paragraph VII (a). See *Coomer II*, 316 Ga. at 872-873 (holding that the conduct underlying a judge's violations of CJC "Rule 1.1 and/or Rule 1.2 (A)," which was done outside the judge's judicial capacity, was prejudicial to the administration of justice and brought the judicial office into disrepute, because the record generally supported the Hearing Panel's findings that the judge undertook the conduct in bad faith).

(d) *Handling of a Petition for Year's Support (Counts 35 and 37 to 43)*

(i) *The Hearing Panel's Findings Are Not Clearly Erroneous as to Counts 35 and 37 to 43*

With respect to Count 35 and Counts 37 to 43, the Hearing Panel found the following facts pertaining to Judge Peterson's handling of a petition for year's support in the spring and summer of 2021. In early 2021, a petitioner filed the petition for year's

support, seeking to obtain funds from her deceased husband's estate.[22] The petition listed the petitioner's daughter as an interested party and provided her out-of-state address. Judge Peterson's chief clerk sent by certified mail, with restricted delivery, a notice of the petition to the address that was provided for the daughter; the notice set the deadline to submit a caveat to the petition by May 3, 2021. On April 5, 2021, the signature card for the certified delivery of the notice of the petition was returned to the probate court with a signature from someone else—not the daughter.[23] Judge Peterson's chief clerk then asked Judge Peterson

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[22] See OCGA §§ 53-3-1 (providing, in pertinent part, that a decedent's surviving spouse is "entitled to year's support in the form of property for [her] support and maintenance for the period of 12 months from the date of the decedent's death" and that the provision of year's support generally is "to be preferred before all other debts or demands") & 53-3-5 (a) (providing, in pertinent part, that "[u]pon the death of any individual leaving an estate solvent or insolvent, the surviving spouse . . . may file a petition for year's support in the probate court having jurisdiction over the decedent's estate."). See also Mary F. Radford, 1 Georgia Wills & Administration § 10:1 (Nov. 2023 update) (explaining that "'year's support'" is "defined in the law as property that is set apart for the family's support and maintenance for the period of 12 months from the date the decedent died" and is "based on the public policy of providing support for the family of a decedent before allowing the estate to be distributed to creditors or other distributees").

[23] The record shows that the signature card was signed by someone with

to search LexisNexis to try to obtain an alternate address for the daughter. Judge Peterson conducted the search and found the daughter's email address. Judge Peterson's chief clerk emailed a second notice to the daughter, setting a new deadline to file a caveat by July 10, 2021. The daughter eventually emailed her caveat to the probate court clerk's office.[24] The chief clerk and the daughter then spoke by phone, and the chief clerk asked about the status of the original document and the filing fee, which were both required for filing. The daughter said that she mailed the filing fee. The chief clerk assumed that it was lost in the mail and ultimately took payment from the daughter over the phone and filed the caveat on July 14, 2021—four days after the July 10 deadline. None of the chief clerk's communications with the daughter included counsel for the petitioner. The Hearing Panel found that although Judge Peterson's staff, including the chief clerk, knew that ex parte

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the same last name as the daughter, but with a different first name; no other evidence was presented about who signed the card.

[24] The exact date of this filing is not clear from the record.

communications with parties to a proceeding were prohibited, Judge Peterson "clearly failed to conduct proper oversight" to ensure that the chief clerk was not participating in such communications.

The petitioner's counsel filed a motion to strike the caveat as untimely, and Judge Peterson denied it. Judge Peterson later recused herself from the case, which was eventually transferred to Douglas County Superior Court; that court struck the caveat as untimely and granted the petition for year's support about 15 months after it was first filed.

The record supports the findings summarized above, so we conclude that they are not clearly erroneous. See *Coomer II*, 316 Ga. at 860-861.

(ii) *Judge Peterson Violated CJC Rules 1.1, 1.2 (A), 2.9 (A), 2.9 (B), and 2.9 (D)*

We agree with the Hearing Panel that the Director proved by clear and convincing evidence that Judge Peterson violated CJC Rules 1.1 (Count 35), 1.2 (A) (Count 37), 2.9 (A) (Count 39), 2.9 (B) (Count 40), and 2.9 (D) (Count 42) in connection with her handling

of the petition for year's support.[25]

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[25] CJC Rule 2.9 (A) says,

Judges shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. Judges shall not initiate, permit, or consider ex parte communications, or consider other communications made to them outside the presence of the parties, or their lawyers, concerning a pending proceeding or impending matter, subject to the following exceptions.

(1) Where circumstances require, ex parte communications are authorized for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided that:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) Judges may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court, if they give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(3) Judges may consult with court staff and court officials whose functions are to aid in carrying out adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) Judges may, with the consent of the parties, confer separately with the parties or their lawyers in an effort to mediate or settle pending proceedings.

(5) Judges may initiate, permit, or consider ex parte communications when authorized by law to do so, such as when issuing temporary protective orders, arrest warrants, or search warrants, or when serving on therapeutic, problem-solving, or

We turn first to the alleged CJC Rule 2.9 violations. By accepting and considering the daughter's emailed caveat, of which the petitioner and her counsel had no notice, Judge Peterson "permit[ted]" and "consider[ed] ex parte communications" in violation of CJC Rule 2.9 (A). And as the Hearing Panel noted in its Report and Recommendation, none of the exceptions listed in CJC Rule 2.9 (A) that might authorize ex parte communications applied here. Compare *Lue v. Eady*, 297 Ga. 321, 323 (773 SE2d 679) (2015) (explaining, in the context of examining the denial of a motion to recuse, that former Canon 3 of the prior CJC, which contained language similar to Rule 2.9 (A) (1), authorized ex parte

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accountability courts, including drugs courts, mental health courts, and veterans' courts.

CJC Rule 2.9 (B) says, "If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with a reasonable opportunity to respond." CJC Rule 2.9 (D) says, "A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control."

As discussed further below in Division 2 (e), we do not decide whether the conduct alleged in Counts 38, 41, and 43 constituted violations of the CJC.

communications with respect to scheduling hearings). By failing "promptly to notify" the petitioner's counsel of the second notice of the petition that was sent to the daughter by email (with the extended deadline for filing a caveat), Judge Peterson violated CJC Rule 2.9 (B). And by failing to provide proper oversight to her own chief clerk—who sent the daughter the second notice of the petition and spoke to the daughter on the phone about the case, without notifying the petitioner's counsel of these communications—Judge Peterson violated CJC Rule 2.9 (D) because she failed to "make reasonable efforts, including providing appropriate supervision, to ensure that [Rule 2.9] is not violated by court staff, court officials, and others subject to the judge's direction and control." Accordingly, Judge Peterson violated each of the provisions of CJC Rule 2.9 noted above. See CJC Rule 2.9 Comment [11] ("Impending matters and pending proceedings are only as good as the parties make them; neutral and detached impartial judges should not be concerned about augmenting cases."); *Inquiry Concerning Anderson*, 304 Ga. 165, 166 (816 SE2d 676) (2018) (holding that a judge violated CJC

Rule 2.9 (A) when he communicated with parties to a lawsuit individually, even if such communications were made "with good intentions"). Cf. *State v. Hargis*, 294 Ga. 818, 823 n.11 (756 SE2d 529) (2014) (explaining that "trial judges 'must scrupulously avoid [improper] ex parte communications'") (citation omitted).[26]

As to the other alleged rule violations pertaining to these counts, the Hearing Panel concluded that Judge Peterson violated CJC Rule 1.1 by failing to comply with Uniform Probate Court Rule 5.1, which generally prohibits judges from initiating or considering ex parte communications with parties to a pending proceeding. The Hearing Panel determined that Judge Peterson also violated CJC Rule 1.2 (A), because permitting and sending communications to only one of the interested parties in the case diminishes "public confidence in the independence, integrity, and impartiality of the judiciary" and weakens the public's perception that the judge has

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[26] Judge Peterson argues in her Exceptions that the ex parte communications were permissible because they were made in an effort to perfect service. But her attempts to ensure that the daughter had notice of the proceedings, even if undertaken in good faith, do not excuse her failure to provide the same sort of notice to the petitioner.

afforded all of the parties the same right to be heard. We agree with the Hearing Panel's determinations in this regard.[27]

(iii) *Judge Peterson's Conduct Is Prejudicial to the Administration of Justice, Such that Discipline is Authorized Under Paragraph VII (a) of the Georgia Constitution*

We agree with the Hearing Panel that Judge Peterson's "'inappropriate [judicial] actions taken in good faith'" with respect to her handling of the petition are prejudicial to the administration of justice and bring the judicial office into disrepute. See Ga. Const., Art. VI, Sec. VII, Par. VII (a). "'Conduct prejudicial to the administration of justice' refers to inappropriate actions taken in good faith by the judge acting in her judicial capacity, but which may

[27] We note, however, that in determining the appropriate sanction in this case, we afford little weight to the Hearing Panel's conclusion that Judge Peterson's permitting and sending ex parte communications violated CJC Rule 1.2 (A), which covers a broad and wide-ranging category of conduct—"promot[ing] public confidence in the independence, integrity, and impartiality of the judiciary." Generally speaking, when a specific rule governs a type of conduct, that specific rule should be the focus of a disciplinary action, rather than the CJC's less specific, vaguer rules. Cf. *Smallwood v. State*, 310 Ga. 445, 452 (851 SE2d 595) (2020) (explaining, in the context of rejecting an appellant's argument that he should have received a lesser criminal sentence under the rule of lenity, that "a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent").

appear to be unjudicial and harmful to the public's esteem of the judiciary." *Coomer I*, 315 Ga. at 859 (citation and punctuation omitted).[28] Judge Peterson was acting in her judicial capacity in handling the petition and in directing or supervising her staff. As the Hearing Panel noted, even if Judge Peterson did not intend to favor one party over another, engaging in ex parte communications is inappropriate and "unjudicial." We agree; engaging in or allowing ex parte communications presents to the public an image of a judge who covertly interacts with a party in order to unfairly advance that party's interests and jeopardizes the appearance of the independence, integrity, and impartiality of the judiciary. Because Judge Peterson's inappropriate actions taken in her judicial capacity, even if undertaken in good faith, appeared to be "'unjudicial and harmful to the public's esteem of the judiciary,'" *Coomer I*, 315 Ga. at 859 (citation omitted), her conduct is

[28] As explained above in connection with the charges related to the HOA meeting, "'[p]rejudicial conduct may also refer to actions taken in bad faith by a judge acting outside her judicial capacity.'" *Coomer I*, 315 Ga. at 859 (citation omitted).

prejudicial to the administration of justice and discipline regarding these counts is authorized under the Georgia Constitution. See Ga. Const., Art. VI, Sec. VII, Par. VII (a).

(e) *Other Alleged Violations Found by the Hearing Panel, Which We Decline to Consider*

In addition to the violations of the CJC that we determined above that Judge Peterson committed and for which she may be disciplined pursuant to Paragraph VII (a) of the Georgia Constitution, the Hearing Panel concluded that the Director proved by clear and convincing evidence eight other counts in the formal charges (Counts 14-15, 19, 21, 38, 41, 43, and 50). We briefly discuss below the Hearing Panel's findings, which we determine are not clearly erroneous, as to these counts. But ultimately, we need not decide whether the Panel correctly determined that the conduct underlying those counts constituted violations of the CJC or sanctionable conduct under Paragraph VII (a), because the affirmance of those counts is not necessary to reach the conclusion that Judge Peterson's removal from the bench is the appropriate

sanction in this case.[29]

As to Judge Peterson's conduct at the HOA meeting, the Hearing Panel concluded that Judge Peterson violated CJC Rules 1.2 (A) (Count 14) and 1.2 (B) (Count 15) when she "repeatedly cut off homeowners as they attempted to speak; engaged in petty quibbles with them; mocked them; and used cavalier, rude gestures

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[29] We also note that with respect to Judge Peterson's conduct toward county personnel as alleged in Counts 28 and 30 (discussed above), the Hearing Panel made additional findings that formed alternate bases for the violations of CJC Rules 1.2 (B) and 2.8 (B). Specifically, the Panel found that Judge Peterson sent an email to the Chief Judge of the Douglas County Superior Court in which she questioned the Chief Judge's authority and competency and said to the Chief Judge, among other things, "Please retire as this county has outgrown your spirit." The Hearing Panel also determined that after Judge Peterson had several email exchanges with an employee in the Douglas County Information Services Department about transferring probate court case files to a new case management system, Judge Peterson sent an email to the employee and other county officials threatening to "move forward with legal action" if the data transfer was not facilitated. Although Judge Peterson argues in her Exceptions to the Report and Recommendation that the Hearing Panel's findings in these respects are clearly erroneous, she does not argue that the Panel's findings of misconduct do not constitute violations of CJC Rules 1.2 (B) and 2.8 (B). Although the Panel's factual findings are not clearly erroneous, we question whether those findings support the conclusions that Judge Peterson violated Rules 1.2 (B) and 2.8 (B). But because we determined above that the Director proved Counts 28 and 30 by showing that Judge Peterson's requesting sheriff's deputies and activating the panic button violated CJC Rules 1.2 (B) and 2.8 (B), we need not address whether the Hearing Panel correctly concluded that Judge Peterson violated those same rules in the other ways that those counts alleged.

while communicating," because those interactions fell short of the high standards of conduct necessary to maintain the integrity of the judiciary. And as to Judge Peterson's handling of the petition for year's support, the Hearing Panel found that Judge Peterson violated CJC Rule 2.9 (C) (Count 41), which prohibits judges from "investigat[ing] facts in a pending proceeding," by researching alternative addresses for the daughter. The Panel also found that Judge Peterson violated CJC Rule 2.5 (A) (Counts 38 and 43), which says that "[j]udges shall perform judicial and administrative duties competently, diligently, and without bias or prejudice," because her extension of the deadline to file a caveat and acceptance of the untimely caveat created "an appearance of bias in favor" of the daughter; her actions led to a 15-month delay in resolving the petition, which was "anything but diligent"; and she incorrectly transferred the case to the superior court and then failed to ensure that the entire record was transmitted.

In addition, the Hearing Panel made findings as to a separate incident, involving Judge Peterson's conduct in allowing a party to

a wedding over which she was scheduled to preside to enter the Douglas County Courthouse, while the courthouse was closed, without ensuring that the party underwent security screening by sheriff's deputies, in contravention of an express directive from the Division Commander for Court Services with the Douglas County Sheriff's Office not to allow the party inside (Counts 19 and 21). The Hearing Panel ultimately concluded that Judge Peterson violated CJC Rules 1.2 (B) (Count 19) and 2.5 (B) (Count 21), which says in pertinent part that "[j]udges . . . shall cooperate with . . . court officials in the administration of court business," because she violated the courthouse security protocol and the division commander's directive by allowing civilians to enter the courthouse without required security screenings.

And finally, the Hearing Panel concluded that Judge Peterson violated CJC Rule 2.4 (A), as alleged in Count 50 of the formal charges, "by persistently and continuously failing to respect and comply with the law and the [CJC] as alleged in Counts Sixteen through Forty-Nine above, demonstrating systemic judicial

incompetence and a disregard for the law." CJC Rule 2.4 (A) says, "Judges shall be faithful to the law and maintain professional competence in it. Judges shall not be swayed by partisan interests, public clamor or intimidation, or fear of criticism." The Hearing Panel found in its Report and Recommendation that the Director had proven this count by clear and convincing evidence "based on all the findings of fact and conclusions of law above, as well as the pervasive nature and expansive temporal scope of [Judge Peterson's] misconduct."

The Hearing Panel's factual findings with respect to Counts 14-15, 19, 21, 38, 41, 43, and 50 generally are supported by the evidence presented at the hearing, but we need not decide whether the Hearing Panel correctly concluded that Judge Peterson's conduct violated Rules 1.2 (A) and (B), 2.5 (A) and (B), 2.9 (C), and 2.4 (A), as alleged in those counts, or whether discipline is authorized under Paragraph VII (a) for any or all of the conduct at issue, because the affirmance of those counts is not necessary to reach our conclusion that Judge Peterson's removal from the bench is the appropriate

sanction in this case.[30]

3. *Removal Is The Appropriate Sanction*

We have determined above that Judge Peterson violated eight provisions of the CJC, as charged in 12 counts: CJC Rule 1.1 (Count 13) in connection with her communications with represented parties at the HOA meeting; Rules 1.2 (B) (Count 28) and 2.8 (B) (Count 30) in connection with her conduct toward county personnel; Rules 1.1 (Count 31), 1.2 (A) (Count 32), 1.2 (B) (Count 33), and 2.2 (Count 34) in connection with the criminal contempt matter; and Rules 1.1

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[30] We note, however, that with respect to certain types of charges, some of us have concerns about how to determine whether and what conduct would rise to the level of a CJC violation such that discipline would be authorized under the Georgia Constitution. To that end: the more generalized the category of conduct, the more difficult it can be to discern whether the CJC provides sufficient notice to judges about what conduct may violate the provision. See, e.g., CJC Rules 1.2 (A) (requiring judges to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary"); 2.5 (B) (requiring judges to "cooperate with other judges and court officials in the administration of court business"); 2.8 (B) (requiring judges to be "patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity"). We also note that Judge Peterson has not challenged the original public meaning of the constitutional term "habitual intemperance," and that the Hearing Panel did not endeavor to construe that phrase before determining that certain of Judge Peterson's conduct demonstrated habitual intemperance that would authorize discipline. But we need not resolve any of these questions today to complete our analysis of the claims before us in Judge Peterson's case.

(Count 35), 1.2 (A) (Count 37), 2.9 (A) (Count 39), 2.9 (B) (Count 40), and 2.9 (D) (Count 42) in connection with her handling of the petition for year's support.[31] We have also determined that discipline for Judge Peterson's violations of these rules is constitutionally permitted, because her actions constituted willful misconduct in office or conduct prejudicial to the administration of justice which brings the judicial office into disrepute. See Ga. Const., Art. VI, Sec. VII, Par. VII (a).

The Hearing Panel noted in its Report and Recommendation that the violations at issue here, when viewed individually, likely would not warrant the sanction of removal from office. We agree. See *In re Inquiry Concerning a Judge*, 275 Ga. at 406-412 (determining that removal from office was the proper sanction and noting that "[c]onsidered in isolation, none of [the judge's] actions

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[31] As we noted above, we pretermitted whether Judge Peterson violated six provisions of the CJC, as charged in eight additional counts: CJC Rules 1.2 (A) (Count 14) and 1.2 (B) (Count 15) in connection with her conduct at the HOA meeting; Rules 1.2 (B) (Count 19) and 2.5 (B) (Count 21) in connection with admitting the wedding party to the courthouse; Rules 2.9 (C) (Count 41) and 2.5 (A) (Counts 38 and 43) in connection with her handling of the petition for year's support, and 2.4 (A) (Count 50) related to the allegation of systemic incompetence.

would warrant his removal from the bench" but that "[c]onsidered as a whole, . . . [the judge's] actions demonstrate[d] a troubling pattern of ineptitude and misconduct"). But the Hearing Panel also determined that Judge Peterson's misconduct related to the contempt matter was "troubl[ing]" and "discordant with one of the judiciary's primary purposes: to provide due process to all who come into court, especially when one's freedom is at stake," and that her pattern of misconduct related to the many other matters exhibits a "persistent unwillingness to apply to herself the rules that apply to everyone else." In particular, the Hearing Panel's findings (which we have determined were not clearly erroneous) show that Judge Peterson acted in bad faith in her judicial capacity by willfully disregarding the petitioner's basic due-process rights in the criminal contempt proceeding, which portrays to the public an image of a judge who believes she is above the law. And the Hearing Panel's findings that Judge Peterson acted in bad faith *outside* her judicial capacity by knowingly communicating with represented parties at the HOA meeting present a comparable image. See *Coomer II*, 316

Ga. at 865-866 ("[J]udges are not above the law and must respect the law, because otherwise they cannot be trusted to apply the law honestly and fairly."); *Fowler*, 287 Ga. at 472 ("[W]e cannot expect that members of the public will respect the law and remain confident in our judiciary while judges who do not respect and follow the law themselves remain on the bench."); *Matter of Inquiry Concerning a Judge*, 265 Ga. at 852 (explaining that judges "are entrusted with the duty to safeguard the fundamental rights of others" and holding that when "it is established by clear and convincing evidence that an individual is not competent to sit as a judge because she has breached that sacred trust, the same great authority that established those fundamental rights commands us to protect the citizenry and the judicial system from harm, and remove that individual"). The Hearing Panel's findings similarly establish that Judge Peterson acted in bad faith in her judicial capacity toward county officials when she requested sheriff's deputies to be present after regular courthouse hours—including overnight—and when she activated the panic button in her judicial chambers. See id. at 852

(explaining that "[t]hose who are called upon to live the life of a judge must act with dignity and respect toward others"). And although Judge Peterson possibly acted in good faith by permitting the ex parte communications with respect to the petition for year's support, her misconduct demonstrated a failure to comprehend and follow the law, which in turn causes prejudice to the administration of justice. As the Hearing Panel determined in recommending her removal, Judge Peterson's "misconduct has already demonstrably eroded the public's respect for the judicial system." And regardless of the extent to which the Hearing Panel considered the mitigating evidence that Judge Peterson offered at the hearing and emphasizes again before this Court, we conclude that such evidence is not particularly persuasive, as the instances of misconduct at issue here spanned nearly the entirety of Judge Peterson's judicial career.

Moreover, the Hearing Panel's determinations supported a conclusion that Judge Peterson was "disingenuous, if not outright dishonest," during the JQC proceedings, because she provided untruthful or evasive testimony with respect to, among other things,

her conduct regarding the HOA meeting and the courthouse wedding. The Hearing Panel noted in this respect that Judge Peterson "falsely testified" that she made no recording of the events that took place at the HOA meeting, pointing out that the video recording of the meeting that was admitted into evidence at the hearing showed that she held up her cell phone, indicating that she had in fact recorded the meeting. It also noted that Judge Peterson's "attempts to avoid responsibility" for violations related to the HOA meeting "severely erod[ed] her credibility with the Hearing Panel."

The Hearing Panel also found that Judge Peterson falsely testified that after the division commander told her not to take the wedding party into the courthouse, the sheriff overrode that directive and "granted her permission to enter the courthouse" to perform the wedding ceremony, because the Hearing Panel "fully credit[ed]" the sheriff's testimony, which "flatly contradicted" those assertions. In addition, the Hearing Panel expressly concluded in other sections of its Report and Recommendation that Judge Peterson lied during her testimony, including when she claimed that

she had not predetermined that the petitioner was guilty of criminal contempt before she issued the notice of hearing on the petition, when she stated that she was not aware of the purpose of the panic button, and when she "feigned ignorance" about communicating with represented parties at the HOA meeting. As we recently explained in determining that another judge's "disingenuous, if not outright dishonest" testimony during the JQC proceedings informed our decision to remove him:

> a judge faced with an ethics investigation by the JQC has every right to defend himself. He can argue that his actions do not violate a particular statute or rule, including the Code of Judicial Conduct. He can disagree with JQC staff or the Hearing Panel as to appropriate sanctions. He can dispute the factual accuracy of the allegations against him. And judges must be free to do all of those things without fear that a sanction will be worse if they simply fail to prevail. But judges cannot be misleading during that process, any more than lawyers can be misleading during State Bar disciplinary processes.

Coomer II, 316 Ga. at 874. As in *Coomer II*, the Hearing Panel in this case found multiple instances in which Judge Peterson attempted to mislead the Panel by falsely testifying, indicating her desire to conceal her misconduct. Because those findings are

supported by the evidence at the hearing, we consider them as an aggravating favor in determining the proper sanction. See id. at 874-875 & n.19.[32]

In conclusion, in light of her multiple violations of the CJC rules in relation to several matters—some of them reflecting a flagrant disregard for the law, court rules, and judicial conduct rules; the pattern of violations that the Director proved by clear and convincing evidence; the extremely concerning nature of some of those violations, in particular with respect to the criminal contempt matter; and her behavior during the JQC inquiry, we conclude that removal is the appropriate sanction. See, e.g., *Fowler*, 287 Ga. at 472 (holding that removal from office was the appropriate sanction where the judge exhibited a "consistent pattern of misconduct" that

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[32] As we recognized in *Coomer II*, "imposing discipline on a judge solely based on the judge's response to a JQC inquiry"—in other words, conduct during a JQC hearing—"without the JQC first filing formal charges against the judge alleging such conduct constituted a violation of the Code of Judicial Conduct, might raise due process concerns." 316 Ga. at 874 n.19. But this case, like *Coomer II*, does not present that scenario, because we have already concluded that Judge Peterson violated several provisions of the CJC through her actions that took place before the JQC inquiry and we consider her actions during the JQC process as an aggravating factor only in determining the proper sanction. See id.

stemmed from "willful misconduct in office . . . and conduct prejudicial to the administration of justice which brings the judicial office into disrepute," among other things) (cleaned up); *In re Inquiry Concerning a Judge*, 275 Ga. at 406-412 (determining that removal from office was the proper sanction for a judge who, among other things, demonstrated a lack of competence in the law, failed to safeguard basic constitutional rights of litigants, and failed to respect and comply with the law with respect to multiple matters of misconduct, and noting that "[c]onsidered in isolation, none of [the judge's] actions would warrant his removal from the bench" but that "[c]onsidered as a whole, . . . [the judge's] actions demonstrate[d] a troubling pattern of ineptitude and misconduct"); *Matter of Inquiry Concerning a Judge*, 265 Ga. at 850-852 (concluding that removal from office was the appropriate discipline for a judge who violated multiple former canons of the prior CJC, including in five instances disregarding defendants' "basic and fundamental constitutional rights," which "exhibit[ed] an intolerable degree of judicial incompetence, and a failure to comprehend and safeguard the very

basis of our constitutional structure").

Accordingly, it is ordered that Judge Christina Peterson of the Douglas County Probate Court be removed from office, effective upon the date of this opinion. As a result, Judge Peterson "shall not be eligible to be elected or appointed to any judicial office in this state until seven years have elapsed" from the date of this opinion. OCGA § 15-1-13 (a).

Removed from office. All the Justices concur, except Colvin, J., disqualified.

PETERSON, Presiding Justice, concurring.

I concur fully in the Court's opinion today removing Judge Christina Peterson from office. I write separately in response to Commissioner Hyde's thoughtful concurrence (joined by Commissioners McBurney and Lopez) to the JQC Hearing Panel's Report and Recommendation. In his concurrence, Commissioner Hyde writes that for some of the counts of lesser misconduct proven by the JQC Director, he would have liked to have suggested a suspension without pay, but he does not believe that to be a type of judicial discipline authorized by the Georgia Constitution. I appreciate this careful respect the Hearing Panel members show for the constitutional limits on the authority of the JQC and this Court. And I agree that the question is open to reasonable debate. But as I explain below, I think that the best interpretation of relevant provisions of the Georgia Constitution is that the constitutional authority to discipline judges *does* include the authority to suspend a judge without pay.

Article VI, Section VII, Paragraph VII ("Paragraph VII") of the

Georgia Constitution explicitly provides three possible forms of discipline of judges for various forms of misconduct — removal, suspension, or other unspecified discipline. See Ga. Const. of 1983, Art. VI, Sec. VII, Par. VII (a). An earlier paragraph in that same section of Article VI, Section VII, Paragraph V ("Paragraph V"), provides in part that "[a]n incumbent's salary, allowance, or supplement shall not be decreased during the incumbent's term of office." Commissioner Hyde's concurrence understands this provision to prohibit suspension without pay. That's a reasonable reading. But based on the text, history, and context of these provisions, I conclude that the Georgia Constitution permits a judge to be suspended without pay once the judge has been afforded due process.[33] See *Elliott v. State*, 305 Ga. 179, 188 (II) (C) (824 SE2d

[33] This kind of suspension-as-discipline is imposed only by consent or at the end of the full JQC disciplinary process and after a determination by this Court that the judge violated the Code of Judicial Conduct and that discipline is appropriate. That is different from the interim suspension that JQC Rule 15 permits upon indictment, see JQC Rule 15 (a) (suspension with pay), conviction, see JQC Rule 15 (b) (suspension without pay), or a determination that a judge poses a substantial threat of serious harm to the public or to the administration of justice, see JQC Rule 15 (c) (suspension with pay or transfer to inactive status with pay).

265) (2019) ("[A]ny decision about the scope of a provision of the Georgia Constitution must be rooted in the language, history, and context of that provision." (citation and punctuation omitted)).

Examining the text of the relevant provisions, there is nothing about the term "suspension" that itself suggests continuing receipt of pay. As Commissioner Hyde notes, a suspension with pay amounts to little discipline at all, such that this key term in Paragraph VII would be robbed of significant meaning if that were all that "suspension" meant. This is especially so when imposed after providing due process and concluding that a violation of the Code of Judicial Conduct in fact has been committed and the conduct is of such character as to invoke this Court's authority to discipline under Paragraph VII. And the language of Paragraph V on its face — forbidding decrease in an incumbent's "salary" during a term of office — does not require us to impose this meaning on the term "suspension" in Paragraph VII. "Salary" generally was defined around the time of the ratification of the 1983 Georgia Constitution as a fixed rate of pay for services *when they are rendered*. See

Webster's New World Dictionary of the American Language (2d. college ed. 1980) 1255 (defining "salary" as "a fixed payment at regular intervals *for services*, esp. when clerical or professional" (emphasis supplied)). Not paying a person while that person is legally prohibited from rendering services for some period of time does not decrease that person's "salary" within the ordinary meaning of that word.

This understanding of the meaning of the term "suspension" is consistent with the context in which the people ratified the constitution containing the current version of Paragraph VII. Paragraph VII (a) was ratified in its current form in 1983. See *Inquiry Concerning Judge Coomer*, 315 Ga. 841, 858-859 (6) nn.11-12 (885 SE2d 738) (2023). Paragraph V also entered the Georgia Constitution with the 1983 overhaul. See Ga. L. 1981 (Extraordinary Session), pp. 143, 182; Ga. L. 1983, p. 2070. The 1976 Constitution contained neither the provision for suspension as a form of judicial discipline nor the language forbidding a decrease in a judge's salary. See Ga. Const. 1976, Art. VI, Sec. XII; Art. VI, Sec.

XIII. In determining the meaning of a constitutional provision as understood by the people when they ratified it, "it is the understanding of the text by reasonable people familiar with its legal context that is important[.]" *Elliott*, 305 Ga. at 207 (III) (C) (ii) (citation and punctuation omitted). Just a few years before the ratification of the current version of Paragraph VII, we suspended a judge without pay as a means of judicial discipline. See *In re Judge Broome*, 245 Ga. 227, 229 (264 SE2d 656) (1980). Although I have found one instance prior to the voters' approval of the 1983 Constitution[34] where this Court imposed a suspension as a form of judicial discipline without specifying whether the suspension was with or without pay, see *Inquiry Concerning a Judge; W.D. Josey, J.P., No. 469*, 249 Ga. 425, 427 (292 SE2d 59) (1982), I have not found any reported case prior to the ratification of the 1983 Constitution in which this Court made clear that it was suspending

[34] The people voted to approve the new Constitution on November 2, 1982. See *Building Authority of Fulton County v. State of Georgia*, 253 Ga. 242, 245 (3) (321 SE2d 97) (1984).

a judge with pay.[35] This supports a conclusion that when the people approved the current form of Paragraph VII, they understood the term "suspension" as contained therein to mean suspension without pay.

This conclusion about the meaning of the term "suspension" also is consistent with our handling of judicial discipline matters under the 1983 Constitution. We have suspended judges without pay numerous times in the years since the ratification of that Constitution.[36] See *Inquiry Concerning Judge Gundy*, 314 Ga. 430, 434 (877 SE2d 612) (2022); *Inquiry Concerning Judge Hays*, 313 Ga. 148, 150 (868 SE2d 792) (2022); *Inquiry Concerning a Judge 93-154*, 263 Ga. 883, 884 (440 SE2d 169) (1994); *Inquiry Concerning a Judge Nos. 1546, 1564 & 1666*, 262 Ga. 252, 253 (417 SE2d 129) (1992);

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[35] In 1978, in lieu of removal, we ordered that a Senior Judge of the superior courts be "prohibited and restricted from presiding as judge of the superior courts in any judicial proceeding whatsoever at any time after this date." *In re Judge Dunahoo*, 240 Ga. 617, 618 (242 SE2d 116) (1978).

[36] Of course, the fact that we have done so does not mean that we were right to do so. At least Gundy and Hays were suspended by consent. But while a judge may consent to waive procedural rights, a judge cannot by agreement confer on this Court power that it does not already possess.

Inquiry Concerning a Judge No. 1228, 259 Ga. 146, 147 (378 SE2d 115) (1989); *Inquiry Concerning a Judge No. 1036*, 257 Ga. 481, 481 (361 SE2d 158) (1987); *Inquiry Concerning a Judge No. 1035*, 257 Ga. 479, 480 (361 SE2d 157) (1987); *Inquiry Concerning a Judge No. 693*, 253 Ga. 485, 486 (321 SE2d 743) (1984); *Inquiry Concerning a Judge No. 481*, 251 Ga. 524, 525 (307 SE2d 505) (1983); *Inquiry Concerning a Judge No. 506*, 250 Ga. 764 (300 SE2d 808) (1983). Although we did not do so with any fulsome analysis of whether such a sanction was consistent with Paragraph V, that may simply reflect a consistent understanding that a suspension without pay is constitutionally permissible.[37]

Another provision in Paragraph VII, addressing discipline for judges who are the subject of criminal proceedings, bolsters this

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[37] Indeed, we have treated "suspension" as a serious sanction, bolstering the idea that we understand suspension to be unpaid, something very different from a paid vacation. See *Inquiry Concerning Judge Crawford*, 310 Ga. 403, 408 (851 SE2d 572) (2020) (Blackwell, J., concurring) (describing censure, public reprimand, and limitations on the performance of judicial duties as "*lesser* sanctions" than the removal and suspension sanctions expressly authorized by the Constitution and concluding that they "fit comfortably within the constitutional authorization for judges to be 'otherwise disciplined' for judicial misconduct"), concurrence cited favorably in *Kinslow v. State*, 311 Ga. 768, 774 (860 SE2d 444) (2021).

conclusion. See Ga. Const. Art VI, Sec. VII, Par. VII (b) (1). This provision requires in certain cases the suspension of a judge who is indicted for a felony in state or federal court pending final disposition of the case or expiration of the judge's term of office. See id. This provision explicitly provides for that suspension to be with pay under some circumstances, and without pay in others, depending on the amount of process offered: "While a judge is suspended under this subparagraph and until initial conviction by the trial court, the judge shall continue to receive the compensation from his office. After initial conviction by the trial court, the judge shall not be entitled to receive the compensation from his office." Id. This suspension without pay is not equivalent to removal, as the subparagraph provides that if the judge's conviction is overturned as a result of a direct appeal or application for a writ of certiorari, the judge shall be reinstated immediately, at which point the judge will be entitled to any withheld compensation. See id.

Of course, the Georgia Constitution provides that "[n]o action shall be taken against a judge except after hearing and in

accordance with due process of law." Ga. Const. Art. VI, Sec. VII, Par. VIII. "Based on this provision, this Court has said the JQC's authority to enforce the Code is not unlimited, inasmuch as the Constitution requires the Commission to afford due process to judges and provides for this Court to review the imposition of discipline." *Inquiry Concerning Judge Coomer*, 315 Ga. at 849 (4) (a) (citation and punctuation omitted). "Federal due process requirements also apply" to the discipline of Georgia judges. Id. at 849 (4) (a) n.3. Therefore, this Court cannot suspend judges without pay on an interim basis, before disciplinary proceedings have afforded full due process. See id. at 844 (2) (noting that interim suspension of judge was with pay per Paragraph V). But, although this case does not require us to decide the question, my best reading is that Paragraph V does not forbid the use of a suspension without pay as a sanction for judicial misconduct once due process has been provided.

I am authorized to state that Chief Justice Boggs joins in this concurrence.

Ryan V. Commission on Judicial Performance

Ryan v. Commission on Judicial Performance

Supreme Court of California

May 31, 1988

S.F. No. 25086

Reporter
45 Cal. 3d 518 *; 754 P.2d 724 **; 247 Cal. Rptr. 378 ***; 1988 Cal. LEXIS 111 ****; 76 A.L.R.4th 951

RICHARD RYAN, a Judge of the Municipal Court, Petitioner, v. COMMISSION ON JUDICIAL PERFORMANCE, Respondent

Subsequent History: [**1]** Petitioner's application for a rehearing was denied June 30, 1988, and the opinion was modified to read as printed above.

Disposition: We order that Judge Richard Ryan, Municipal Court Judge of the Roseville-Rocklin Judicial District, Placer County, be removed from office. Because the misconduct for which he is removed does not amount to grounds for disbarment, he shall, if otherwise qualified, be permitted to practice law (Cal. Const., art. VI, § 18, subd. (d); see *Wenger* v. *Commission on Judicial Performance, supra*, 29 Cal.3d at p. 654), on condition that he pass the Professional Responsibility Examination (see *Gonzalez* v. *Commission on Judicial Performance, supra*, 33 Cal.3d at p. 378). This order is effective upon the finality of this decision.

Counsel: Thomas J. Nolan, Kathleen C. Caverly and Nolan & Parnes for Petitioner.

John K. Van de Kamp, Attorney General, Raymond Brosterhous II and Eddie T. Keller, Deputy Attorneys General, for Respondent.

Opinion by: THE COURT

Opinion

[*525] [726] [***380]** The Commission on Judicial Performance (hereafter the Commission) recommends that **[****2]** Municipal Court Judge Richard J. Ryan, of the Roseville-Rocklin Judicial District of Placer County, be removed for "wilful misconduct in office" (hereafter wilful misconduct) and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" (hereafter prejudicial conduct). (Cal. Const., art. VI, § 18, subd. (c).) Judge Ryan petitions this **[***381]** court for remand to the Commission, alleging that he was denied due process of law because (1) numerous witnesses in these disciplinary proceedings were admonished not to speak to the judge or anyone, and (2) the Commission limited Judge Ryan's oral argument time to 45 minutes rather than the 2 hours he had requested. Judge Ryan also petitions for review, [1] alleging that the **[**727]** Commission's findings of fact and conclusions of law are not supported by clear and convincing evidence.

[**3]** After independently reviewing the record, we conclude that Judge Ryan has not been deprived of due process in this disciplinary proceeding. Moreover, we conclude that the Commission's recommendation of removal is supported by clear and convincing evidence.

I. *Background Information*.

Judge Ryan is 39 years of age and was born in San Mateo, California. He served in the Air Force from 1965 to 1968 and graduated from San Diego State University in 1971. The judge attended the University of San Diego Law School and graduated from that institution in 1974. He was admitted to the California State Bar soon after.

Judge Ryan moved to Auburn, where he worked in a law office for two years and then went into sole practice for another two years. In 1978 he was elected as a judge of the Justice Court for the Foresthill Judicial District. In 1982 he became municipal court judge in the Roseville-Rocklin Judicial District, Placer County, where he has served to the present time.

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[1] Judge Ryan's petition states that it is made pursuant to rule 920(c) of the California Rules of Court. However, rule 920 applies only to Commission determinations for private admonishment. Rule 919, on the other hand, applies to review of Commission recommendations of censure or removal from office. It therefore appears that Judge Ryan intended to file a petition for review under rule 919(b), and we treat the petition as so filed.

The Commission served Judge Ryan with notice of formal proceedings on January 14, 1986. Three special masters (the masters) were appointed to take testimony on this matter, and the Commission appointed examiners **[****4]** to present the case. After 13 days of hearings, the masters found that Judge **[*526]** Ryan had engaged in numerous acts of wilful misconduct and prejudicial conduct. The Commission then heard oral argument in the matter and determined that Judge Ryan committed three acts of wilful misconduct in office and seventeen acts of prejudicial conduct. The Commission dismissed 17 other charges as not proven. **(1)** In reviewing the Commission's findings and conclusions, we are concerned only with the charges that the Commission sustained. (*Wenger v. Commission on Judicial Performance (1981) 29 Cal.3d 615, 622 [175 Cal. Rptr. 420, 630 P.2d 954]*; *Spruance v. Commission on Judicial Qualifications (1975) 13 Cal.3d 778, 784, fn. 5 [119 Cal. Rptr. 841, 532 P.2d 1209]*.) The Commission recommended removal by a vote of five to two. The two commissioners in the minority espoused censure.

II. *Petition for Remand Based on Alleged Due Process Violations*.

A. *Propriety of Admonishments*.

Judge Ryan contends that he was denied due process of law because the examiners improperly admonished the witnesses during the preliminary investigation **[****5]** that they were not to talk to anyone about the subject of the investigation. The judge claims that this admonishment prevented him from adequately preparing for his defense because certain witnesses refused to speak with him.

The pertinent facts may be summarized briefly and are not in dispute. From September through December of 1985, the Commission conducted a preliminary investigation into the judicial performance of Judge Ryan. The investigation consisted of sworn interviews with over 100 people. After each interview, the examiners informed the interviewees of the confidential nature of the investigation and told them not to speak to anyone about it. Moreover, in some of the interviews the examiners admonished the interviewees specifically not to speak to Judge Ryan. While the **[***382]** preliminary investigation was being conducted, Judge Ryan wrote several letters to the Commission, objecting to the admonishments given to the witnesses. The Commission responded that it was not aware of any improprieties.

After the notice of formal proceedings was served, the judge received discovery information from the examiners from January through March, including tapes of the investigative **[****6]** interviews and lists of prospective witnesses. During this time **[**728]** Judge Ryan did not retain counsel or avail himself **[*527]** of applicable discovery procedures that would have allowed him to compel information from hesitant witnesses. [2]

On March 31, 1986, the first day of hearings before the masters, Judge Ryan made a motion to dismiss or exclude evidence based on the allegedly improper admonishments. The masters placed the burden on the judge to identify which persons had been improperly admonished and which persons refused to speak to the judge as a result of the improper admonishments. The judge offered evidence that he had tried to speak to four witnesses, but that they had refused to speak with him. He **[****7]** claims he stopped seeking information at that point because the admonishments rendered his discovery futile.

Although Judge Ryan never proved that the admonishments caused the witnesses to refuse to speak with him, the masters nevertheless directed the examiners to send letters to those individuals who had been admonished, informing those witnesses that they were free to speak to the judge if they wished. The examiners initially sent letters only to those persons who had been admonished not to speak to Judge Ryan personally. However, on April 8, 1986, while the hearing before the masters was still pending, the examiners sent another 66 letters to every prospective witness they intended to call in the proceeding, informing those people that they could speak to the judge if they wished. The hearing before the masters continued through April 21, 1986.

On the third day of the hearings, the examiners indicated that they would agree to a continuance so that Judge Ryan could interview any witnesses he wished. The judge rejected a continuance, stating that the examiners should have to "live with" their errors. The masters then indicated that they would grant the judge a continuance **[****8]** at any time so that he could

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[2] Rule 910 of the California Rules of Court gives the judge the right to subpoena witnesses. Moreover, *Government Code section 68752* provides procedures to compel a witness to attend or testify, and *section 68753* provides the authority for ordering depositions.

interview any of the witnesses that he claimed were improperly admonished, but the judge chose to stand on the record as it existed. During the remainder of the hearing, the masters began the practice of informing each witness who took the stand that they could speak to Judge Ryan. The masters subsequently denied the judge's motion for dismissal or exclusion of evidence.

(2) Article VI, section 18 of the California Constitution and rule 902(a) of the California Rules of Court require that preliminary investigations by the Commission be strictly confidential. [3] Such confidentiality protects a **[*528]** judge from premature public attention and also protects the witnesses from intimidation. (McCartney v. Commission on Judicial Qualifications (1974) 12 Cal.3d 512, 520-521 [116 Cal. Rptr. 260, ***[***383]*** 526 P.2d 268]; *Mosk* v. *Superior Court, supra*, 25 Cal.3d 474, 491.) In admonishing the interviewees as to the confidentiality of the proceedings, the examiners were faithful to the constitutional mandate of article VI, section 18. Moreover, newspaper articles published during the preliminary investigation **[****9]** indicate that the witnesses properly refused to speak to the press about the investigation because they had been admonished **[**729]** that the proceedings were confidential. Thus, the admonishments served their intended purpose.

[**10]** Nevertheless, a judge certainly has the right to conduct a proper defense in disciplinary actions. Rule 910 of the California Rules of Court provides that "[in] *formal proceedings* involving his censure, removal, retirement or private admonishment, a judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter." (Italics added.) While the language of rule 910 specifies a judge's right to conduct an adequate defense, it also indicates that the right attaches once formal proceedings are instituted. A judge does not have the same right while the Commission is conducting its preliminary investigation.

As we stated in McCartney, supra, 12 Cal.3d at page 519, during the preliminary investigation stage the Commission has not yet begun its adjudicatory function, "but is merely attempting to examine citizen complaints in a purely investigatory manner." During this investigatory period **[****11]** the Commission must have the freedom to collect accurate and untainted information. The accuracy of the investigation could be compromised if the witnesses were allowed to discuss the matter with others, especially the judge. For this reason, the examiners conducting the investigation were correct in admonishing the witnesses not to speak to anyone.

Simply stated, a judge does not have the right to defend against a proceeding that has not yet been brought.

[*529] Thus, the issue presented is limited to whether the admonishments prevented the judge from conducting reasonable discovery *after* formal proceedings were brought against him. Although we have no reason to disbelieve Judge Ryan's claim that several witnesses refused to speak with him, we nevertheless conclude that he has not made a sufficient showing of prejudice.

(3) The masters correctly placed the burden on the judge to identify (1) which witnesses were admonished, (2) which witnesses refused to speak to the judge *because* of the admonishment, and (3) how such refusal prejudiced the judge's preparation for the hearing. (McCartney, supra, 12 Cal.3d at p. 519 ["relief from . . . **[****12]** the Commission's failure . . . may be secured by petitioner only upon a showing of actual prejudice"].) The only showing made by the judge was that substantially all of the witnesses were admonished not to speak to "anyone," that some of the witnesses were admonished not to speak to him personally, and that

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[3] Article VI, section 18, of the California Constitution provides for the suspension or removal of judges. Subdivision (f) of section 18 states: "The Judicial Council shall make rules implementing this section and providing for confidentiality of proceedings." Subdivision (f) has been held to *require* confidentiality in disciplinary proceedings before the Commission. (Mosk v. Superior Court (1979) 25 Cal.3d 474, 499 [159 Cal. Rptr. 494, 601 P.2d 1030].) Moreover, rule 902(a) of the California Rules of Court provides: "Except as provided in this rule, all papers filed with and proceedings before the Commission, or before the masters appointed by the Supreme Court pursuant to rule 907, shall be confidential until a record is filed by the Commission in the Supreme Court. Upon a recommendation of censure, all papers filed with and proceedings before the Commission or masters shall remain confidential until the judge who is the subject of the proceedings files a petition in the Supreme Court to modify or reject the Commission's recommendation or until the time for filing a petition expires."

four individuals actually did refuse to speak with him. This showing was insufficient in light of the clear need to protect confidentiality and accuracy in the preliminary investigation and the fact that the witnesses could have refused to discuss the matter with the judge for a variety of reasons not associated with the admonishment.

Moreover, once formal proceedings were brought, Judge Ryan had the power under rule 910 to subpoena witnesses who were reluctant to speak with him. He also had the power to compel depositions and testimony under *Government Code sections 68752* and *68753*. The judge never utilized these procedural tools.

Furthermore, the examiners and the masters made a tremendous effort to alleviate any prejudice that may have resulted from the admonishments. Judge Ryan rejected **[***384]** these efforts and refused **[****13]** the offer of a continuance. [4]

For these reasons, we conclude that Judge Ryan was given ample opportunity **[**730]** to conduct adequate discovery. The admonishments did not deny him due process.

B. *Rejection of Requested Argument Time*.

(4) Judge Ryan also contends that he was denied due process because the Commission refused to provide his counsel with adequate oral argument **[*530]** time to present his defense. The judge requested 2 hours, but the Commission limited argument to 45 minutes for each side. The judge argues that 45 minutes was insufficient to address the numerous **[****14]** charges brought against him and asks that we remand his case to the Commission for further argument.

Rule 914 of the California Rules of Court provides: "[The] Commission shall give the judge and the examiner an opportunity to be heard orally before the Commission . . . ." However, the rule does not specify a minimum time allotment for oral argument.

Nevertheless, 45 minutes for oral argument is certainly a reasonable time limit. Argument before this court is limited to 45 minutes even in automatic appeals, where the issues are often more numerous and complex. (Cal. Rules of Court, rule 22.)

Judge Ryan had the opportunity in his briefs to address every charge in detail. Moreover, as a result of the questioning by the Commissioners, Judge Ryan's counsel was allowed to argue for a total of 59 minutes. The Commission did not abuse its discretion in limiting the oral argument time. Judge Ryan's petition for remand is denied.

III. *Petition for Review of Commission's Findings and Conclusions*.

A. *Standard of Review*.

(5) We independently review the findings of the Commission to ensure that there is clear and convincing evidence to sustain the charge to a **[****15]** reasonable certainty. (*Gonzalez v. Commission on Judicial Performance (1983) 33 Cal.3d 359, 365 [188 Cal. Rptr. 880, 657 P.2d 372]*; *Geiler v. Commission on Judicial Qualifications (1973) 10 Cal.3d 270, 275 [110 Cal. Rptr. 201, 515 P.2d 1]*.) In doing so, we give special weight to the factual determinations of the masters, who are best able to evaluate the truthfulness of the witnesses appearing before them. (*Gubler v. Commission on Judicial Performance (1984) 37 Cal.3d 27, 34 [207 Cal. Rptr. 171, 688 P.2d 551]*; *Wenger, supra, 29 Cal.3d at p. 623*.) At the same time, we accord great weight to the legal conclusions of the Commission. (*Wenger, supra, 29 Cal.3d at p. 623*.)

(6a) Censure or removal from office is appropriate when a judge engages in wilful misconduct or prejudicial conduct. (*Cal. Const., art. VI, § 18, subd. (c)*.) The charge of wilful misconduct refers to "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith." (*Geiler, supra, 10 Cal.3d. at p. 284*.) **(7)** The lesser charge of prejudicial conduct comprises conduct **[****16]** which the judge undertakes in good faith but **[*531]** which would nonetheless appear to an objective observer to be unjudicial and harmful to the public esteem of the judiciary. It also refers to unjudicial conduct committed in bad faith by a judge not acting in an official capacity. (*Furey v. Commission on Judicial Performance (1987) 43 Cal.3d 1297, 1304-1305 [240 Cal. Rptr. 859, 743 P.2d 919]*; *Gonzalez, supra, 33 Cal.3d at p. 365*; *Geiler, supra, 10 Cal.3d at p. 284* and fn. 11.)

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[4] Judge Ryan argues that it would have been "absurd" to accept a continuance when it was offered to him during the hearing, because by that time the witnesses probably suffered from loss of memory due to the passage of time. It is therefore incongruous that he should ask us to remand his case *now* so that he can conduct proper discovery. Surely the witnesses' memories are not getting any better as time goes on.

(6b) When a judge is acting in an official capacity, the critical distinction between **[***385]** wilful misconduct and prejudicial conduct is the presence of bad faith or malice. (*Furey, supra, 43 Cal.3d at p. 1304*.) In *Wenger v. Commission on Judicial Performance, supra, 29 Cal.3d 615*, we enunciated a two-prong test for the determination of bad faith or malice. It must be shown that the judge intentionally "(1) committed acts he knew or should have known to be beyond his power, (2) for a purpose other than faithful discharge of judicial duties." (*Id. at p. 622, fn. 4*.) **[**731]** **[****17]** Both prongs of the *Wenger* test apply an objective, rather than subjective, standard. The objective approach is consistent with our holdings in judicial discipline cases prior to the adoption of the *Wenger* two-prong test. (See *Geiler, supra, 10 Cal.3d at p. 277*.) The objective approach is also consistent with canon 2 of the California Code of Judicial Conduct, which provides that a judge should avoid the "appearance" of impropriety.

B. *Charged Instances of Misconduct*.

1. *The Starks Matter*.

(8) Dean H. Starks, an attorney, was in court for an unrelated matter when he observed a friend, Charles Jergo, appearing before Judge Ryan without counsel on several misdemeanor charges. Starks attempted to intervene on behalf of the defendant regarding the issue of release on bail. Judge Ryan thanked Starks, but stated he had already made his decision. Judge Ryan then left the courtroom. Once the court session had ended, Starks approached another attorney in the courtroom and jokingly asked when the next judicial election would be held. Judge Ryan's court clerk, Samantha Spangler, overheard Starks's question and stated that Starks's comment was **[****18]** inappropriate. Starks then began to explain his friendship with Jergo, while Spangler defended the judge's ruling. The conversation became heated and the bailiff had to intervene. Starks did not make any derogatory comments about the judge during the exchange, and the entire conversation occurred out of the judge's presence.

Spangler immediately went to Judge Ryan's chambers and informed him of what transpired. The judge called Starks into his chambers. Following an unsworn recitation of the facts by certain witnesses, Judge Ryan held Starks **[*532]** in contempt of court and summarily sentenced him to a $ 200 fine or three days in jail. The judge gave Starks three days to pay the fine.

Starks immediately filed a petition for writ of habeas corpus in the superior court. Soon after, Judge Ryan told the press that he intended to drop the contempt charge. Nevertheless, Judge Ryan asked the district attorney to research contempt law for him and did not inform Starks that he was dropping the contempt order until two weeks later. The contempt order was later invalidated by the superior court. [5]

[**19]** The masters concluded that Judge Ryan committed wilful misconduct in this matter. The Commission agreed. The Commission determined that Judge Ryan should have known his contempt order was both substantively and procedurally invalid. Moreover, the Commission determined that the judge's continued pursuit of the contempt case was done in bad faith and for an improper purpose.

Judge Ryan completely ignored the procedures required for issuing contempt orders. Starks could not be held in direct contempt because his statements were made outside the judge's presence and after the court session had ended. (*Code Civ. Proc., § 1209, subd. (b)*.) [6] Moreover, the judge failed to follow the procedures **[***386]** for indirect contempt outlined in *section 1211 of the Code of Civil Procedure. Section 1211* requires that an affidavit be presented to the judge reciting the facts constituting contempt. No such affidavit was presented. Judge Ryan found Starks guilty of contempt merely on the basis of the unsworn testimony presented in his chambers. Thus, the Commission was correct in concluding that Judge Ryan's contempt order was procedurally **[****20]** invalid.

The Commission also correctly concluded that the contempt order was substantively invalid. The comment made by Starks regarding **[**732]** the next judicial election was mild. Those who accept judicial office must expect and endure such criticism. As one court

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[5] Judge Ryan dropped the contempt charge before the superior court heard the matter. Despite the apparent mootness of the issue, the superior court chose to decide the matter to redress any harm the contempt order had on Starks's reputation in the community.

[6] *Section 1209, subdivision (b)* provides: "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

aptly stated, "the judge must be long of fuse and somewhat thick of skin." (*DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 312 [114 Cal. Rptr. 860]*.) Moreover, Starks's heated discussion with Spangler did not rise to the level of contemptuous behavior. Starks's conduct did not interfere with court proceedings, nor did it lower esteem for the judiciary.

[*533] In *Cannon v. Commission on Judicial Qualifications (1975) 14 Cal.3d 678 [122 Cal. Rptr. 778, 537 P.2d 898]*, **[****21]** we held that ignorance of proper contempt procedures, without more, constituted bad faith. (*Id. at p. 694*.) In *Cannon* we emphasized that Judge Cannon was an experienced judge, with more than nine years on the bench. Judge Ryan is also experienced, having served on the justice court bench for four years and on the municipal court bench since 1982. Judge Ryan should have known, or should have researched, the proper contempt procedures in this matter. His failure to do so constituted bad faith under the *Wenger* two-prong test.

However, Judge Ryan's ignorance of contempt procedure was not his only transgression in this matter. Judge Ryan testified that he knew he had made mistakes immediately after he held Starks in contempt. Nevertheless, even after the judge realized his contempt order was invalid, he still pursued the matter with the district attorney and did not notify Starks that the matter was dropped until two weeks later. This conduct also constituted bad faith. We agree with the Commission that Judge Ryan committed wilful misconduct.

2. *The Hiter Matter*.

(9) Maxine Hiter appeared as a defendant in a civil matter before Judge Ryan. **[****22]** The judge ordered Hiter to pay a judgment. Hiter was upset and protested the decision, but later apologized for her outburst. As she was leaving the courtroom she remarked, "you can't get blood out of a turnip." Judge Ryan heard the comment and ordered his bailiff to take her into custody for contempt. The judge summarily sentenced her to jail for 24 hours without notice or an opportunity to be heard. Judge Ryan then relied on his bailiff for advice as to the code section to cite in his order. The order improperly cited Penal Code section 166.1 and did not include a summary of facts constituting contempt. Hiter served 24 hours in the county jail.

This is another inexcusable example of Judge Ryan's abuse of the contempt power. Once again, the judge completely ignored contempt procedures. He failed to return Hiter to court to inform her that she was in contempt. Moreover, he never gave her a chance to respond to the contempt order. Judge Ryan also committed unjudicial conduct in relying on his bailiff for the legal citations to put in his order.

As we stated in the Starks matter, *ante*, wilful ignorance of contempt procedures by an experienced **[****23]** judge constitutes bad faith. Although the masters concluded that the judge's conduct was merely prejudicial, we agree with the Commission that Judge Ryan committed wilful misconduct in this matter.

[*534] 3. *The Wiggins Matter*.

(10) David Wiggins appeared before Judge Ryan on a charge of driving under the influence. Judge Ryan offered him a "no time" disposition at the pretrial conference. Wiggins rejected the offer and requested a jury trial. The judge then privately told Deputy District Attorney Jess Bedore that he was going to teach Wiggins's **[***387]** attorney a lesson for seeking a jury trial. The judge said he would sentence Wiggins to 30 days in jail if the jury convicted him. When Bedore expressed reservations, Judge Ryan said the sentence would be for refusing the standard plea bargain. However, Judge Ryan added that he could further justify the long sentence by stating that Wiggins committed perjury during his trial.

Wiggins was convicted by the jury. Judge Ryan, in accordance with his pretrial statement to Bedore, sentenced Wiggins to 30 days in jail, plus fines and assessments. The sentence was unusually severe for such a conviction. Wiggins's **[****24]** attorney **[**733]** asked the judge to state his reasons for the sentence on the record. Judge Ryan refused. The next day the judge made comments to the press which appeared on the front page of the local newspaper. Judge Ryan told the press that the Wiggins sentence was intended to discourage costly and time-consuming jury trials and that "there had to be some incentive not to go to trial." [7]

Wiggins brought a habeas corpus action in the superior

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[7] Judge Ryan is separately charged with improperly communicating with the press. To avoid the danger of double-counting misconduct arising from the same activity, we discuss the details of the press charges *infra*. Nevertheless, we include some of Judge Ryan's statements to the press at this point because they provide evidence of his improper motives in sentencing Wiggins.

court challenging the sentence imposed. Judge Ryan hired a private attorney at county expense to defend his sentence. When Judge Ryan was ordered by the superior court to justify his **[****25]** sentence, but only after the judge had exhausted his appellate remedies, he stated that the sentence was justified because of Wiggins's perjury at trial.

The masters and the Commission both determined that the judge committed wilful misconduct in this matter.

In the case of *In re Lewallen (1979) 23 Cal.3d 274 [152 Cal. Rptr. 528, 590 P.2d 383, 100 A.L.R.3d 823]*, we held that a judge is precluded from imposing a more severe sentence based on the accused's election to proceed to trial. Such conduct by a judge chills the exercise of the constitutional right to trial by jury. (*Id. at p. 281*.)

[*535] Although trial judges have broad sentencing discretion, clear and convincing evidence supports the Commission's determination that Judge Ryan based his sentence on improper factors. The judge stated to Bedore that he would teach Wiggins's attorney a lesson. He also refused to state his reasoning for the sentence to Wiggins's attorney, but admitted to the press that there had to be some incentive to plea bargain. Moreover, the judge privately told Bedore that he could support the sentence by claiming that Wiggins committed perjury during trial, **[****26]** even though the trial had not yet occurred. Then, when the superior court ordered the judge to justify the sentence, Judge Ryan relied on his fabricated allegation of perjury despite the fact that perjury had never been charged or determined.

The misconduct in this matter is especially serious because it indicates that the judge was willing to fabricate justifications for a challenged ruling. This is misconduct of the worst kind, evidencing moral turpitude and dishonesty. We agree with the Commission that Judge Ryan committed wilful misconduct.

4. *The Jacks Matter*.

(11) Robert Jacks appeared at a preliminary hearing in Judge Ryan's court to answer on a felony sodomy charge. After the preliminary hearing, the judge learned that the district attorney intended to prosecute on misdemeanor charges. The judge called the district attorney ex parte and urged him to pursue the matter as a felony.

The judge's misconduct did not prejudice the defendant. The district attorney did not follow the judge's suggestion to pursue the matter as a felony and the judge had nothing further to do with the case. Nevertheless, the fact that no harm was **[***388]** done to defendant **[****27]** does not lessen the judge's culpability.

Although the masters and the Commission both concluded that this conduct was merely prejudicial, we conclude that it constituted wilful misconduct. Judge Ryan attempted to intrude into the charging authority of the administrative branch of government. Moreover, he deprived the defendant of an impartial magistrate by advocating a harsher charge.

In *Gonzalez v. Commission on Judicial Performance, supra, 33 Cal.3d 359*, we addressed similar misconduct. In that case Judge Gonzalez attempted to persuade the district attorney to drop charges in matters that were not before the judge. We concluded **[**734]** that such activity constituted wilful misconduct. (*Id. at 369*.)

[*536] Applying the *Wenger* test (*supra*, *29 Cal.3d 615*) to the case at bar, Judge Ryan knew or should have known that his conduct was beyond his lawful authority, and the purpose of his conduct, viewed objectively, went outside the scope of the judicial function. Judge Ryan acted in bad faith and his misconduct was wilful.

5. *The Handcock Matter*.

(12) In the midst of a criminal jury trial involving a hit-and-run **[****28]** accident, Judge Ryan conducted his own investigation of the matter. Without notice to the parties, the judge directed his bailiff to contact a local auto dealer's parts manager. The judge wanted to obtain a rear light lens for the type of vehicle driven by defendant, so that he could compare the lens with trial evidence. The judge then went on a lunch break, sought out the parts manager with the lens, and determined that the lens matched defendant's car. Back in court, the judge interrupted the defense case and called the parts manager as the court's own witness. The judge did this with minimal notice to the parties and over objection from both sides. The evidence presented by the judge was extremely damaging to defendant's case.

Defendant's resulting conviction was later set aside by the appellate department of the superior court because of Judge Ryan's misconduct. (*People v. Handcock*

(1983) 145 Cal. App. 3d Supp. 25 [193 Cal. Rptr. 397].) The court found no authority for the judge's investigation. (*Id.* at p. Supp. 32.) Moreover, the appellate department also held that although a judge may call and examine witnesses (*Evid. Code, § 775* **[****29]**), the manner in which Judge Ryan placed his own witness on the stand (by interrupting the defendant's testimony) seriously prejudiced the defendant. (*Handcock, supra*, 145 Cal. App. 3d at p. Supp. 31.)

The masters and the Commission both determined that the judge's conduct was prejudicial.

Wenger v. Commission on Judicial Performance, supra, 29 Cal.3d 615, involved similar misconduct. In that case Judge Wenger conducted his own investigation, suspecting that one of the parties had made false statements in the briefing. The Commission found that Judge Wenger "'should have known that it was beyond his lawful authority to conduct an ex parte investigation . . . .'" (*Id. at p. 632*.) The Commission determined that Judge Wenger's conduct was prejudicial. We agreed, concluding: "By undertaking a collateral investigation [the judge] abdicated his responsibility for deciding the parties' dispute on pleadings and evidence properly brought before him." (*Ibid.*)

[*537] We conclude that Judge Ryan's handling of the Handcock case was improper and constituted prejudicial conduct.

6. *The Merkle Matter*.

(13) Madeleine **[****30]** Merkle was charged with various misdemeanor drug violations. Judge Ryan ordered her into the drug diversion program. Later, the probation department sought to have Merkle removed from the program, alleging that she was not complying with program rules. The probation department sought to have criminal proceedings reinstituted.

[*389]** Merkle was called into the judge's chambers to discuss the matter. A deputy district attorney, a deputy public defender and the judge's clerk were also present. During the conversation, Merkle, who was wearing a low-cut sweater, bent over several times to remove documents from her purse. Thereafter the judge dismissed all criminal charges against her. When his clerk asked why the charges had been dropped, Judge Ryan replied, "she showed me her boobs."

Judge Ryan is charged with issuing his order to dismiss Merkle's criminal charges for improper personal reasons. The judge contends that his comment was only a joke and that his decision was based on the documents Merkle removed from her purse, which showed that she had successfully **[**735]** completed the drug diversion program.

The masters determined that the charge against Judge Ryan **[****31]** was not proven. However, the Commission disagreed, concluding that the charge was proven and that Judge Ryan's conduct was prejudicial.

Although there is much to find wrong with Judge Ryan's "joke," we nevertheless cannot exceed the scope of the formal charge brought against him. (*Wenger, supra, 29 Cal.3d at pp. 638-639*; *Cannon, supra, 14 Cal.3d at p. 696*.) We conclude that although Judge Ryan's comment was in very poor taste, the charge that he based his order on improper personal reasons has not been proven by clear and convincing evidence. While inferences may be drawn from the record that the documents presented by Merkle did not justify the judge's order, [8] we nevertheless agree with the masters that the **[*538]** testimony is evenly balanced on the question. The witnesses present at the hearing testified that Merkle gave the judge documents that she said proved her completion of the diversion program. Those documents were not placed into evidence. Thus, we cannot find clear and convincing proof that the documents submitted by Merkle did *not* provide an adequate basis for Judge Ryan's ruling. We defer to the masters' findings of **[****32]** fact and dismiss the charge.

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[8] The examiners enumerate the following facts in support of their position that Judge Ryan made his ruling for improper reasons: (1) the probation department reported to Judge Ryan that Merkle had not attended the counselling program and had failed to report regularly to the department; (2) the deputy public defender did not argue for dismissal of the case and did not believe Merkle's chances for reinstatement to the diversion program were good; (3) if Merkle did have proof of completion of the program, she did not bother to show it to her own attorney prior to the hearing; (4) the district attorney and the deputy public defender who were present at the time cannot remember what proof Merkle offered to the judge, and both were surprised at the dismissal of the case; (5) the deputy public defender was so surprised by the dismissal that he consulted other members of the bar to determine his responsibilities; and (6) there is no documentary proof of Merkle's completion of the program in the court file.

[**33]** 7. *The Mitchell Matter*.

(14) Deborah Mitchell pled guilty in Judge Ryan's court to a violation of the Vehicle Code (unlawful taking or driving of an automobile). Judge Ryan suspended execution of sentence and ordered two years probation. As a condition of probation, Judge Ryan committed Mitchell to the county jail for 20 days, but ordered that she serve the time in the work-release program.

The probation department subsequently terminated Mitchell from the work-release program because of an alleged back injury. Mitchell notified Judge Ryan of the termination and the judge scheduled a hearing in the matter. Over objection, Judge Ryan reinstated Mitchell into the program. When the probation department again terminated Mitchell from the program because she refused to comply with program rules, the judge again scheduled a hearing. After being advised by the deputy county counsel that he had no authority to act in the matter, Judge Ryan threatened to obtain "the most expensive lawyer that he could find" if his actions were challenged. Writ proceedings were pursued by the county counsel and Judge Ryan hired a private attorney to represent the court, failing to comply **[****34]** with a county requirement **[***390]** that he submit a written request to hire counsel. The judge later billed the county for counsel's services. The superior court subsequently determined that Judge Ryan had unlawfully ordered Mitchell into the work-release program. Both the masters and the Commission found the judge's conduct to be prejudicial.

Penal Code section 4024.2 provides that the administrative official in charge of county correctional facilities may offer a voluntary work-release program in lieu of jail time. [9] *Subdivision (a) of section 4024.2* **[**736]** states that the **[*539]** program may only be offered to someone already committed to the correctional facility. Moreover, subdivision (c) provides that a person is eligible for the program at the discretion of the administrative official in charge of the program, subject to the fitness of the person for the program and compliance with the rules of the program.

[**35]** As the superior court correctly held, Judge Ryan did not have authority under *Penal Code section 4024.2* to order Mitchell into the work-release program. A judge has the power to commit a person to a correctional facility, but then the administrative official in charge of the facility has the discretionary power to offer work release if the person is deemed eligible under the rules of the program.

Thus, Judge Ryan erred in twice ordering Mitchell into the work-release program. Moreover, although the superior court admitted that the question of Mitchell's due process right to a hearing upon termination from the program was legitimately raised, the judge nevertheless should have appointed counsel for Mitchell so that *she* could seek habeas corpus relief. Instead, Judge Ryan hired a private attorney to defend his actions. He then billed the county for the attorney fees.

This is another instance where the judge became personally embroiled in a case before him. He exhibited bad faith in threatening to retain "the most expensive lawyer that he could find." Nevertheless, we do not find wilful misconduct here, because the record indicates that the judge **[****36]** may have been genuinely concerned with Mitchell's situation. We do conclude, however, that the judge's improper actions constituted prejudicial conduct.

8. *The Cabrera Matter*.

(15) Rick Cabrera, represented by the public defender, pled guilty to two misdemeanor counts in Judge Ryan's court. Cabrera subsequently failed to appear for sentencing and a bench warrant issued. After apprehension, Cabrera was again brought before Judge Ryan. Without notice to Cabrera's counsel, the judge asked Cabrera whether he wanted to proceed **[*540]** with sentencing without his attorney present. Cabrera

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[9] ***Penal Code section 4024.2*** provides in pertinent part: "(a) Notwithstanding any other provision of law, the board of supervisors of any county may authorize the sheriff or other official in charge of county correctional facilities to offer a voluntary program under which any person committed to such facility may perform a minimum of 8 and a maximum of 10 hours of labor on the public works or ways in lieu of one day of confinement . . . . [para.] (b) The board of supervisors may prescribe reasonable rules and regulations under which such labor is to be performed and may provide that such persons wear clothing of a distinctive character while performing such work. . . . [para.] (c) Nothing in this section shall be construed to require the sheriff or other such official to assign labor to a person pursuant to this section if it appears from the record that such person has refused to satisfactorily perform labor as assigned or has not satisfactorily complied with the reasonable rules and regulations governing such assignment . . . . [para.] A person shall be eligible for work release under this section only if the sheriff or other such official in charge concludes that such person is a fit subject therefor."

said, "I don't see if it's going to make any difference," and then indicated that he wanted to "get it over with." Judge Ryan sentenced Cabrera to jail. Cabrera's defense attorney then challenged the judge's action in a petition for writ of habeas corpus. In granting habeas corpus relief, the superior court held that counsel should have been formally notified of the sentencing and that Cabrera did not make a knowing and intelligent waiver of the right to counsel. Both the masters and the Commission found that the judge's conduct was prejudicial.

We agree that Judge Ryan erred **[****37]** in failing to notify Cabrera's counsel of record **[***391]** prior to sentencing. (*In re Haro (1969) 71 Cal.2d 1021, 1028-1029 [80 Cal. Rptr. 588, 458 P.2d 500]*; *In re Martinez (1959) 52 Cal.2d 808, 813 [345 P.2d 449]*.) He also erred in accepting an invalid waiver of counsel. We held in *Gonzalez v. Commission on Judicial Performance, supra, 33 Cal.3d 359*, that conducting judicial proceedings in the absence of counsel constitutes judicial misconduct. (*Id. p. 372*.) In that case, Judge Gonzalez conducted proceedings without waiting for counsel to arrive, claiming that he abhorred tardiness. We found Judge Gonzalez had committed wilful misconduct. (*Ibid.*)

Given Cabrera's statement that he wanted to proceed without counsel, we do not believe the judge's actions rise to the level **[**737]** of wilful misconduct. We conclude that the judge committed prejudicial conduct in this matter.

9. *The Burgess Matter*.

(16) Defendant Burgess was represented by counsel and pled guilty to a misdemeanor charge. He was placed on formal probation for three years. Many months later, the probation department **[****38]** petitioned for revocation of probation based on Burgess's subsequent criminal convictions. Burgess appeared in Judge Ryan's chambers for the revocation-of-probation proceedings. There was no court reporter present. The judge asked Burgess if he wanted an attorney. Burgess said that he *did*. The minute order indicates that Judge Ryan then appointed a public defender to represent Burgess. However, without waiting for appointed counsel to arrive, the judge asked Burgess if he had done the acts alleged in the petition to revoke parole. Burgess admitted that he had. The judge then turned to the probation officer, who was present at the hearing, and directed her to prepare a report and have it ready for Burgess's sentencing. With that, the hearing was concluded.

The masters and the Commission both determined that Judge Ryan's conduct was prejudicial. Although there is conflicting testimony in the **[*541]** record as to whether Burgess actually requested counsel, the masters found that he did make such a request. We defer to the masters' finding of fact on this question. (*Gubler v. Commission on Judicial Performance, supra, 37 Cal.3d 27, 34*.) Thus, **[****39]** we conclude that the judge ignored Burgess's request for counsel and continued to extract a confession from him. Although there is no evidence of bad faith, the judge's conduct was prejudicial.

10. *Court Reporter Charges*.

(17) Judge Ryan is charged with three instances of prejudicial conduct for failing to provide a court reporter in criminal hearings. The pertinent facts surrounding these matters may be summarized briefly. The court administrator for Placer County advised all members of the court, including Judge Ryan, of the case of *In re Armstrong (1981) 126 Cal. App. 3d 565 [178 Cal. Rptr. 902]*, which held that it is a violation of due process and equal protection to deny a verbatim record upon request in all municipal court criminal proceedings. Funds were appropriated in January 1983, for reporters to serve the Municipal Court of Placer County on a daily basis. Judge Ryan took the position that reporters were not required and directed the clerk of his court to discharge the reporters assigned to his courtroom unless a timely request was made for their presence. To ensure that a court reporter would be present in Judge Ryan's courtroom, the **[****40]** district attorney's office began stamping a request for a court reporter on every pleading or motion filed. However, individuals appearing without counsel were not advised of their right to have a reporter, and hence did not know they had to request one.

In one incident, Judge Gilbert of the superior court remanded a matter to Judge Ryan because of Judge Ryan's failure to provide a reporter. Judge Ryan telephoned Judge Gilbert to express his disagreement with the latter's decision and stated that reporters were not required and **[***392]** their presence resulted in an unnecessary expense to the county.

In the Bremer matter, Judge Ryan accepted defendant's waiver of a preliminary hearing in the absence of a court reporter. The superior court remanded the case back to

Judge Ryan because of the omission.

The Mitchell matter, discussed previously, involved the judge's unauthorized placement of Mitchell into the work-release program. In a separate disciplinary count against Judge Ryan arising from the same matter, the probation department had requested a reporter at the hearing. The request was denied by Judge Ryan as untimely, because no request had been made prior to the hearing.

[**41] [*542]** Finally, the previously discussed Burgess matter involved the charge that Judge Ryan ignored Burgess's request for counsel. As a separate count of improper conduct, it was alleged that the judge failed to provide a court reporter upon return of the **[**738]** bench warrant and that he also sentenced Burgess without a reporter present.

In all three of the counts enumerated above (Bremer, Mitchell, and Burgess) the masters and the Commission concluded that the judge committed prejudicial conduct. Judge Ryan contends that *Armstrong, supra, 126 Cal. App. 3d 565*, required verbatim records only upon request, and that he did provide court reporters whenever a timely request was made. Moreover, Judge Ryan points out that he eventually began to provide court reporters on a regular basis after the district attorney and the board of supervisors made it known that reporters were desired.

The judge correctly interprets *Armstrong* as requiring a court reporter upon request. However, he misperceives the significance of his failure to instruct defendants appearing in propria persona that they had a right to a verbatim record. The judge's stubborn and obstructionist **[****42]** attitude effectively denied those defendants their constitutional right to have a reporter present.

We concur with the masters and the Commission that Judge Ryan's conduct in these matters was prejudicial.

11. *Communication With the Press*.

The Commission determined that Judge Ryan made improper comments to the press in four pending cases before him. The Commission stated in its ruling that "[when] cases are pending it is entirely improper for a judge to use the media either as a platform or as a method of responding to criticism. In some instances, his comments have drawn unfavorable reaction from the press and in others, prejudiced litigants."

(18) In the Nutrition Site matter, Judge Ryan informed the parties that he would mail them his written decision. A short time later a newspaper reporter learned that the judge had finished his opinion in the case. The reporter came to Judge Ryan's chambers and asked if she could see the decision. Although the judge admitted to the masters that the decision was still only in draft form, he nevertheless showed it to the newspaper reporter and discussed his rationale for deciding the case. Judge Ryan's statements appeared **[****43]** in the local newspaper before the parties received copies of the decision.

The masters and the Commission both concluded that this was prejudicial conduct. We agree. Canon 3A(6) of the California Code of Judicial **[*543]** Conduct provides: "Judges should abstain from public comment about a pending or impending proceeding in any court . . . ." By showing his decision to the press before it was in final form and by discussing his decision with the press before he had informed the parties of his ruling, Judge Ryan acted improperly.

(19) We have previously discussed the Starks matter, which involved the contempt order for Attorney Starks. In a separate count, Judge Ryan is charged with discussing his contempt order with the press while the matter was pending. Specifically, Judge Ryan informed a newspaper reporter that he planned to vacate his order of contempt, but would ask another judge to review the matter. Starks learned of Judge Ryan's intention to vacate the contempt order by **[***393]** reading the local newspaper. Starks did not receive formal notice of Judge Ryan's order vacating contempt for another two weeks.

After stating to the press that he intended to **[****44]** drop the contempt charge, Judge Ryan nevertheless went on to defend his contempt order in the press. He is reported as saying: "I was told [Starks] was really out of line, but since there was something negative said about me and since it involved my clerk, I don't want to appear biased and will let another judge decide." Judge Ryan added that Starks had said "some really rude and nasty things in court," and "[a] judge has to protect the integrity of the court, and it's not proper for loud, derogatory statements to [be] made in [front] of the whole courtroom as soon as the judge leaves."

Judge Ryan made his statements to the press while the validity of his contempt order was pending in the superior court on petition for writ of habeas corpus. As

[739]** canon 3A(6) of the California Code of Judicial Conduct expressly states, the judge acted improperly in commenting on pending matters. We agree with the masters and the Commission that Judge Ryan's conduct was prejudicial.

(20) In the McGinnis matter, the judge is charged with defending his rather unique disposition in a "dog custody" case to the press. [10] The masters **[*544]** and the Commission determined **[****45]** Judge Ryan's comments to be prejudicial. However, the record indicates that all of the statements made by the judge and reported in the press were statements that he made from the bench while the press was present in the courtroom. Judge Ryan merely declared that the parties had reached a settlement and announced what amounted to an interlocutory judgment granting temporary joint custody of the dog to both parties. Although the examiners allege that Judge Ryan was "grandstanding" for the press during the court session, we do not find clear and convincing evidence of any impropriety in this matter.

[**46]** **(21)** Finally, in the previously discussed Wiggins matter, which involved the judge's imposition of a 30-day jail sentence because Wiggins requested a jury trial, the judge is separately charged with defending his sentence by discussing the pending matter with the press and writing a letter to the editor explaining his sentence. There is clear and convincing evidence to support the findings of the masters and the Commission, and we agree with the Commission that the judge committed prejudicial conduct.

12. *Offensive Jokes to Female Attorneys*.

(22) The Commission determined that Judge Ryan committed two acts of prejudicial conduct when he told offensive jokes to female attorneys in his chambers.

The judge admits telling the following joke while two female attorneys, among others, were present in his chambers: "It's during the period of creation and God has just gone ahead and has made -- he's made the earth and the stars and the wind and some of the animals. He's still creating things. Adam and Eve have been created. They discover each other and they discover the physical portions of each other and they lay down and they make love. When they finish, Eve **[****47]** leaves for a little while and then returns. When she returns, she -- or Adam says, where have you been? She says, I went to the stream to wash off. And Adam says, gee, I wonder if that's going to give a scent to the fish?" The **[***394]** two female attorneys were offended by the joke.

In another count, two female attorneys, among others, appeared before the judge in his chambers to conduct a preliminary hearing. Judge Ryan asked the two female attorneys if they knew the difference "between a Caesar salad and a blow job." When the attorneys responded that they did not know the difference, the judge said, "Great, let's have lunch." The attorneys were offended.

Judge Ryan intended these comments as jokes. He later apologized to some of the individuals present. The masters found that the judge had **[*545]** indeed made the comments, but that his conduct was not prejudicial. The Commission disagreed, concluding that prejudicial conduct existed.

It is sometimes difficult to determine the line between "extremely poor taste" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Nevertheless, we believe the fact that the judge **[****48]** was acting in his official **[**740]** capacity when he told the Caesar salad joke provides ample support for the Commission's determination that the judge committed prejudicial conduct. When Judge Ryan told the Caesar salad joke, the two female attorneys were appearing before him for a preliminary hearing. The fact that the hearing was conducted in Judge Ryan's chambers makes little difference; his conduct was just as improper as if he had told the joke from the courtroom bench. [11]

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[10] Judge Ryan argues in his response brief that the McGinnis matter is not properly before us because the Commission specifically incorporated into its decision certain exhibits (examiners' exhibits 14, 15, 16-22, 25, 26, 28-31) as the basis for its conclusion of prejudicial conduct, and none of those exhibits involve the McGinnis matter. Judge Ryan's argument is without merit. Exhibit 56 is a newspaper article pertaining to the McGinnis case. Although the Commission did not list this exhibit in making its determination, the Commission did state that it was relying on *four* charges of improper communication with the press. Moreover, because we independently review the record in disciplinary proceedings (*Furey, supra, 43 Cal.3d at p. 1304*), we are not limited by the Commission's failure to cite certain exhibits in support of its determinations.

[11] It is unclear from the record why the attorneys were present when Judge Ryan told the Adam and Eve joke. Nevertheless, we conclude from the evidence available that telling such a

In *Geiler v. Commission on Judicial Qualifications, supra, 10 Cal.3d 270*, we removed Judge Geiler from office because of his vulgar and profane statements and conduct, among other things. Two of Judge Geiler's vulgar comments are illustrative: (1) Referring to his female court **[****49]** clerk while she was present, Judge Geiler asked other men in his chambers, "How would you like to eat that?" (2) In conversations with his female clerk, the judge occasionally asked, "Did you get any last night?" We found the comments made by Judge Geiler to be prejudicial.

As we stated in *Gonzalez v. Commission on Judicial Performance, supra, 33 Cal.3d 359*, "[derogatory] remarks, although made in chambers or at a staff gathering, may become public knowledge and thereby diminish the hearer's esteem for the judiciary -- again regardless of the speaker's subjective intent or motivation. The reputation in the community of an individual judge necessarily reflects on that community's regard for the judicial system." (*Id. at p. 377*.) We conclude that Judge Ryan's offensive and insensitive jokes constituted prejudicial conduct.

13. *Absenteeism*.

(23) The masters and the Commission also determined that Judge Ryan committed two counts of prejudicial conduct because of his practice of leaving the courthouse after his calendars were completed, usually in the early afternoon. The evidence shows that Judge Ryan regularly left the courthouse **[****50]** at 2 p.m. each day. On Fridays, he often left in the morning and did not return. Numerous witnesses testified that the judge's short hours made it necessary for police and deputy district attorneys to bring warrants **[*546]** and other matters in the morning before the judge left. Moreover, many witnesses testified that the municipal court was in need of another judge, but that the board of supervisors refused to provide one until it was shown that all of the judges were currently working full-time.

In the Fitzpatrick matter, the Commission determined that the clerk had to tell members of the public that Judge Ryan was not available because he had gone for the day. In another count, the Commission found that the judge's abbreviated hours caused the presiding judge to issue an order providing that all judges had to advise the presiding judge if they completed their **[***395]** judicial business and intended to leave before 3 p.m.

Canon 3B(1) of the California Code of Judicial Conduct provides: "Judges should diligently discharge their administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative **[****51]** responsibilities of other judges and court officials." As canon 3B(1) makes clear, administrative duties must be discharged with the same diligence as adjudicative duties. It was therefore improper for Judge Ryan to leave the moment his adjudicative duties were completed. The fact that police officers, deputy district attorneys and other members of the public could not reach the judge in the afternoons supports the conclusion that the judge failed to fulfill certain aspects of his judicial function.

We therefore agree with the Commission that Judge Ryan's work routine amounted to prejudicial conduct.

[741]** IV. *Aggravating and Mitigating Circumstances*.

(24) Aggravating and mitigating circumstances are appropriate factors to consider in determining judicial discipline. (See *Furey, supra, 43 Cal.3d 1297, 1319-1320*.) The record in this case does not provide evidence of aggravating circumstances. Although Judge Ryan presented mitigating evidence, such evidence is insufficient to reduce the level of discipline.

Petitioner's application for a rehearing was denied June 30, 1988, and the opinion was modified to read as printed above.

[**52]** **(25)** We conclude that Judge Ryan has committed four acts of wilful misconduct and fourteen acts of prejudicial conduct. We dismiss two charges of misconduct that have not been proven by clear and convincing evidence.

The judge's conduct exhibits a pattern of personal embroilment in the cases assigned to him. He has lost his temperance and objectivity on several occasions, resulting in prejudice to the parties appearing before him or in **[*547]** abuse of his contempt power. He has attempted to defend his position in the courts and in the media with little regard for procedure or judicial decorum.

"The purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield."

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joke in chambers constituted unjudicial conduct.

(*Furey, supra, 43 Cal.3d at p. 1320*.) That purpose will best be served by adopting the recommendation of the Commission that Judge Ryan be removed from office.

We order that Judge Richard Ryan, Municipal Court Judge of the Roseville-Rocklin Judicial District, Placer County, be removed from office. Because the misconduct for which he is removed does not amount to grounds for disbarment, he shall, if otherwise qualified, **[****53]** be permitted to practice law (*Cal. Const., art. VI, § 18, subd. (d)*; see *Wenger v. Commission on Judicial Performance, supra, 29 Cal.3d at p. 654*), on condition that he pass the Professional Responsibility Examination (see *Gonzalez v. Commission on Judicial Performance, supra, 33 Cal.3d at p. 378*). This order is effective upon the finality of this decision.

End of Document

In re Mosley

Mosley v. Nev. Comm'n on Judicial Discipline (In re Mosley)

Supreme Court of Nevada

December 21, 2004, Decided

No. 39336

Reporter
120 Nev. 908 *; 102 P.3d 555 **; 2004 Nev. LEXIS 126 ***; 120 Nev. Adv. Rep. 94

IN THE MATTER OF THE HONORABLE DONALD M. MOSLEY, DISTRICT COURT JUDGE, COUNTY OF CLARK, STATE OF NEVADA. THE HONORABLE DONALD M. MOSLEY, DISTRICT COURT JUDGE, COUNTY OF CLARK, STATE OF NEVADA, Appellant, vs. NEVADA COMMISSION ON JUDICIAL DISCIPLINE, Respondent.

Prior History: [*1]** Appeal from a decision of the Nevada Commission on Judicial Discipline, which imposed discipline upon a district court judge, including a public reprimand, a fine, and attendance at an ethics course.

Mosley v. Nev. Comm'n on Judicial Discipline, 117 Nev. 371, 22 P.3d 655, (2001).

Disposition: Affirmed in part and reversed in part.

Counsel: Dominic P. Gentile, Ltd., and Dominic P. Gentile, Las Vegas; Neil G. Galatz & Associates and Neil G. Galatz, Las Vegas; Thomas F. Pitaro, Las Vegas, for Appellant.

David F. Sarnowski, Executive Director, Nevada Commission on Judicial Discipline, Carson City; Sinai Schroeder Mooney Boetsch Bradley & Pace and Mary E. Boetsch, Reno, for Respondent.

Georgeson Thompson & Angaran, Chtd., and Harold B. Thompson, Reno, for Amicus Curiae Nevada District Judges Association.

Judges: SHEARING, C.J. AGOSTI, J., concurs. MAUPIN, J., with whom BECKER, J., and PUCCINELLI, D.J., agreed, dissented in part. ROSE, J., dissented in part. GIBBONS, J., dissented.

Opinion by: SHEARING

Opinion

[*911] [557]** BEFORE THE COURT EN BANC. [1]

[*2]** By the Court, SHEARING, C.J.:

On May 22, 2000, a special prosecutor for the Nevada Commission on Judicial Discipline (the Commission) filed charges against **[**558]** the Honorable Donald M. Mosley, District Judge for the Eighth Judicial District Court. The complaint contained the following allegations:

Count I, that Judge Mosley violated Nevada Code of Judicial Conduct (NCJC) Canon 2B in August 1999 by writing a letter on official judicial letterhead to the principal at his son's school;

Count II, that Judge Mosley violated NCJC Canon 2B in February 1998 by writing a letter on official judicial letterhead to the principal at his son's school;

Count III, that Judge Mosley violated *NCJC Canons 1*, *2*, 2A, 2B and 3B(7) in August 1999 by engaging in an ex parte conversation with his friend, Barbara Orcutt, regarding the arrest and release of Robert D'Amore;

Count IV, that Judge Mosley violated *NCJC Canons 1*, *2*, 2A and 2B in August 1999 by ordering the release of Robert D'Amore on his own recognizance (OR), without notifying the district attorney's office, after the police arrested D'Amore on a bench warrant issued by a different district court judge;

Count V, that Judge Mosley violated **[***3]** NCJC Canon 3B(7) by engaging in an ex parte telephone conversation with Catherine Woolf, an attorney representing Joseph McLaughlin in a criminal case that was assigned to Judge Mosley's chambers for

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[1] The Honorable Andrew J. Puccinelli, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. *Nev. Const. art. 6, § 4*. The Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.

sentencing;

Count VI, that Judge Mosley violated NCJC Canon 3B(7) in August 1997 by engaging in an ex parte conversation in his chambers with Woolf;

Count VII, that Judge Mosley violated NCJC Canon 3B(7) in August 1997 by participating in an ex parte conversation with Woolf, McLaughlin and McLaughlin's wife;

Count VIII, that Judge Mosley violated *NCJC Canons 1*, *2*, 2A and 2B by failing to recuse himself from McLaughlin's criminal case until after Mrs. McLaughlin had testified in Judge Mosley's custody case;

Count IX, that Judge Mosley violated *NCJC Canons 1*, *2* and 2B by communicating with McLaughlin's wife regarding McLaughlin's incarceration;

Count X, that Judge Mosley violated *NCJC Canons 1*, *2* and 2B by assisting McLaughlin's wife in obtaining the return of her vehicle; and

Count XI, that Judge Mosley violated *NCJC Canons 1*, *2*, 2A and 2B by continuing to communicate with McLaughlin and his **[*912]** wife after October 10, 1997, the date of Judge Mosley's recusal in the McLaughlin case, the **[***4]** continued communication creating an appearance that Judge Mosley was rewarding the McLaughlins for assisting him in his custody dispute.

From February 25, 2002, through February 28, 2002, the Commission conducted a formal evidentiary hearing. The Commission concluded that Judge Mosley had committed the violations alleged in Counts I, II, III, IV, VI, VII, and VIII, and dismissed Counts V, IX, X, and XI. The Commission also determined that the appropriate discipline was to require Judge Mosley to attend the first general ethics course at the National Judicial College at his own expense, to pay a $ 5,000 fine, and to receive strongly worded censures for violating ethics rules.

Judge Mosley appeals, alleging that there was insufficient evidence to support the Commission's findings and that the Commission erred in other respects. We conclude that clear and convincing evidence supports the Commission's findings on all counts but Counts III and IV and affirm the Commission's determination of the appropriate discipline for Judge Mosley.

DISCUSSION

Standard of review

Rule 25 of the Procedural Rules for the Nevada Commission on Judicial Discipline (CPR) provides that "counsel **[***5]** appointed by the commission to present the evidence against the respondent have the burden of proving, by clear and convincing legal evidence, the facts justifying discipline in conformity with averments of the formal statement of charges." In *Goldman v. Nevada Commission on Judicial Discipline*, this court held that *Article 6, Section 21 of the* ***[**559]*** *Nevada Constitution* "does not contemplate this court's *de novo* or independent review of factual determinations of the commission on appeal." [2] **[***6]** This court went on to say:

> To the contrary, the constitution confines the scope of appellate review of the commission's factual findings to a determination of whether the evidence in the record as a whole provides clear and convincing support for the commission's findings. The commission's factual findings may not be disregarded on appeal merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. [3]

[*913] *Counts I & II: Use of judicial letterhead*

The evidence adduced at the hearing established that Judge Mosley and his ex-girlfriend, Terry Mosley, who is also referred to as Terry Figliuzzi, have a child named Michael. Judge Mosley and Figliuzzi have been involved in a bitter child custody dispute. In June 1998, Judge Mosley was awarded custody of Michael. After that custody order was issued, Judge Mosley sent two letters to Michael's school. Both of those letters were written on Eighth Judicial District Court letterhead. The letters explained that Judge Mosley had been awarded custody of his son, and asked that the school prohibit

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[2] *108 Nev. 251, 267, 830 P.2d 107, 117-18 (1992)*, *overruled on other grounds by Matter of Fine, 116 Nev. 1001, 1022 n.17, 13 P.3d 400, 414 n.17 (2000)*; *see also Nev. Const. art. 6, § 21*.

[3] *108 Nev. at 267, 830 P.2d at 118*.

Figliuzzi from visiting Michael at school.

The letters were addressed to the principals of Michael's school, Diane Reitz and Frank Cooper. Reitz testified that it was part of the school's procedure to have a letter along with a custody order placed in the student's file. Reitz and Cooper testified that they were not influenced by the fact that Judge Mosley was a district court judge and that they knew, before **[***7]** receiving the letters, that he was a judge.

The Commission found that Judge Mosley violated NCJC Canon 2B. For Counts I and II, the Commission ordered Judge Mosley to attend the first available general ethics course at the National Judicial College at his own expense.

NCJC Canon 2B provides, in pertinent part:

> A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

Whether judicial letterhead may be used for personal reasons is an issue of first impression for this court. While NCJC Canon 2B does not specifically address the use of judicial letterhead for personal purposes, the commentary to NCJC Canon 2B provides some guidance:

> Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential **[***8]** treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.
>
> A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, **[*914]** a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family.

Judge Mosley asserts that he did not violate NCJC Canon 2B because both school principals knew that he was a district court judge before he sent letters to them on judicial letterhead. Judge Mosley also contends that because principals Cooper and Reitz did not provide special treatment to Judge Mosley, he was not advancing his position by using his judicial letterhead.

[560]** The United States Supreme Court, in interpreting a section of the federal judicial code, has held that a judge is not to be evaluated by a subjective standard, but by the standard of an objective reasonable person, because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." [4] In *Inquiry Concerning a Judge*, an Alaska Supreme **[***9]** Court justice sent three letters on judicial chambers stationery to opposing counsel regarding a personal matter. [5] The court held that it was irrelevant that the "intended recipients of the letters were not influenced in fact by the chambers stationery." [6] The court noted that using judicial stationery for personal reasons would likely cause the public to believe that the justice is "unable to distinguish his judicial activities from his personal ones. This failure to maintain separate interests could lead a reasonable person to believe that petitioner's judicial decision-making ability similarly might be flawed." [7]

In interpreting the judicial canons, we adopt the objective reasonable person standard. In applying that standard, we conclude that there was clear and convincing evidence **[***10]** produced at the evidentiary hearing that an objective reasonable person could conclude that Judge Mosley wrote letters on his judicial letterhead to his son's school in an attempt to gain a personal advantage in violation of NCJC Canon 2B.

Counts III & IV: Ex parte communication and own recognizance (OR) release

District Judge John McGroarty testified that in 1999 he was assigned a criminal case concerning Robert D'Amore. According to **[*915]** Judge McGroarty, the case originally involved a burglary and a theft, which was eventually negotiated to attempted theft. Judge

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[4] *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988)*.

[5] *822 P.2d 1333, 1336 (Alaska 1991)*.

[6] *Id. at 1341*.

[7] *Id.*

McGroarty stated that the plea bargain required D'Amore to make restitution payments of $ 10,000 a month. Additionally, Judge McGroarty testified that because D'Amore failed to attend some hearings or make payments, he issued a bench warrant for $ 10,000. At the time Judge McGroarty issued the bench warrant, D'Amore had entered a plea but had not been sentenced. D'Amore was eventually arrested on the bench warrant.

Barbara Orcutt testified that in August 1999, she learned that D'Amore, a former employee, had been arrested on a bench warrant. Orcutt stated that she called her friend, Judge Mosley, to see if he would **[***11]** issue an OR release because D'Amore's mother was concerned about D'Amore's health, and he would not be a flight risk.

Judge McGroarty testified that Judge Mosley contacted him and asked if he would mind if Judge Mosley issued an OR release for D'Amore. Judge McGroarty testified that he would not have issued an OR release because of the preexisting bench warrant. Additionally, however, Judge McGroarty stated that he did not find his conversation with Judge Mosley unethical. Judge McGroarty also testified that Judge Mosley had the power to issue an OR release without consulting him and that the same type of situation had happened once or twice before. When Judge McGroarty was asked whether a judge with equal jurisdiction had overridden one of his bench warrants, he answered "not of equal jurisdiction."

Peter Dustin, an investigative aide for the Las Vegas Metropolitan Police Department, testified that he had several contacts with D'Amore. Dustin stated that he received a telephone call from Judge Mosley in August 1999 asking him what he knew about D'Amore. According to Dustin, he told Judge Mosley that D'Amore "was a con man and that . . . if he was out he'd probably do it again."

[*12]** Judge Mosley stated that in his twenty-three years' experience as a district court judge, he never called a district attorney regarding an OR release. Alexandra Chrysanthis, the district attorney in D'Amore's **[**561]** case, testified that she would have objected to issuing D'Amore an OR release had she been contacted. Judge Mosley testified that he had already made the decision to grant the OR release before he spoke with Judge McGroarty, but called Judge McGroarty as a matter of courtesy and policy. Further, Judge Mosley stated that Judge McGroarty responded to his query about an OR release, "Mos, it's your call." Judge Mosley ultimately called the jail and granted D'Amore an OR release.

[*916] The Commission found that Judge Mosley violated *NCJC Canons 1*, [8] **[***13]** *2*, [9] 2A and 3B(7) [10]

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[8] ***NCJC Canon 1*** provides, in pertinent part: "A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

[9] ***NCJC Canon 2*** provides, in relevant part:

> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

[10] NCJC Canon 3B(7) provides:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that :
>
> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided :
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

by engaging in an ex parte communication with Orcutt regarding D'Amore's arrest and release and violated *NCJC Canons 1*, *2*, 2A and 2B by ordering the release of D'Amore on his OR at Orcutt's request, without notifying the district attorney's office. The discipline that the Commission ordered for the violations in Counts III and IV was "a strongly worded censure."

[*14]** Judge Mosley contends that the special prosecutor did not provide clear and convincing evidence that he engaged in an improper ex parte communication with Orcutt. Instead, he asserts that his ex parte communications were expressly authorized by law. **[*917]** According to Judge Mosley, it was common practice in the Eighth Judicial District for a district judge to respond to calls from the public, police, district attorneys, and defense attorneys regarding OR releases. Judge Mosley also asserts that under the totality of the circumstances, [11] including the common practice in the district and the fact that his conduct in speaking to Orcutt was not considered unethical by the other district judges, he should not be found to have violated the code of conduct.

Testimony from **[***15]** a number of district court judges established that for many years, the custom and practice of some judges in Clark County was consistent with Judge Mosley's ex parte conversations with Orcutt. The judges testified that they would get calls from police officers, defense attorneys and private citizens requesting OR releases, bail reductions or bail increases for defendants in custody. This practice continued with the **[**562]** acquiescence of every district attorney for over thirty years.

The practice usually occurred in situations in which the accused had not been brought before a magistrate for an initial appearance, and it was understood that such relief would be reviewed at the first appearance before the judge assigned to the case. Since all of the district attorneys during the entire period acquiesced in the policy, it cannot be said that the ex parte conversations were not approved by the opposing party. The district attorney at the time of Judge Mosley's hearing and the judges who had been in private practice all had participated in the custom of getting OR releases for clients and others. Also, police frequently relied upon getting an OR release from a judge to help them in their law **[***16]** enforcement activities.

Judge Mosley's contact with Orcutt and his release of D'Amore was within the spirit of the local practice. It is true that the local practice violated the Canons to the extent that the general public may not have known about the procedures available and OR releases were frequently granted upon the requests of a judge's family or friends, thus creating an appearance of special favors. But, because of the custom and practice in Clark County, however flawed, with the acquiescence of the district attorneys, we reverse the Commission's finding that Judge Mosley violated *NCJC Canons 1*, *2*, 2A and 3B(7) as alleged in Counts III and IV. [12]

[*918] *Counts VI, VII, and VIII: Ex parte communication and delayed* **[***17]** *recusal*

Joseph McLaughlin was charged with first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, burglary with use of a deadly weapon and cheating at gambling. McLaughlin was represented on these charges by attorney Catherine Woolf. Pursuant to plea negotiations, McLaughlin pleaded guilty to robbery and burglary without the use of a deadly weapon, and agreed to testify against his co-defendant. In July 1997, McLaughlin's case was transferred to Judge Mosley.

Woolf testified that around August 1997, McLaughlin told her that Figliuzzi was living at his house, and that he was unhappy with the way she was taking care of Michael, her son with Judge Mosley. Woolf testified that McLaughlin was unaware at this time that his case had been reassigned to Judge Mosley. Woolf also testified that she told McLaughlin that if he cooperated with Judge Mosley in the child custody case, Judge Mosley would have to recuse himself in McLaughlin's criminal

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(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

[11] *See* *In re Greenberg, 457 Pa. 33, 318 A.2d 740, 741 (Pa. 1974)* (noting that it is the court's "duty to consider the totality of all the circumstances when determining questions pertaining to professional and judicial discipline").

[12] Although we reverse the findings of the Commission in this instance, nothing in our decision should be read to suggest the judges in Clark County may continue the practices that do not comply with the recently enacted Rule 3.80 of the Rules of Practice of the Eighth Judicial District Court.

case. She testified that she was unhappy that McLaughlin's case had been transferred to Judge Mosley because he was known as a harsh sentencer.

Woolf subsequently met with Judge Mosley in his chambers. Only Woolf **[***18]** and Judge Mosley were present, and neither Woolf nor Judge Mosley notified the district attorney. Woolf testified that she stated at the beginning of the meeting that McLaughlin had been assigned to his chambers for sentencing. Woolf testified that she informed Judge Mosley that District Judge Gene Porter had taken McLaughlin's plea and that McLaughlin "was cooperating with the authorities on this case" and on another case. Woolf also testified that McLaughlin's sentencing date had been continued due to his cooperation in the other criminal case. Woolf testified that they then discussed the information that McLaughlin and his wife had concerning Michael. Woolf testified that Judge Mosley asked Woolf to meet with Judge Mosley's attorney, Carl Lovell. Woolf stated that Judge Mosley never indicated at this meeting that he was planning to recuse himself from McLaughlin's criminal case.

A second meeting took place at Lovell's office with Judge Mosley, Lovell, Woolf, McLaughlin, and McLaughlin's wife. Woolf testified that at the meeting, Judge Mosley discussed his son and the custody battle, asking a series of questions regarding Figliuzzi and Michael. Woolf stated that at some point in **[***19]** the conversation, Woolf again **[**563]** mentioned that Judge Mosley was assigned to McLaughlin's case. Lovell testified that he first became aware at this meeting that McLaughlin's criminal case had been assigned to Judge Mosley. After the meeting, the McLaughlins signed affidavits for Judge Mosley to use in his custody case.

[*919] According to Woolf's testimony, the McLaughlins testified in Judge Mosley's custody case on October 10, 1997. At that point, Woolf stated that she had not received notification that Judge Mosley had recused himself from McLaughlin's criminal case. Lois Bazar, Judge Mosley's judicial assistant, testified that on the morning of October 10, 1997, the first day of the child custody hearing, Judge Mosley told Bazar to recuse him from McLaughlin's case. The district court entered the actual recusal order into the minutes on the afternoon of October 10, 1997. Judge Mosley admitted that the recusal order was entered after McLaughlin's wife testified in his custody case. Bazar testified that Judge Mosley's normal practice was to wait until the next scheduled court date before he would recuse himself, and that recusing himself before the date for McLaughlin's court appearance deviated **[***20]** from Judge Mosley's normal practice.

The Commission held that Judge Mosley violated NCJC Canon 3B(7) for engaging in an ex parte meeting with Woolf in his chambers as alleged in Count VI, that he violated NCJC Canon 3B(7) by engaging in an ex parte meeting with Woolf and the McLaughlins at Lovell's office as alleged in Count VII, and that he violated *NCJC Canons 1*, *2*, 2A and 2B by failing to recuse himself from the McLaughlin case until October 10, 1997, the date of the custody hearing, as alleged in Count VIII. The discipline that the Commission imposed for Count VI was "a strongly worded censure," for Count VII attendance at the National Judicial College ethics course, and for Count VIII a $ 5,000 fine.

Judge Mosley argues that his conversations were not ex parte communications because the merits of the McLaughlin case were not discussed during the meetings. However, Woolf testified that they did discuss the merits of McLaughlin's case. Woolf told him about McLaughlin's plea and alleged that he was cooperating with the police. This is the very information that a sentencing judge would consider-the fact that McLaughlin was cooperating with authorities and testifying in another case. **[***21]** It is information that is not appropriate for ex parte conversations and should only be communicated with the district attorney present. The Commission could choose to believe Woolf's testimony.

Judge Mosley also argues that this situation concerned an emergency involving his son's welfare. Even if an emergency was involved, the conditions under which ex parte meetings are allowed were not followed, as NCJC Canon 3B(7)(a) provides, in pertinent part:

> Where circumstances require, ex parte communications for . . . emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> **[*920]** (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
> (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

Substantive matters in McLaughlin's case were

discussed at the ex parte meeting, and Judge Mosley did not notify the district attorney's office after the meeting took place. Furthermore, there is also evidence that Woolf intended to gain a procedural advantage as a result **[***22]** of these ex parte communications because she hoped Judge Mosley would have to recuse himself if the McLaughlins testified at Judge Mosley's custody hearing. Even if the judge did not know this, the judge had to realize that the McLaughlins would expect to get an advantage in the criminal case by testifying in favor of the judge on a matter important to the judge.

Count VIII addresses the timing of Judge Mosley's recusal from the McLaughlin case. Judge Mosley did not recuse himself from that case until October 10, 1997, the day of the child custody hearing. Since McLaughlin's attorney had not been notified of any **[**564]** recusal by Judge Mosley by the time of the hearing, it can be inferred that the McLaughlins did not know. Mrs. McLaughlin had already testified on behalf of Judge Mosley by the time of the recusal.

Since Judge Mosley had not recused himself, the McLaughlins may reasonably have believed that if they testified favorably to Judge Mosley in his child custody case, McLaughlin would have an advantage at sentencing. Judge Mosley's delay in recusing himself also raises the implication that he wanted to make sure the testimony was in his favor, not that he wanted to see if the testimony **[***23]** was "genuine," as he alleges.

Judge Mosley asserts that a recusal is not required at any particular time so long as it is accomplished. Judge Mosley also argues that judges do not have a duty to recuse themselves unless a clear and valid reason exists for doing so. [13] Therefore, Judge Mosley argues that he was not unreasonable in waiting to determine whether the McLaughlins' testimony was genuine before he recused himself.

We conclude that Judge Mosley is wrong. Judge Mosley should have recused himself immediately after he received a telephone call from Woolf notifying him that the McLaughlins had information about his custody case **[***24]** and that Mr. McLaughlin was assigned to **[*921]** his chambers for sentencing. As the Wisconsin Supreme Court observed in *Disciplinary Proceedings Against Carver*, [14] there is a danger that a judge's failure to immediately recuse himself would lead others to conclude that the judge was not going to do so. A reasonable, objective observer could conclude that the judge was using his position for personal advantage, thereby diminishing public confidence in the integrity and impartiality of the judiciary. Therefore, we conclude that the Commission did not err in determining that Judge Mosley violated *NCJC Canons 1*, *2*, and 3B(7).

Expert witness

Judge Mosley asserts that the Commission violated the Due Process Clauses of the Nevada and United States Constitutions by excluding the testimony of his expert witness, Professor Stempel. Stempel had been watching the proceedings from the beginning and was to act as a summary witness, stating his opinion as to whether Judge **[***25]** Mosley had violated the rules of ethics.

Under the Commission rules, the Nevada rules of evidence apply. NRS 50.275 provides that an expert may testify "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." We have held that "whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion." [15] The goal of expert testimony "'is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity.'" [16] The Commission determined that its members did not require expert assistance to decide whether Judge Mosley's conduct violated the canons. The Commission had that discretion. As an article in the *Judicial Conduct Reporter* states:

> Judicial conduct organizations often have the

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[13] *See* Ham v. District Court, 93 Nev. 409, 414, 566 P.2d 420, 423 (1977) (noting that "'[a] judge *has a discretion* to disqualify himself as a judge in a case if he feels he cannot properly hear the case because his integrity has been impugned'" (quoting State v. Allen Superior Court , 246 Ind. 366, 206 N.E.2d 139, 142 (Ind. 1965))).

[14] 192 Wis. 2d 136, 531 N.W.2d 62, 69 (Wis. 1995).

[15] Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

[16] Prabhu v. Levine, 112 Nev. 1538, 1547, 930 P.2d 103, 109 (1996) (quoting Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987)).

> difficult job of determining ethical issues of first impression in their states, or perhaps, nationally. That important job should not be delegated to an expert witness in a proceeding. **[***26]** No legal scholar or judge familiar with the customs of a judicial community possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members **[*922]** of the judicial conduct organization. By relying on their own expertise **[**565]** as representatives of the public and legal community, rather than the opinions of experts, a judicial conduct commission fulfills its official public responsibility to formulate the appropriate ethical standards for their states. [17]

Judge Mosley argues that other witnesses were used as experts and asked hypothetical questions, and therefore, he had a **[***27]** right to call his expert. Considering that both sides had elicited opinions on ethics throughout the hearing from most witnesses, the testimony could well have been cumulative. We conclude that the Commission did not abuse its discretion in excluding Judge Mosley's expert witness.

Hypothetical questions

During the evidentiary hearing, the Commission members asked a number of hypothetical questions of various witnesses. Judge Mosley contends that his due process rights were violated when the commissioners and the special prosecutor asked unqualified expert witnesses hypothetical questions. We disagree.

NRS 50.265 provides that lay witness testimony must be "rationally based on the perception of the witness" and "helpful to a clear understanding of his testimony or the determination of a fact in issue." The hypothetical questions that the Commission asked of judges and attorneys were all questions that would be helpful to determine a fact in issue, since most of the questions related to Judge Mosley's defense that his actions were part of a common practice in the Eighth Judicial District. The suggestion that the judges and attorneys were unqualified **[***28]** to give their observations and opinions on the common practice in the district is without merit. Both sides asked hypothetical questions of witnesses, most without objection. The Commission was within its discretion to ask the questions and did not violate Judge Mosley's right to due process.

The Commission's public statements

Finally, Judge Mosley contends that the Commission made an improper statement in violation of CPR 7. We disagree.

CPR 7 provides:

> In any case in which the subject matter becomes public, through independent sources, or upon a finding of reasonable probability and filing of a formal statement of charges, the commission may issue statements as it deems appropriate in **[*923]** order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without prejudgment, and to state that the respondent denies the allegations. At all times, however, the commission, its counsel and staff shall refrain from any public or private discussion about the merits of any pending or impending matter, or discussion which might otherwise prejudice a respondent's reputation **[***29]** or rights to due process.

On May 9, 2000, Leonard Gang, the Executive Director of the Judicial Discipline Commission at that time, stated in a *Las Vegas Review-Journal* article that:

> He could not speak about Mosley's contentions that the commission is unconstitutional.
>
> Gang said every state has a judicial discipline commission, and the constitutionality of Nevada's commission has been upheld by the court.
>
> "The commissions around the United States are all pretty similar," Gang said. "I know of no one that has been found unconstitutional."

Judge Mosley asserts that Gang's comments created an appearance of partiality on the part of the Commission because Gang directly attacked the merits of Judge Mosley's legal position.

We conclude that Judge Mosley's argument is without merit. Gang's comment merely discussed the law and did not address the merits of Judge Mosley's case.

[**566]** CONCLUSION

We affirm the Commission's determination that Judge

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[17] Marla N. Greenstein & Steven Scheckman, *The Judicial Ethics Expert Witness*, Jud. Conduct Rep., Winter 2001, at 1.

Mosley violated *NCJC Canons 1*, *2*, 2A, 2B, and 3B(7) in Counts I, II, VI, VII and VIII and the imposition of the discipline requiring Judge Mosley to attend the next general ethics course at the National Judicial College, **[***30]** to pay a $ 5,000 fine to the Clark County library or a related library foundation, and to receive censures for unethical conduct. We reverse the determination of violations in Counts III and IV.

AGOSTI, J., concurs.

Dissent by: MAUPIN; ROSE; GIBBONS

Dissent

MAUPIN, J., with whom BECKER, J., and PUCCINELLI, D.J., agree, concurring in part and dissenting in part:

I agree with our affirmation today of the discipline imposed by the Nevada Commission on Judicial Discipline in connection with Counts I, II, VI, VII and VIII of the complaint against Judge Mosley. In accordance with the majority, I would reverse the discipline **[*924]** imposed under Count III. Departing from the majority, I would affirm the discipline imposed with regard to Count IV. I write separately with regard to the discipline under Counts III and IV. Count III concerns Judge Mosley's discussions with Barbara Orcutt; Count IV concerns the release of Robert D'Amore.

For many years, magistrates and district judges in Clark County have released persons charged with nonviolent offenses based upon ex parte communications with attorneys and persons from the community at large, governed by the considerations set forth in *NRS 178.4853* **[***31]** . This practice has continued with the tacit agreement of the Clark County District Attorney's Office under the administrations of Roy Woofter, George Holt, Bob Miller, Rex Bell and Stewart Bell. However, this practice was generally restricted to situations in which the accused had not been brought before a magistrate for an initial appearance, and it was generally understood that such relief would be denied when another judge had been assigned to the case. With the reservations noted by the majority, the practice provided essential compliance with our judicial canons, and very few abuses of the practice have been documented. In fact, the police and the district attorneys have for many years frequently relied upon ex parte applications for release of inmates in aid of law enforcement initiatives. [1]

[*32]** In my view, the communications between Ms. Orcutt and Judge Mosley did not violate the local practice. Thus, I agree with the majority in its reversal of the discipline imposed in connection with Count III of the complaint. However, Judge Mosley should have never proceeded to release D'Amore on his own recognizance. D'Amore had apparently absconded following entry of a negotiated plea of guilty to a felony and was in custody pursuant to a bench warrant. Under these circumstances, Judge John McGroarty, the presiding judge in the case, was not inclined to release D'Amore, and Judge Mosley must have known that the district attorney would **[*925]** have opposed the release. Finally, the evidence before the Commission suggests that, while Judge Mosley contacted Judge McGroarty, he did so only as a formality, having determined to release D'Amore in any event. In short, this exercise of judicial power had every appearance of an act of favoritism taken without regard to its merits.

Because Judge Mosley's release of D'Amore was not in conformity with the then-accepted practice of issuing such releases **[**567]** without initiating contact with the district attorney's office, and because this release clearly **[***33]** implicates *Canon 2 of the Nevada Code of Judicial Conduct*, we should affirm the Commission's imposition of discipline under Count IV of the complaint.

ROSE, J., concurring in part and dissenting in part:

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[1] I am the first to admit that the general practice was in part flawed because the general public did not have access to the practice except through persons acquainted with municipal judges, justices of the peace and district court judges. This court, in its recent changes to the Rules of Practice for the Eighth Judicial District, specifically delineated the circumstances under which judges may reduce bail without contact with the state pursuant to ADKT 340. In my dissent, I noted my preference for creating

> an "on-call" system for judges and deputy district attorneys and deputy city attorneys to review informal applications for bail reductions; in this way, general access to bail reductions prior to an initial appearance would be achieved.

In the Matter of the Proposed Eighth Judicial District Court Rule (EDCR 3.80) Regarding Release From Custody or Bail Reduction, ADKT 340 (Order Adopting Rule 3.80 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, May 23, 2003).

I concur with the majority's conclusion, except that I do not believe that there was clear and convincing evidence produced to support the allegations made in Count VII, concerning the ex parte communications in Lovell's office. The record indicates that during Mr. Pitaro's cross-examination of Woolf, he specifically asked Woolf whether the communication in Lovell's office as alleged in Count VII was an improper ex parte communication. Woolf responded negatively and explained that nothing about the case was discussed other than the fact that McLaughlin was a defendant in front of Judge Mosley. Thus it appears that, although Judge Mosley did engage in communications with McLaughlin and Woolf absent the presence of, or notification to, the State, the communications at Lovell's office did not pertain to the merits of McLaughlin's pending criminal proceeding. The Commission was presented with no testimony to show that the merits of McLaughlin's case were discussed during the communications **[***34]** at Lovell's office. To the contrary, other than Woolf's mention of the procedural posture of McLaughlin's case, it appears that Judge Mosley's communications with McLaughlin and Woolf were limited to the subject of Terry Figliuzzi's parenting of Michael, and these communications did not affect the substance or merits of the State's prosecution of McLaughlin. [1] While Judge Mosley may have been using his position as a judge presiding over McLaughlin's case to obtain favorable evidence in his custody casewith Terry Figliuzzi, that is not the charge brought against him. Therefore, I conclude that there was by definition no violation of the ban on ex parte contacts concerning a pending or impending proceeding, and Judge Mosley did not violate *NCJC Canon 3(B)(7)* as regards Count VII.

[*926] GIBBONS, **[***35]** J., dissenting:

I respectfully dissent from the majority's conclusion that we should affirm the decision of the Nevada Commission on Judicial Discipline.

We have previously held that precluding the admission of evidence that supports an expert's opinion may constitute an abuse of discretion. [1] In *Born v. Eisenman*, [2] **[***36]** a patient sued two surgeons for medical malpractice in performing an abdominal surgery. The surgeons' experts testified that the patient's injuries could not have resulted from the surgeons' negligence because such result was medically impossible. [3] Judge Mosley, as the presiding district judge, precluded the patient's expert from referring to a prior Colorado case describing a similar surgical event, and the jury found for the surgeons. [4] We reversed Judge Mosley's decision and concluded that he abused his discretion by prohibiting the patient's expert from referring to the Colorado case while allowing the surgeons' experts to testify as to medical impossibility. [5]

The case at bar goes a step further. Jeffrey Stempel, a professor of law and author of several articles on legal ethics, proposed to testify on Judge Mosley's behalf. Professor Stempel attempted to render an opinion on the judicial ethics questions in this case, but the Commission precluded his testimony.

In *Pineda v. State*, we held that a defendant is entitled to call an expert witness **[**568]** when the expert's testimony will be helpful to the trier of fact and corroborates the theory of defense. [6] We held that "'the *due process clauses* in our constitutions assure an accused the right to introduce into evidence *any* testimony or documentation which would tend to prove the defendant's theory of the case.'" [7] Judge Mosley planned to call Professor Stempel to testify regarding whether Judge Mosley violated the code of judicial conduct. Professor Stempel's testimony was intended to advance Judge Mosley's theory of the case. **[***37]** Accordingly, due process requires that Judge Mosley be allowed to present that testimony.

The majority cites to an article from the *Judicial Conduct Reporter* to support its decision to deny Judge Mosley's right to due process. The authors of that article

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[1] *See In re Varain, 114 Nev. 1271, 1277, 969 P.2d 305, 309 (1998)* (observing that the judge's brief communication with the defendant did not affect the substance or merits of the State's prosecution).

[1] *Born v. Eisenman, 114 Nev. 854, 962 P.2d 1227 (1998)*.

[2] *Id. at 855-56, 962 P.2d at 1228*.

[3] *Id. at 858, 962 P.2d at 1229-30*.

[4] *Id. at 857-58, 962 P.2d at 1229-30*.

[5] *Id. at 861, 962 P.2d at 1231*.

[6] *120 Nev. 204, 88 P.3d 827, 833-34 (2004)*.

[7] *Id. 88 P.3d at 834* (quoting *Vipperman v. State, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980)* (emphasis added)).

conclude that "no legal scholar or judge . . . possesses unique knowledge of ethical standards that is more reliable than the independent decision-making **[*927]** of the members of the judicial conduct organization." [8] I disagree. Judge Mosley's right to procedural due process trumps the authors' opinions.

[*38]** Apart from due process considerations, there are other valid justifications for admitting expert testimony on judicial ethics. West Virginia University College of Law Professor Carl M. Selinger has detailed three such justifications: (1) the inaccessibility of legal ethics law, (2) the advantage of objectivity, and (3) the advantage of cross-examination. [9]

First, the relative inaccessibility of legal ethics law supports the admission of expert testimony. "As more ethics rules are drafted to cover **[***39]** only lawyers in particular practice contexts, it is possible for such rules to be much more accessible to, and readily understood by some lawyers than others." [10] Such inaccessibility may support the admission of expert testimony even where the decision maker is relatively familiar with the rules at issue. This is true because the decision to consider expert testimony, subject to cross-examination, is "superior to relying only on the judge's, or a law clerk's, independent research, or on the arguments of non-scholar advocates." [11] I suggest that this proposition is also applicable to cases tried before the Commission on Judicial Discipline.

Further, the admission of expert testimony provides the advantage of objectivity. "From the point of view of achieving justice, the main advantage that can be cited for the admission of legal ethics expert testimony is that it provides decisionmakers with more objective analysis of the issues than they would gain from **[***40]** advocacy alone." [12] This is true because the scholar expert has no attorney-client relationship with the accused; thus, he has no duty to tailor his testimony regarding the alleged ethical violations to fit the defense's theory of the case. Indeed, such tailoring would ruin the scholar's reputation as an expert in the field whose opinions could be trusted by courts and disciplinary bodies. [13]

Finally, the admission of expert testimony provides the advantage of cross-examination. As Professor Selinger states, the opportunity **[*928]** for cross-examination allows for a more thorough analysis of the expert's opinion regarding ethical violations:

> "If an expert testifies before the court, cross-examination is available. Thus, the **[**569]** bases of the expert's conclusions can be tested. However, if the court simply reads law review articles or books written by that same expert, cross-examination is not available and it is more difficult to attack the reliability of the **[***41]** opinions expressed." [14]

Thus, this testimony allows the decision maker to consider the expert's objective opinion regarding the alleged ethical violations. Admission further subjects the testimony to scrutiny from both the disciplinary body and opposing counsel. I submit that this system, though not universally endorsed, is preferable to the decision to deny Judge Mosley's right to present expert testimony in support of his theory of the case.

In conclusion, the Commission's actions were improper and constitute an abuse of discretion. Judge Mosley had a due process right to present expert testimony in support of his theory of the case. Furthermore, Professor Stempel's testimony may have been helpful to the Commission in reaching its decision. Accordingly, I would reverse the decision and remand this case to the Commission **[***42]** with instructions to consider Professor Stempel's testimony.

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[8] Marla N. Greenstein & Steven Scheckman, *The Judicial Ethics Expert Witness*, Jud. Conduct Rep., Winter 2001, at 1.

[9] *See* Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 Geo. J. Legal Ethics 405, 409-18 (2000). Though Professor Selinger ultimately concluded that other ethical concerns outweigh these justifications, he did not suggest that the justifications are without merit. Rather, his article endorsed the use of ethics experts as advocates, as opposed to expert witnesses, as a better means of determining whether particular activities constitute ethical violations. *Id.*

[10] *Id. at 411*.

[11] *Id.*

[12] *Id. at 414*.

[13] *Id.*

[14] *Id. at 417* (quoting Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. Va. L. Rev. 645, 672 (1990)).

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In re Cummings

In re Cummings

Supreme Court of Alaska

January 18, 2013, Decided

Supreme Court No. S-14692, No. 6743

Reporter
292 P.3d 187 *; 2013 Alas. LEXIS 6 **

In re Dennis Cummings, Judge of the District Court, Fourth Judicial District at Bethel, Alaska.

Prior History: [1]** Original Application from the Alaska Commission on Judicial Conduct. ACJC File No. 2011-012.

In re Cummings, 211 P.3d 1136, 2009 Alas. LEXIS 98 (Alaska, 2009)

Counsel: Karen Lambert, Jamin Law Office, Kodiak, Special Counsel for the Alaska Commission on Judicial Conduct.

No appearance by Dennis Cummings, Bethel.

Judges: Before: Carpeneti, Chief Justice, Fabe, Winfree, and Stowers, Justices.

Opinion by: WINFREE

Opinion

[*188] WINFREE, Justice.

I. INTRODUCTION

In early April 2012 the Alaska Commission on Judicial Conduct (Commission) referred to us its unanimous recommendation for removal of Judge Dennis Cummings, a district court judge in Bethel. However in December 2011, Judge Cummings had announced his retirement and he retired shortly after we received the Commission's recommendation. Judge Cummings has not participated in this matter before us. Despite Judge Cummings's retirement, we consider this matter a live controversy — a judge's retirement does not extinguish the Commission's and this court's jurisdiction to complete disciplinary proceedings, and there are important policy reasons to do so. After independently reviewing the record and the Commission's recommendation to remove Judge Cummings, we accept the Commission's recommendation for removal.

II. COMMISSION JURISDICTION AND WHY WE CONSIDER [**2] THIS MATTER

Article IV, section 10 of Alaska's Constitution creates the Commission. [1] *Alaska Statute 22.30.011(a)* authorizes the Commission to investigate alleged judicial misconduct, including violations of Alaska's Code of Judicial Conduct. [2] Upon finding probable cause that misconduct occurred, the Commission must hold a formal hearing. [3] After the hearing the Commission must either exonerate the judge or make a disciplinary recommendation and refer the matter to the Alaska Supreme Court. [4]

The Commission's jurisdiction extends to a retired judge if the alleged misconduct occurred and the investigation began before the judge retired. [5] We have explained that the plain meaning of *AS 22.30.011(a)(3)* "authorizes the [C]ommission to retain jurisdiction over a retired judge whose alleged misconduct occurs during a period of active judicial service and who remained an active judge when the [C]ommission began **[**3]** its

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[1] *Article IV, section 10* provides: "The powers and duties of the [C]ommission and the bases for judicial disqualification shall be established by law."

[2] The preamble explains that the Code "is intended to establish standards for ethical conduct of judges."

[3] *AS 22.30.011(b)*.

[4] *AS 22.30.011(d)*.

[5] ***In re Johnstone, 2 P.3d 1226, 1231-34 (Alaska 2000)*** ("Having properly acquired jurisdiction, the [C]ommission did not lose it merely because the judge subsequently opted to retire.").

investigation." [6]

We also have explained "that a primary purpose of judicial discipline in Alaska is to protect the public rather than to punish **[*189]** the judge." [7] Judicial discipline keeps the public "informed of judicial transgressions and their consequences, so that it knows that its government actively investigates allegations of judicial misconduct and takes appropriate action when these allegations are proved. Judicial discipline thus protects the public by fostering public confidence in the integrity of a self-policing judicial system." [8] Additionally a judge who voluntarily retires may immediately seek and receive future appointment as a judge or supreme court justice, [9] but "[a] judge removed by the supreme court is ineligible for judicial office for a period of three years." [10] A decision to remove a judge would therefore protect the public by barring reappointment to judicial office for at least three years. Finally, punishing a retired judge's misconduct provides guidance for the judiciary **[**4]** as a whole, highlights the importance of judicial ethics, and protects persons interested in employing retired judges by ensuring past misconduct is known to the public. [11]

For these reasons we consider the Commission's recommendation in this case.

III. COMMISSION PROCEEDINGS

In June 2011 the Commission received a complaint from Deputy Attorney General Richard Svobodny alleging that Judge Cummings had engaged in improper ex parte communications with Bethel Assistant District Attorney Ben Wohlfeil. The Commission's Executive Director investigated the allegation and **[**5]** conducted a telephonic interview with Judge Cummings. After finding probable cause that Judge Cummings had violated his ethical duty, the Commission entered formal charges and held an evidentiary hearing in March 2012.

Wohlfeil testified that on June 1 and 2, 2011, he was alone in a courtroom with Judge Cummings and the in-court clerk. On both days Judge Cummings told him that he should read the court of appeals' memorandum opinions (MO&Js) issued on June 1, 2011, "because they involved matters [he] was currently litigating." After reading the MO&Js, Wohlfeil recognized that two of them supported his position in two cases he was actively litigating before Judge Cummings. Wohlfeil notified his supervisor, filed notices of supplemental authority with the court, and notified opposing counsel that Judge Cummings engaged in ex parte communication in the two cases.

Judge Cummings testified that he had no recollection of a communication with Wohlfeil on June 1, 2011, and that he did not read the MO&Js until June 2. He further testified that on June 2 he told multiple lawyers in his courtroom, including Wohlfeil, interns from the public defenders office, and a lawyer from the Office of Public **[**6]** Advocacy, that they should read the MO&Js from June 1 because they were interesting. He claimed that he had a practice of encouraging attorneys to read MO&Js and that he did not know the MO&Js pertained to cases before him.

In the face of this conflicting testimony the Commission found the following proved by clear and convincing evidence. On June 1, 2011, Judge Cummings initiated an off-the-record communication with Wohlfeil. Judge Cummings suggested that Wohlfeil read the Court of Appeals' June 1 MO&Js because they were relevant to issues Wohlfeil had pending before Judge Cummings. The next day Judge Cummings asked Wohlfeil — again off the record — whether he had read the MO&Js. The in-court clerk was the only other person in the courtroom during these communications.

Wohlfeil read the MO&Js and determined that they supported his position in two **[*190]** cases he was litigating before Judge Cummings. The MO&Js discussed issues Wohlfeil had not briefed in the two cases. Judge Cummings committed judicial misconduct

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[6] ***Id. at 1234***.

[7] ***Id. at 1233*** (citing *In re Inquiry Concerning a Judge, 788 P.2d 716, 722 (Alaska 1990)*). "Discipline" also connotes an element of punishment. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 514 (definition 3) (5th ed. 2011).

[8] ***Id. at 1234***.

[9] *See, e.g.*, *AS 22.05.070* (establishing mandatory qualifications for supreme court justices); *AS 22.07.040* (establishing mandatory qualifications for court of appeals judges); *AS 22.10.090* (establishing mandatory qualifications for superior court judges); *AS 22.15.160* (establishing mandatory qualifications for district court judges).

[10] *AS 22.30.070(d)*.

[11] ***Johnstone, 2 P.3d at 1233-34***.

— his ex parte communication was an intentional attempt to affect the outcome of pending litigation.

The American Bar Association's (ABA) Standards for Imposing Lawyer Sanctions provide **[**7]** an analogy "insofar as possible when sanctioning judges." [12] The ABA Standards address four questions to determine misconduct and the appropriate level of sanction. [13]

The first question is "[w]hat ethical duty did the [judge] violate?" [14] The Commission determined that Judge Cummings violated his ethical duty "to the legal system," finding by clear and convincing evidence that Judge Cummings violated Alaska Code of Judicial Conduct, Canons 1, 2A, 3B(5), and 3B(7). The Commission explained that Judge Cummings violated Canon 3B(7)[15] by engaging in "ex parte communication that had the appearance of aiding the prosecution" and "by giving the prosecution relevant case law that may have not been available to the defense." The Commission also explained that the ex parte communication created the appearance of impropriety in violation of Canon 2A, [16] and demonstrated bias in violation of Canon 3B(5). [17] Finally, the Commission explained that Judge Cummings violated Canon 1[18] by failing to "participate in . . . high standards of judicial conduct."

The second question is "[w]hat was the [judge's] mental state?" [19] The Commission found that Judge Cummings's mental state was intentional.

The third question is "[w]hat was the extent of the actual or potential injury caused by the [judge's] misconduct?" [20] The **[**9]** Commission found that the misconduct had potential to injure the defendants in Wohlfeil's cases before Judge Cummings.

The fourth question is "[a]re there any aggravating or mitigating circumstances?" [21] The Commission found three aggravating circumstances. First, Judge Cummings had a prior disciplinary offense for a similar ex parte communication. [22] Second, Judge Cummings was deceptive during the disciplinary process. Third, Judge Cummings had more than five years on the bench, constituting substantial experience. The Commission did not find any mitigating factors.

The Commission determined that under Section 6.31(b) of the ABA Standards, disbarment is the appropriate sanction when a lawyer makes ex parte communications with the intent to affect the proceeding's outcome. The Commission determined removal is an analogous sanction to disbarment and recommended that we remove Judge Cummings.

IV. STANDARD OF REVIEW

"The Alaska Supreme Court has the final authority in proceedings related to judicial conduct in Alaska." [23] "In judicial **[*191]** disciplinary proceedings, we **[**10]** conduct a de novo review of both the alleged judicial misconduct and the recommended sanction. In doing so we recognize that judicial misconduct must be established by clear and convincing evidence." [24] Although we have final authority over judicial conduct

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[12] *In re Inquiry Concerning A Judge, 788 P.2d 716, 723 (Alaska 1990)*.

[13] *Id. at 724*.

[14] *Id.*

[15] Canon 3B(7) provides in relevant part: "A judge shall not initiate, **[**8]** permit, or consider ex parte communications or other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ."

[16] Canon 2A provides in relevant part: "In all activities, a judge shall . . . avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

[17] Canon 3B(5) provides in relevant part: "In the performance of judicial duties, a judge shall act without bias or prejudice . . . ."

[18] Canon 1 provides in relevant part: "An independent and honorable judiciary is indispensable to achieving justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of judicial conduct."

[19] *Inquiry Concerning A Judge, 788 P.2d at 724*.

[20] *Id.*

[21] *Id.*

[22] *See In re Cummings, 211 P.3d 1136, 1140 (Alaska 2009)* (sanctioning Judge Cummings for improper ex parte communication).

[23] ***In re Johnstone, 2 P.3d 1226, 1234 (Alaska 2000)***.

[24] *Cummings, 211 P.3d at 1138*.

proceedings and review the evidence de novo, "we give some weight to the [C]ommission's factual determinations involving witness credibility, since the [C]ommission is able to hear witnesses testify and can evaluate their demeanor." [25]

V. ACCEPTANCE OF THE COMMISSION'S RECOMMENDATION

We have independently reviewed the record. Taking the Commission's credibility determination into account, we accept and agree with the Commission's factual findings by clear and convincing evidence. We conclude that Judge Cummings engaged in improper ex parte communications with Wohlfeil on June 1 and 2, 2011. The ex parte communications were violations of *AS 22.30.011(a)(3)(E)* and Canons 1, 2A, 3B(5), and 3B(7) of Alaska's Code of Judicial Conduct. Judge Cummings's **[**11]** mental state was intentional and his behavior during the commission disciplinary process was deceptive. His repeated ex parte communications demonstrate bias for the prosecution; we previously sanctioned Judge Cummings for a similar ex parte communication with the prosecution. Judge Cummings harmed the public when violating his ethical duty to the legal system and creating the appearance of impropriety. In light of the foregoing, we conclude that removal is appropriate.

VI. ORDER FOR REMOVAL

Judge Cummings is REMOVED as a district court judge for the State of Alaska.

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[25] ***Johnstone, 2 P.3d at 1234-35*** (citing *Kennick v. Comm'n on Judicial Performance, 50 Cal. 3d 297, 267 Cal. Rptr. 293, 787 P.2d 591, 598 (Cal. 1990)*.