In The

Supreme Court of Virginia

RECORD NO. 170889

JUDICIAL INQUIRY AND REVIEW COMMISSION,

***Petitioner – Appellant*,**

v.

KURT J. POMRENKE, (JUDGE OF THE TWENTY-EIGHTH JUVENILE AND DOMESTIC RELATIONS JUDICIAL DIVISION),

Respondent – Appellee.

BRIEF OF APPELLEE

John E. Lichtenstein (VSB No. 27048)
Gregory L. Lyons (VSB No. 24037)
Carrol M. Ching (VSB No. 68031)
LICHTENSTEIN LAW GROUP PLC
101 South Jefferson Street, Suite 400
Roanoke, Virginia 24011
(540) 343-9711 (Telephone)
(540) 343-9713 (Facsimile)
John.Lichtenstein@lichtensteinlawgroup.com
Greg.Lyons@lichtensteinlawgroup.com
Carrol.Ching@lichtensteinlawgroup.com

Counsel for Respondent – Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

SCV: Submitted on 09-29-2017 16:16:51 EDT for filing on 09-29-2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. Counterstatement of Material Proceedings 2

II. Counterstatement of Facts 3

A. Judge Pomrenke 6

B. Donald Bowman 8

C. Mrs. Pomrenke 9

D. The Bowman Thank You Note 11

E. The Moffatt Voicemail 12

STANDARD OF REVIEW 13

ARGUMENT 15

I. Given the context from which Judge Pomrenke's charged actions arose, censure is the appropriate sanction 16

A. The Bowman Note 18

B. The Moffatt Voicemail 20

C. The circumstances mitigate against removing Judge Pomrenke 21

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

Page(s)

CASES

Inquiry in the Conduct of Murphy,
737 N.W.2d 355 (Minn. 2007) 26

In re Krull,
860 N.W.2d 38 (Iowa 2015) 26, 27

Judicial Inquiry & Review Comm'n v. Bumgardner,
293 Va. 588, 801 S.E.2d 406 (2017) 14

Judicial Inquiry & Review Com'n v. Jordan,
Record No. 730725 25

Judicial Inquriy & Review Comm'n v. Lewis,
264 Va. 401, 568 S.E.2d 687 (2002) 24

Judicial Inquiry & Review Comm'n v. Waymack,
284 Va. 527, 745 S.E.2d 410 (2012) 14

Judicial Inquiry & Review Comm'n v. Shull,
274 Va. 657 (2007) 22, 23

Judicial Inquiry & Review Comm'n v. Taylor,
278 Va. 699, 685 S.E.2d 51 (2009) 24, 26

Wis. Judicial Comm'n v. Ziegler (In re Ziegler),
309 Wis. 2d 253, 750 N.W.2d 710 (Wis. 2008) 26, 27

CONSTITUTIONAL PROVISION

Va. Const. art. VI, § 10 ..... 1, 13, 14

STATUTES

Va. Code § 17.1-902 13

Va. Code § 17.1-906 1

INTRODUCTION

Pursuant to this Court's Order of July 11, 2017, Article VI, § 10 of the Constitution of Virginia, and Virginia Code § 17.1-906, Judge Kurt J. Pomrenke ("Judge Pomrenke"), by counsel, respectfully submits this response to the opening brief of the Virginia Judicial Inquiry and Review Commission ("the Commission").

In his testimony before the Commission, Judge Pomrenke described his personal evolution (Joint Appendix ("JA") 243, 251, 266) from the point of his wife's indictment, prosecution, sentencing and imprisonment, to his initial communications with the Commission, to his appearance before the Commission on June 13, 2017. Though the subject actions did not relate to his actions on the bench or to any case before him, and were born entirely of the most unique and difficult family trauma, over time he had come to understand what he could not see from within that trauma, that the actions complained of were wrong and in his view violated the Canons. JA 253, 255. He expressed sincere remorse. JA 231, 251-252.

When the circumstances began out of which the subject actions arose, Judge Pomrenke had been on the bench for only two years.

STATEMENT OF THE CASE

I. Counterstatement of Material Proceedings

After Judge Pomrenke retained counsel in June 2016, the Commission solicited a formal written response from him in relation to its pending inquiry regarding two contacts from Judge Pomrenke to certain individuals in connection with the federal prosecution of his wife, Stacey Pomrenke. JA 3-12. Neither of the alleged contacts were related to cases or litigants before him on the bench.

Judge Pomrenke, by counsel, and consistent with his previous efforts to cooperate with the Commission, provided the requested written response on December 2, 2016. JA 13-26. Judge Pomrenke agrees with the Commission's Statement of Material Proceedings with regard to the subsequent proceedings in this matter, beginning with the Commission's Notice of charges issued on January 17, 2017.

Additionally, prior to retaining counsel, in March of 2016, Judge Pomrenke called counsel for the Commission after learning that he was the subject of a complaint, formal or otherwise, made to the Commission. JA 19-21, 230-31. Judge Pomrenke advised Commission counsel that he would provide a "writing summarising (sic) everything we discussed on the phone yesterday, so you will have a document from me for the Commission

to review." JA 20. That writing was provided by letter to counsel for the Commission, dated March 16, 2016, several months before Judge Pomrenke retained counsel. JA 22-24. Thereafter, until he retained counsel in June 2016, Judge Pomrenke continued communicating with Commission counsel to provide additional information he understood to be relevant to the complaint he understood had been made to the Commission. JA 25-26. His communications with Commission counsel arose not because of media coverage (see Comm'n Brf. at 13, 16); rather, they were in response to a complaint he understood had been made against him with the Commission.[1]

II. Counterstatement of Facts

As stated in his December 2, 2016 written response to the Commission, and again at the June 13, 2017 hearing before the Commission, the two actions which are the focus of these proceedings took place within the unique context of the federal prosecution of Judge Pomrenke's beloved wife. Neither action involved any of Judge Pomrenke's work on the bench. Judge Pomrenke has admitted that he was acting in

---

[1] Some of the communications between Judge Pomrenke and Commission counsel are not currently a part of the record filed with this Court. Given the need to respond to certain matters raised in the Commission's brief, Judge Pomrenke is evaluating a motion to amend or enlarge the record to include such communications.

each instance as a husband who felt helpless during the prosecution of his wife, which was all-consuming during that time. JA 230, 241. He felt that he needed to be doing more as her husband, and he did not think about the Canons. JA 230. His life was completely consumed with what his wife was going through. JA 241. He never stepped out of himself to realize at the time how the charged actions might be misinterpreted. JA 241.

> Well, I've had to accept the fact that she was convicted, that she's in prison, that she will be there for maybe a couple years or a year and a half, that a lot of my strong opinions and feelings were, I guess were wrong, although I will always defend her and love her, I'm -- I've -- I can see now where I was totally immersed and still am to the extent with the kids, making sure the kids are okay, totally immersed in that. But this process has definitely enlightened me, it has forced me to understand that there are some issues that are greater than the personal forces that I was feeling, that the perception of the way a judge acts is incredibly important to the way the public perceives our judicial system.

JA 246.

Judge Pomrenke is deeply remorseful for his conduct. JA 222. As early as his formal, written response of December 2, 2016 to the Commission, he stated that he had already stopped enclosing his business card in his correspondence and that he would not resume that practice. JA 17. Judge Pomrenke also then stated that he would not again make a call like he made to Ms. Moffatt, even in such inconceivable circumstances. *Id*.

He reiterated these positions regarding the Bowman note and Moffatt voicemail in his Answer of February 8, 2017. JA 93, 94.

On September 26, 2016, Judge Pomrenke delivered his wife to the federal prison in Alderson, West Virginia, where she is serving her sentence, leaving him to raise their two young children until she is released. JA 240, 251. His life off the bench is dedicated to their children's well-being, and he takes them to see their mother almost every weekend, a two-and-a-half hour drive away. JA 240-41. In the time since his wife's conviction in February 2016, he has had the opportunity to reflect on his actions during the wrenching experience of his wife's prosecution. Judge Pomrenke told the Commission that he now realizes that he was operating during that time with blinders on, consumed by the process and not accepting what was happening to his wife and family. JA 242, 246-47. Further, as Judge Pomrenke has experienced the Commission's process, he has spent more time reflecting upon his actions, particularly in light of the Canons and his role as a judge, and not simply as a husband. As he has told the Commission, he has come to understand that those actions were inappropriate and that he would never take them again, under any circumstances. JA 246-47, 266-69. Judge Pomrenke's expressed

understanding and remorse, as well as the subjective features and context surrounding the two charged actions, provide mitigating influence.

A. Judge Pomrenke

Judge Pomrenke had practiced law in and around the area of Bristol, Virginia since the early 1980's, before he was sworn in as a Juvenile and Domestic Relations District Judge of the 28th District on July 1, 2013. JA 116M, 206. Historically, Judge Pomrenke had been very active in the community, volunteering in many different capacities, serving on a number of boards, and umpiring local baseball games. JA 108, 207-08.

Judge Pomrenke also served on the Board of Directors for the Bristol Virginia Utilities Authority ("BVU"), beginning in 2005. JA 232. Judge Pomrenke's wife, Stacey Pomrenke, was the Chief Financial Officer for BVU, which had hired her in March of 2003. JA 319. In fact, the couple met through their work with BVU, and started dating in late 2009. Judge Pomrenke resigned from the BVU Board of Directors in April of 2010. JA 232. Mrs. Pomrenke had two young children, and Judge Pomrenke adopted them, aged 2 and 4, after he and Mrs. Pomrenke were married. JA 240.

Judge Pomrenke had been on the bench for only two years prior to the difficult context regarding the investigation and subsequent federal

prosecution of Mrs. Pomrenke, out of which the charged actions arose. His goal as a judge was to do good for the children and families in his community. JA 96. The evidence of Judge Pomrenke's excellent performance and demeanor as a lawyer and as a judge, as well as his commitment to his court and those who appear before him, is uncontroverted. JA 107-14, 116K, 207-08, 219-23.

Judge Pomrenke is known as an honest, caring, loving individual and as someone who is deeply devoted to his wife and family. JA 109, 219. As an outgrowth of his friendly and outgoing personality, Judge Pomrenke has always been a prolific writer of notes, to people he knows and to people he did not know, to compliment or thank them. JA 108, 208-09. Over the years, he wrote letters and cards of appreciation, thanks, sympathy, and congratulations to many recipients. JA 108-09, 208-09. Judge Pomrenke is also known for his optimistic and positive view of others, which his friend Ray Ferris described as "almost Pollyannish" in attitude, thinking the best of everyone. JA 220-21.

B. Donald Bowman

Donald Bowman was hired as the Chief Executive Officer and President of BVU in November of 2014. JA 134. Although a lawyer, Mr. Bowman had never appeared before Judge Pomrenke or had reason to expect he would do so. JA 168-69. Judge Pomrenke was personally acquainted with Mr. Bowman's father, who had been a State Trooper in some of Judge Pomrenke's cases before he took the bench in July 2013. JA 235. In fact, shortly after Mr. Bowman was hired in 2014, Judge Pomrenke sent him a note welcoming him to BVU and to the community. JA 144, 158-59, 396. Mr. Bowman responded to Judge Pomrenke by email on November 5, 2014, thanking him for the note and expressing his excitement about his new position and working with Mrs. Pomrenke. JA 159, 433.

Before Mr. Bowman was hired, federal and local authorities had begun investigating BVU. JA 190. Mr. Bowman was not with BVU when the actions that were the subject of that investigation were committed. When Judge Pomrenke sent Mr. Bowman the subject November 2015 note, Judge Pomrenke did not know that Mr. Bowman was cooperating with federal authorities beyond responding to government subpoenas to BVU,

JA 116M-N, 253-54, or that he had testified for the government in any proceeding involving other BVU employees. JA 260-61.

C. Mrs. Pomrenke

Mrs. Pomrenke received a target letter in relation to the federal investigation in July of 2015, which came as a shock to Judge Pomrenke. JA 116N, 234. Mrs. Pomrenke was later indicted on several criminal counts on October 26, 2015. JA 116N, 234. Regarding his wife's indictment and prosecution, Judge Pomrenke stated that he was in "total disbelief" and "couldn't accept" it. JA 235.

When he was not on the bench, the judge's entire focus shifted to his wife and what was happening to her and their family. JA 209. Judge Pomrenke believed that his beloved wife was completely innocent of the charges. His focus in life shifted to defending her as her husband, while simultaneously feeling helpless in the face of the federal prosecution. JA 230-40. Nevertheless, attorneys who practiced before Judge Pomrenke in that time frame attest that his work on the bench did not suffer, but in fact continued at a high level of professionalism. JA 112, 114.

In response to the federal charges against Mrs. Pomrenke, the Pomrenkes hired legal counsel, incurring substantial legal charges. JA 235. These legal fees placed a significant financial burden on the family,

including requiring withdrawals from Mrs. Pomrenke's retirement accounts. JA 235. Judge Pomrenke was concerned that Mrs. Pomrenke would be let go or suspended from her position at BVU under the circumstances; however, Mr. Bowman allowed her to continue working and did not suspend her without pay. JA 155-56, 235, 258. He allowed her to continue earning her salary. JA 157. In fact, Mrs. Pomrenke had informed the judge during this time period that Mr. Bowman was supportive of her, that he treated her pleasantly and professionally at work, and that they had a "very good relationship." JA 236. Judge Pomrenke was " . . . really appreciative of that. I was so thankful for that." JA 236.

Edward G. Stout, a Bristol attorney who served for approximately 20 years as City Attorney for the City of Bristol and later in private practice served as counsel for Washington County Social Services and City of Bristol Social Services, confirmed Judge Pomrenke's thankfulness towards Mr. Bowman when he testified to the Commission that on several occasions Judge Pomrenke had been very complimentary of Mr. Bowman for allowing Mrs. Pomrenke to continue working at BVU after she had been indicted. JA 210. Attorney Stout also spoke to Judge Pomrenke's fervent desire and very real ability, that he has seen in court, to make a difference in the lives of children who appear in his court. JA 212.

D. The Bowman Thank You Note

Judge Pomrenke did send Mr. Bowman a handwritten, personal thank you note dated November 18, 2015, enclosing his business card. JA 47-49. The note was not on judicial letterhead, was signed "Kurt Pomrenke," used his home address as the return address, and was mailed with personal, non-judicial postage. JA 164-65. At this time, Judge Pomrenke did not believe that Mr. Bowman would be a witness in his wife's federal trial, because Mr. Bowman had been hired at BVU "after the fact." He was not at BVU when the investigated actions occurred. JA 116M-N, 238, 239, 253-54, 256-57. Mr. Bowman was not subpoenaed for Mrs. Pomrenke's trial until January of 2016, two months after the subject note was sent, and he was not included on a government witness list until February 5, 2016. JA 116O. Mr. Bowman acknowledged these facts in testifying before the Commission. JA 164, 168. Mr. Bowman was never called as a witness at Mrs. Pomrenke's trial, and agreed that, if he had been called at the trial of Mrs. Pomrenke, it would have been solely as a custodian of records. JA 161.

Judge Pomrenke sent the note to Mr. Bowman as a loving husband who was thanking his wife's boss for allowing her to continue to work, and

for supporting her during the federal investigation, as his wife had described to him. JA 236, 238.

In his Answer of February 8, 2017, Judge Pomrenke indicated that he would not again send such a note (or make such a call as the one to Connie Moffatt). He spoke in that Answer of a "clarity in retrospect" of this "terrible period in which he sought to be the loving and supportive husband" of his wife as she underwent an aggressive federal prosecution. It was stated that he had learned a great deal from this experience and that he looked forward to discussing these matters before the Commission. JA 95.

Six months later, Judge Pomrenke testified before the Commission that he had come to recognize that sending the thank you note was a mistake, that under these circumstances he saw how the note could have given the wrong impression, and that he would not take such action in the future. JA 231, 251-52.

E. The Moffatt Voicemail

Judge Pomrenke left the voicemail message on February 13, 2016 on the voice mailbox of Connie Moffatt, who was a longtime and dear friend of both Mrs. Pomrenke and himself. JA 116O. Judge Pomrenke called her as a husband. He was terrified and scared to death. JA 242. He identified himself only as "Kurt" and addressed himself to "Connie." JA 301. Ms.

Moffatt was present when Mrs. Pomrenke's children were born. JA 242-43, 435-37. Ms. Moffatt was extremely supportive of Mrs. Pomrenke throughout the federal investigation and prosecution, sending her prayers and many supportive text messages. JA 244, 365.

Judge Pomrenke believed that the statements referenced in the voicemail were true and believed that Ms. Moffatt also believed them to be true. JA 244-45. Ms. Moffatt testified under oath that the statements discussed in the subject voicemail were true, and that he did not ask her to say anything untruthful. JA 369-70. Notwithstanding, Judge Pomrenke testified before the Commission that he had come to realize that he should not have contacted Ms. Moffatt in connection with his wife's federal trial, that such action was violative of the Canons, regardless of whether she was a close friend. JA 231.

STANDARD OF REVIEW

The Commission has filed a complaint in this Court pursuant to Virginia Code § 17.1-902, alleging that Judge Pomrenke engaged in misconduct and conduct prejudicial to the proper administration of justice of sufficient gravity to constitute the basis for retirement, censure, or removal. After such a complaint is filed, this Court must conduct an open hearing on the Complaint. Va. Const. art. VI, § 10. In conducting this hearing,

> this Court considers the evidence and makes factual determinations de novo. The Commission must prove its charges in this Court by clear and convincing evidence. The term "clear and convincing evidence" has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases. It does not mean clear and unequivocal.

Judicial Inquiry & Review Comm'n v. Bumgardner, 293 Va. 588, 597, 801 S.E.2d 406, 410 (2017) (quoting *Judicial Inquiry & Review Comm'n v. Waymack*, 284 Va. 527, 534-35, 745 S.E.2d 410, 414 (2012)). This Court accords no "particular weight or deference to factual determinations, findings and opinions of the Commission." *Waymack*, 284 Va. at 414. Therefore, this Court conducts its own independent review of the record and hears the argument of counsel. *Id.* If the Court finds clear and convincing evidence of a violation of the Canons, that is "that the judge's actions were of sufficient gravity as to amount to misconduct while in office, persistent failure to perform the duties of the office, or conduct prejudicial to the proper administration of justice," it shall censure or remove the judge from office. *Bumgardner*, *supra*, 293 Va. at 597-98; Va. Const. art. VI, § 10.

ARGUMENT

As the events that are now before the Court began to unfold in July 2015 with his wife's receipt of a federal target letter, Judge Pomrenke had been on the J&DR bench for only two years. That event began a seismic shift in Judge Pomrenke's life, that was exacerbated three months later when his wife was indicted. His perspective, already negatively affected by the target letter indicating an upcoming indictment, narrowed even further when the indictment was followed by pretrial proceedings and trial preparation began, all with the attendant and unavoidable expense of defending a federal prosecution.

Judge Pomrenke now understands and appreciates, and he acknowledges to this Court as he acknowledged at the June 2017 Commission hearing, that in such a setting, he was consumed by his fear and concern for his wife and was not operating with the necessary level of awareness with regard to his judicial responsibilities off the bench. This lack of awareness and deep stress resulted in lapses of judgment in sending the November 2015 note to Donald Bowman and in leaving the voicemail message for Connie Moffatt in February 2016. In the course of the proceedings below, Judge Pomrenke came to recognize first that those

actions had been unwise and that he would not repeat them. This was communicated to the Commission in December 2016. JA 17

Over time, and with the cataclysmic events in his wife's and their children's lives of her trial, conviction, sentencing and incarceration, came a period of sad and difficult reflection and growth. With that opportunity of additional reflection and consideration, he concluded that, more than just being unwise, his actions indeed had been in violation of the Canons. And he acknowledged this in his testimony to the Commission. E.g., JA 230-31, 253-55.

Accordingly, the discussion that follows focuses on censure as the appropriate sanction for his actions.

I. Given the context from which Judge Pomrenke's charged actions arose, censure is the appropriate sanction.

The charged actions arose out of two communications made by Judge Pomrenke in the unique environment of the federal criminal prosecution of his wife. Neither of these actions arose out of Judge Pomrenke's actions on the bench or out of his interactions with any litigants before him. In fact, the evidence of Judge Pomrenke's excellent performance as a judge in this Commonwealth and his commitment to those who appear before him is substantial and uncontradicted.

Nevertheless, Judge Pomrenke has now recognized that he was reacting out of frustration and anger as well as a complete and blinding devotion to his wife during the period of his wife's prosecution and that he must take responsibility for those actions as a judge in this Commonwealth. Further, he has expressed his deep regret over the communications to Mr. Bowman and Ms. Moffatt, both privately and to the Commission itself in his written responses and Answer as well as during the hearing in June of 2017. His understanding of these charges has evolved over time, as he has had an opportunity to reflect on the Canons and the perceptions of the thank you note to Mr. Bowman and voice message to Ms. Moffatt. Further, Judge Pomrenke was able to begin to find a new perspective on his conduct once the criminal trial and sentencing were over and he had delivered his wife to federal prison to serve her sentence. As a result, with a new ability to understand his actions that developed once he was no longer immersed in and consumed by his wife and family's tragedy, he was finally able to see how he had fallen into a loss of vision and clarity regarding his conduct.

Judge Pomrenke has never denied making those communications and has instead made every effort to cooperate with the Commission and provide it with information, both before and after the filing of a formal

charge. In fact, judges in the Commonwealth are encouraged to participate in inquiries from the Commission and to be responsive, in order to ensure the integrity of the process.

Judge Pomrenke has admitted that his actions were not appropriate and that he would not take such actions in the future. Unusually in this case, however, none of the allegations made by the Commission relate to his judgeship, *i.e.*, his work on the bench. Judge Pomrenke recognizes that even his personal actions outside the courtroom must comport with the Canons. Nevertheless, given the unique and subjective environment in which both of these two actions took place, in the Court's consideration of this case and any sanction, these actions do not warrant his removal from office.

A. The Bowman Note

Judge Pomrenke's actions in sending the subject personal, handwritten note of thanks to Mr. Bowman in November 2015 were solely of a personal nature and done in an attempt to express his thanks as a husband to Mr. Bowman, his wife's colleague, who he sincerely believed had been supportive of and professional in his working relationship with Mrs. Pomrenke during the federal investigation.

The note was on Judge Pomrenke's personal stationary, used his personal postage, and was signed "KURT POMRENKE." The subject matter of the note was not related to Judge Pomrenke's work in the courtroom or to any case before him. In fact, Judge Pomrenke did not expect that Mr. Bowman would be a testifying witness at his wife's trial, as Mr. Bowman had not been working at BVU during the period of time the government alleged criminal activities had taken place.

Furthermore, it was not until January 2016 that Judge Pomrenke learned that Mr. Bowman had been subpoenaed by the government, and it was not until February 5, 2016 that Mr. Bowman was listed as a witness on lists filed by the government. Mr. Bowman did not in fact testify at Mrs. Pomrenke's trial. During the hearing before the Commission, Mr. Bowman indicated that, if he had been called at the trial, he believed it would have been only as a custodian of records for BVU. JA 161.

The note to Mr. Bowman is personal by subject but was not sent for personal or family gain. Instead, the purpose of the note was to express gratitude that Mrs. Pomrenke had been allowed to keep her job and continue working, which had allowed Mrs. Pomrenke and her family to survive financially while paying legal fees and expenses associated with her prosecution. Thus, the note was sent to express the judge's

appreciation and gratitude for what he believed at the time was this support of Mrs. Pomrenke by Mr. Bowman.

Judge Pomrenke has acknowledged, including to the Commission, that at the time of this action he was personally consumed with the hardship of his wife's prosecution and his commitment to help her. Over the time of the Commission's investigation, he came to realize that the additional content of the thank you card as it relates to his statements in support of his wife's innocence, her character, and the characterization of the government's actions were capable of being misconstrued. Nevertheless, in this unique context, Judge Pomrenke wrote this thank you note to someone he sincerely believed was being supportive and kind to his wife during an exceptionally difficult time. In his testimony before the Commission, attorney Ed Stout spoke to Judge Pomrenke's excellent character and performance on the bench and also stated that, during this period of time, the judge spoke to Mr. Stout of his appreciation of Mr. Bowman's support for Mrs. Pomrenke and for allowing her to continue working at BVU at that time. JA 210.

B. The Moffatt Voicemail

In the case of the voice message for Ms. Moffatt, Judge Pomrenke also made clear that the message was personal from himself as "Kurt" to

his friend “Connie.” The message included no threats of reprisal or coercion or any reference to his judicial status. Instead, the statements in the message were directed to his and particularly his wife’s close friend of many years, asking her to provide information that he knew was truthful regarding Mrs. Pomrenke, indeed that Ms. Moffatt testified at Mrs. Pomrenke’s contempt hearing that she also believed was truthful. Ms. Moffatt was never listed as a witness for the government, was not subpoenaed at any time, and did not testify at trial. Again, Judge Pomrenke’s personal message to Ms. Moffatt was not related to his work as a judge or related to any case that was or could be pending before him. Rather, the message was the result of Judge Pomrenke’s extreme distress as a husband as well as his consuming devotion to his wife as he watched her going through a federal criminal prosecution.

C. The circumstances mitigate against removing Judge Pomrenke.

The administration of justice in the Commonwealth in general, and in the 28th District in particular, will not be served by removing Judge Pomrenke from the bench.

This is a serious case. Yet, the Judge is a man of excellent record as a practicing lawyer whose performance in his still-short time on the bench, and against all odds, remained exemplary.

Further, though the acts are serious, the underlying nature of the circumstances from which those acts arose is rooted in a human reaction to family crisis and a lapse of consciousness and judgment in two instances.

Finally, and remarkably, the Judge himself explained the clearing of his perspective and proved his responsibility, remorse, and growth by making his own statements against interest to the Commission, effectively surrendering his defenses to the charges against him. Still, the circumstances of this unique context call for censure as sanction, not removal.

Both actions complained of here were taken in Judge Pomrenke's personal, not official capacity, during the unique, all-consuming environment of his wife's federal prosecution and respectfully warrant censure by this Court, rather than removal. This Court removed a judge who had taken several actions denigrating the litigants in a custody case and subjecting the justice system to ridicule, all in his official capacity, in *Judicial Inquiry & Review Comm'n v. Shull*, 274 Va. 657 (2007). In *Shull*, the judge had ordered the wife in a custody hearing to remove her pants on two occasions so he could personally observe an injury on her thigh, knowing she had a history of mental illness and self-mutilation, made an ex parte telephone call to a hospital to personally investigate the wife's

allegations, and directed a coin toss in another case to decide a custody issue. The Court found these several actions taken on the bench in two separate cases were grave and substantial. The Court also noted that the judge had been the subject of a prior charge in 2004 where he had admitted making denigrating comments to the litigants.

The judge in *Shull* was removed based upon the prior instance of misconduct, the nature and frequency of the misconduct alleged, and the fact that the misconduct was taken in his official capacity while on the bench. In *Shull*, this Court also noted that a judge had been removed on only one prior occasion, in 1977, for misappropriating confiscated items, including firearms and alcohol, and consuming confiscated beer with others in the judge's office.

In contrast, Judge Pomrenke took two actions which are the subject of the Complaint. Judge Pomrenke has clearly acknowledged his responsibility off the bench, but unlike in these other cases, the evidence of his performance on the bench is excellent. Nor has Judge Pomrenke before been the subject of a complaint of judicial misconduct. Further, Judge Pomrenke has been forthcoming, both to the Commission and this Court, regarding his conduct and has taken responsibility for the

consequences of his actions, including at the hearing before the Commission.

Censure is an appropriate remedy under Article VI, § 10 of the Virginia Constitution and is the appropriate remedy here. This Court has imposed this sanction in cases involving judge's actions taken in their official capacities. For example, in *Judicial Inquiry & Review Comm'n v. Taylor*, 278 Va. 699, 685 S.E.2d 51 (2009), this Court censured a judge for her actions in a bond proceeding where her conduct in finding her order denying bond to a juvenile by noting the order was interlocutory and non-appealable and similarly responding to the clerk's question regarding the order, affirmatively blocked the juvenile's appeal of the denial of his request for bond. The judge's conduct in *Taylor* actually resulted in the juvenile being held in jail without remedy for 9 days before he was released only after a writ of mandamus was granted.

Likewise, in *Judicial Inquriy & Review Comm'n v. Lewis*, 264 Va. 401, 568 S.E.2d 687 (2002), this Court censured a judge who had deliberately, and with knowledge of a stay of his order requiring a father to surrender custody of his children to the mother, attempted to enforce his prior order by providing for a purge of the contempt in his order. Thus, the judge's order, entered in his official capacity while on the bench, was directly

contrary to and in disregard of the circuit court's stay order, of which he had a certified copy, resulting in the father being taken into custody on a charge of contempt until the circuit court dismissed the show cause summons later that day. Unlike these cases, Judge Pomrenke's two actions were deeply intertwined with his wife's and family's crisis and isolated.

In the instant case, by contrast to those noted above, Judge Pomrenke's personal actions were taken outside the courtroom and off the bench, although in the context of supporting his wife and family during her federal prosecution. In *Judicial Inquiry & Review Com'n v. Jordan*, Record No. 730725, cited by the Commission at p. 38 of its Brief, this Court considered the conduct of a judge who had engaged in inappropriate conduct in advocating for family members in several different cases. Specifically, the judge "represented his son on traffic offenses and, in another instance, threatened to sue a defendant who had been in a vehicle accident involving the judge's son-in-law, followed by sitting with the prosecutor and assisting him in that defendant's criminal trial." Comm'n Brief at p. 38. After considering the judge's actions in personally advocating for family members and making threats against another individual who had been involved in an accident with another family member, this Court censured the judge.

This Court has noted the importance of "public confidence in the judiciary and the administration of our legal system" in the context of a case of judicial misconduct. *Taylor*, *supra*, 278 Va. at 725. Other jurisdictions have also discussed the purposes of judicial sanctions, including to protect the public, to restore and maintain the integrity of the judicial system, and to deter similar conduct by the subject judge or other judges in the future. *See Inquiry in the Conduct of Murphy*, 737 N.W.2d 355, 360 (Minn. 2007) ("When this court imposes judicial sanctions, the purpose of the discipline is not to punish but to protect the public by insuring the integrity of the judicial system"); *In re Krull*, 860 N.W.2d 38, 46 (Iowa 2015) (holding that "[t]he focus of sanctions in judicial disciplinary proceedings is not to punish the individual judge, but to restore and maintain the dignity, honor, and impartiality of the judicial office and to protect the public" and to "deter other judges from engaging in unethical conduct") (internal citations omitted); *Wis. Judicial Comm'n v. Ziegler (In re Ziegler)*, 309 Wis. 2d 253, 275-76, 750 N.W.2d 710, 721 (Wis. 2008) (noting that "the purpose of judicial discipline, like the purpose of the Code of Judicial Conduct, is to protect our court system and the public from misconduct. Discipline is designed to restore and maintain the dignity, honor, and impartiality of the judicial office"). Thus, the purpose of judicial discipline is not focused upon

punishment of the individual judge. *Ziegler*, 309 Wis. 2d at 275; *Krull*, 860 N.W.2d at 46. Discipline is also proportional, *i.e.*, commensurate with the particular conduct involved. *Ziegler*, 309 Wis. 2d at 722-23.

Although Virginia has not set forth specific points to guide a decision with regard to the appropriate sanction in an individual case, courts in other jurisdictions have set forth several factors to consider, which may prove helpful: (1) whether the misconduct is isolated or a pattern of misconduct; (2) the nature, extent and frequency of occurrence of the acts of misconduct; (3) whether the misconduct occurred in or out of the courtroom; (4) whether the misconduct occurred in the judge's official capacity or in his private life; (5) whether the judge has acknowledged or recognized that the acts occurred; (6) whether the judge has made an effort to change or modify his conduct; (7) the length of service on the bench; (8) the extent to which the judge exploited his position to satisfy personal interests; (9) whether any prior complaints have been filed against the judge; and (10) the effect of the misconduct upon the integrity and respect for the judiciary. *Ziegler*, *supra*, 309 Wis. 2d at 279-80; *Krull*, *supra*, 860 N.W.2d at 46.

An application of the foregoing factors to the two actions at the heart of the instant case, in light of the purposes of sanctions for judicial

misconduct, would warrant a finding of censure, rather than removal. Judge Pomrenke's two actions were isolated in the context of his family's extremity, and both occurred outside of the courtroom in the context of his private, family life. Judge Pomrenke had not been the subject of any prior complaints regarding his judicial conduct, and he has since admitted both the actions themselves as well as the inappropriate nature of those actions in the context of the Judicial Canons. He has also specifically stated that he would not take such actions again. Judge Pomrenke's actions were taken in the context of his efforts to support his wife through the federal prosecution; however, both actions were taken personally, rather than as a judge. The imposition of censure in this case would serve the purpose of restoring the integrity and respect for the judiciary, a respect which Judge Pomrenke shares.

The circumstances are ended – they were unique. The Judge made mistakes, which will not be repeated.

Throughout all of this Commission process, not one complaint has arisen concerning the Judge's ability to judge or his commitment to the children, families and litigants who come before him every day.

Attorneys who do not know the Judge personally, but who appeared before him regularly throughout this time frame, wrote letters of support to

the Commission speaking to his judicial temperament, to his courtroom demeanor, to his empathy, and to his ability in the midst of the whirlwind in which he has lived for the last two-plus years, to never forget that the best interests of the children and families who come before him are and must remain paramount. JA 112, 113. Thus, these charges stand in isolation against the uncontroverted evidence of the Judge's conscientiousness and commitment.

Judge Pomrenke made mistakes. This he has acknowledged, and he has vowed not to repeat them.

When this all started for him, Judge Pomrenke had only been a judge for about two years. He was unexpectedly faced with the crisis of his life, by which he was completely consumed, and with next to no experience to create and guide him through that crisis as to his judicial responsibilities off the bench.

He has a better understanding now, including that he now has a deep awareness that he must avoid all impropriety and all appearance of impropriety, and must expect to be the subject of constant public scrutiny; that even in a crisis, he must accept restrictions on his conduct freely and willingly (Canon 2A, Commentary).

The charged actions stand in isolation. He has vowed that they will not be repeated. The lessons of this experience will enable him to keep that vow and to continue to serve, as he is committed to doing, the children of the 28th District.

The Judge's early arguments to the Commission were based on truly mitigating circumstances, but the responsibility that Judge Pomrenke has shown effectively brings him defenseless before the Court.

While the Commission has described his testimony before it at the hearing in June of 2017 as a "convenient about-face," this is a mischaracterization of Judge Pomrenke's testimony that is not supported by the record before this Court. It simply required time and reflection for Judge Pomrenke to understand the seriousness of his actions. As he described to the Commission, Judge Pomrenke's understanding underwent an evolution as he went through the proceedings before the Commission, including from the time he first learned of the complaint, to the formal hearing over a year later. JA 266. He has taken responsibility for his actions at great personal cost and risk.

As these matters became public, associated with Mrs. Pomrenke's federal case, and as part of the judge's consideration of any potential effect on his or those coming before him, he voluntarily removed himself from

hearing any criminal cases and did not re-take the criminal bench for approximately two months following Mrs. Pomrenke's sentencing. JA 248-51. To offset the additional case load on others, Judge Pomrenke picked up civil cases from other judges instead. *Id.*

Judge Pomrenke spoke directly to the Commission of the all-consuming nature of his fears and concerns for his wife and family while she underwent this federal prosecution. He also stated that, following the close of Mrs. Pomrenke's case and more so during the passing of time and the experience of the Commission's investigation and hearing, that he came to see how his thank you card and voice message could have been interpreted by others, an awareness that he did not have at the time he sent the note and left the message.

Judge Pomrenke spoke from the heart when he testified to the Commission that, notwithstanding that he continued to properly carry out the duties of his work and his own court, he had lost perspective when it came to the vulnerability of his wife and family during the prosecution of his wife in federal court. In response to the Commission's questions, and looking back, the judge advised the Commission he now felt his actions were violative of the Canons, never intentionally, but from a lack of awareness at the time of how these two actions could be viewed by the

recipients and given the procedural status of the underlying case. Judge Pomrenke has spent a considerable amount of time seeking to better understand his actions during that time, including questioning his own conduct and reflecting upon the Canons, resulting in a clarity in retrospect. It was this awareness that developed over time and about which Judge Pomrenke spoke to the Commission.

Judge Pomrenke also stated to the Commission that he recognized his position as a judge did not stop when he left the bench and that such position must take precedence over his personal circumstances, which had clouded his view, regardless that such circumstances had become overwhelming and involved those closest to him, his wife and family.

Nevertheless, both prior to and during this difficult time, the evidence of Judge Pomrenke's commitment to his work, his performance as a judge, his excellent demeanor on the bench, and his compassion for those who came before him is uncontradicted. The two actions which are the subject of the Complaint are not part of a pattern or practice of misconduct on the part of Judge Pomrenke, who has never before been subject to any proceeding before the Commission, but were isolated occurrences in the unique context of his wife's federal prosecution. As Judge Pomrenke has acknowledged, the issue with these communications was how they could

be perceived by others, though he also testified that he acted without malicious intent in both cases. Respectfully, Judge Pomrenke's removal is not warranted.

CONCLUSION

For all of the reasons stated above, as well as based upon additional evidence and argument that may be presented at the open hearing before this Court, Judge Pomrenke requests consideration of the sanction of censure.

Respectfully submitted,

HON. KURT J. POMRENKE

By: _____
Of Counsel

John E. Lichtenstein, Esq.
Gregory L. Lyons, Esq.
Carrol M. Ching, Esq.
Lichtenstein Law Group PLC
John.Lichtenstein@lichtensteinlawgroup.com
Greg.Lyons@lichtensteinlawgroup.com
Carrol.Ching@lichtensteinlawgroup.com
101 S. Jefferson St., Suite 400
Roanoke, Virginia 24011
(540) 343-9711 (telephone)
(540) 343-9713 (facsimile)

Counsel for the Hon. Kurt J. Pomrenke

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with this Court's Order of July 11, 2017, and Rules 5:26 and 5:28, and further certifies as follows:

1. The Respondent is the Honorable Kurt J. Pomrenke, Juvenile and Domestic Relations District Judge of the 28th District.

2. Counsel for Judge Pomrenke is:

   John E. Lichtenstein (VSB No. 27048)
   Gregory L. Lyons (VSB No. 24037)
   Carrol M. Ching (VSB No. 68031)
   Lichtenstein Law Group, PLC
   101 S. Jefferson St., Suite 400
   Roanoke, Virginia 24011
   (540) 343-9711 (telephone)
   (540) 343-9713 (facsimile)
   John.Lichtenstein@lichtensteinlawgroup.com
   Greg.Lyons@lichtensteinlawgroup.com
   Carrol.Ching@lichtensteinlawgroup.com

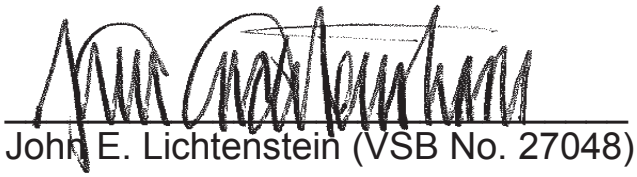
3. Counsel for the Petitioner is:

   Katherine B. Burnett (VSB No. 25023)
   Counsel
   Judicial Inquiry and Review Commission
   100 North 9th Street, Suite 661
   Richmond, Virginia 23219
   (804) 786-6636 (telephone)
   (804) 371-0650 (facsimile)
   kburnett@courts.state.va.us

4. On this 29th day of September, 2017:

   a. The undersigned caused three copies of the foregoing to be hand-delivered to the Clerk's Office of the Supreme Court of Virginia within the time allowed by the Court's VACES Guidelines; and,

b. The undersigned caused an electronic copy of the foregoing to be filed with the Clerk of this Court as required by the Court's VACES Guidelines and also to be served electronically on Counsel for the Commission.



John E. Lichtenstein (VSB No. 27048)