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IN THE

Supreme Court of Virginia

RECORD NO. 170889

JUDICIAL INQUIRY AND REVIEW
COMMISSION OF VIRGINIA,

Petitioner,

v.

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

Respondent.

BRIEF OF THE COMMISSION

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STATEMENT OF THE CASE

I. Material Proceedings

By letter dated October 12, 2016, sent to Judge Kurt J. Pomrenke's attorney, the Commission invited, but expressly did not require, the Judge to provide a written response to multiple complaints that the Judge inappropriately had contacted potential witnesses in his wife's trial on corruption charges in federal court. (JA 3-12).[1] On December 2, 2016, the Judge's attorney filed a written response. (JA 13-26).

On January 17, 2017, the Commission issued a formal Notice of charges of violations of the Canons of Judicial Conduct. (JA 27-83). The Judge, through his attorney, filed an Answer to the charges that the Commission received on February 8, 2017. (JA 88-96). The Commission conducted a formal evidentiary hearing on the charges on June 13, 2017. (JA 117-290).

At the conclusion of the hearing, the Commission determined the charges to be well-founded, and entered an order to that effect on June 15, 2017. (JA 115-16). The Commission found that the Judge had violated Canons 1, 2A, and 2B. (*Id.*). The Commission directed its Counsel to file a Complaint in this Court without recommendation as to sanction. (*Id.*).

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[1] References to the Joint Appendix are denoted herein as "(JA __)."

The Commission filed its Complaint in this Court on July 10, 2017. (JA 116C). The Court entered a scheduling Order on July 11, 2017. (JA 116H). The Judge filed his Answer on August 1, 2017. (JA 116K).

II. Statement of Facts

Judge Pomrenke was sworn in as a Judge of the Juvenile and Domestic Relations District Court of Virginia's twenty-eighth judicial district on July 1, 2013. (JA 116M). Before becoming a judge, he practiced law in the Bristol, Virginia area. He had served on the board of the Bristol Virginia Utilities Authority (BVU) for five years from 2005 to 2010 where he met his future wife who was, at that time, the Chief Financial Officer (CFO) of BVU. (JA 232).

The backdrop to Judge Pomrenke's misconduct began in 2013, when local and federal authorities began investigating BVU for alleged corrupt practices and tax fraud. (JA 190, 320). Then, from March of 2015 through April of 2016, nine BVU employees, contractors, and officials pleaded guilty in federal court and were sentenced to prison for extortion, kick-back schemes, corrupt practices, and tax fraud. Judge Pomrenke's wife, Stacey Pomrenke, was indicted in October of 2015, tried and found guilty in February of 2016, and sentenced to prison in August of 2016, on fourteen charged crimes of extortion, conspiracy to commit tax fraud, making false

statements, federal program theft, conspiracy to commit wire fraud and wire fraud. *See* "Bristol Virginia Utilities Shows Culture of Corruption, Entitlement and Greed," *Daily Progress* (May 10, 2016) (http://www.dailyprogress.com/news/state/bristol-virginia-utilities-shows-culture-of-corruption-entitlement-and-greed/article_4090e45a-16d8-11e6-8a3e-f317dbb8a4cb.html) (site last visited 8-25-17). Judge Pomrenke was aware of these convictions and the widespread media coverage of them. (JA 257, 260).

In 2014, Wes Rosenbalm, the BVU Chief Executive Officer (CEO), resigned (and subsequently was convicted and sentenced on fraud and corruption charges). (JA 145). The BVU Board hired Donald Bowman on November 3, 2014, as its new CEO and President, and directed him to be the point man to clean up the corruption and scandal as quickly as possible. (JA 134, 137, 190-91). Bowman was a military veteran, an engineer, and a lawyer who was licensed in Virginia and who had practiced intellectual property law. (JA 134, 149, 177-78, 190-91).

One of the many actions Bowman took as the new CEO was to suspend Dave Copeland in February of 2015. (JA 145, 201). Copeland was an "at will" employee who improperly failed to report to BVU that he had received a target letter from the federal authorities informing him he

was under investigation for corruption. (JA 186, 201-02). Bowman took this action against the advice of then-BVU counsel, Walt Bressler.[2] (JA 186). Everyone at BVU knew about the Copeland suspension and subsequent conviction. (JA 202).

Media coverage of these events was widespread. (JA 139-40, 145). Bowman held a press conference and freely gave interviews to the media. (JA 140-41). He explained to the media his mandate to be transparent and fully cooperative with the federal law enforcement authorities. (*Id.*). He sent emails to BVU employees to keep them updated on the federal investigation. (JA 191). The BVU corruption scandal was the equivalent of a "Watergate" story in the area of Southwest Virginia served by BVU. (JA 188).

Shortly after starting as CEO on November 3, 2014, Bowman met Judge Pomrenke for the first time when the Judge came by Bowman's office while visiting Mrs. Pomrenke. (JA 143-44). Judge Pomrenke also sent Bowman a "welcome note," and enclosed the Judge's judicial business card upon which the Judge had written his cell phone number and personal email address. (JA 144-45, 292, 345).

---

[2] Copeland resigned after being suspended and then was convicted and sentenced to prison. (JA 186, 201-02). Bressler retired and then was disbarred and sentenced to prison. (JA 201-02).

Bowman did not retain that note but kept the Judge's judicial card in his desk drawer. (JA 345). Judge Pomrenke told the Commission he did not remember sending his judicial card with that note but acknowledged it was his, with his handwriting, and it was his regular and frequent practice to send his judicial cards with personal notes. (JA 116M, 237). The Judge testified that he had used an entire box of judicial cards, and had ordered a second, before deciding it was improper to use them for personal matters. (JA 237).

Bowman came into contact with Judge Pomrenke on only a couple of occasions and did not socialize with him or Mrs. Pomrenke. (JA 142-43, 163). In fact, Bowman intentionally kept his relationships with all BVU employees "guarded" and at "arms' length," as he believed he might have to fire any one of them, and specifically Mrs. Pomrenke, in relation to the ongoing federal corruption investigation. (JA 192).

In March of 2014, before Bowman came to BVU, the federal authorities had served "a big stack of subpoenas" on BVU. (JA 190). In February of 2015, after Bowman was hired, Bowman received approximately thirty subpoenas from federal investigators, asking for BVU records. (JA 136-37). In order to expedite the production of materials, Bowman provided the federal investigators with several offices in BVU

headquarters from which they could obtain all the documents and information they needed, and without the necessity of subpoenas. (JA 180-81). The federal investigators were physically located in offices flanking Mrs. Pomrenke's office. (JA 138-39, 180-81, 263).

Everyone in the BVU offices knew the investigators were present and working with Bowman, and Judge Pomrenke knew this as well. (JA 181, 263). It was generally known inside and outside the company that Bowman was very close to the investigation and a necessary component to the investigation. (JA 191). As CFO, Mrs. Pomrenke worked closely with Bowman in answering the subpoenas, a fact known to her husband. (JA 253-54, 263). She did not interact with the federal investigators directly, as part of her own legal strategy. (JA 178).

In June, 2015, Bowman testified as a witness for the government on the subject of restitution during a BVU ex-employee's (Michael Clark) sentencing. (JA 145-47). That event was reported in the press and generally known, although Judge Pomrenke denied to the Commission that he knew Bowman had testified. (JA 260-61).

Mrs. Pomrenke's lawyer received a target letter from the federal authorities dated July 2, 2015, notifying Mrs. Pomrenke that she was under investigation for corrupt practices and tax fraud and that charges would be

instituted "in the near future." (JA 293-94). Mrs. Pomrenke's lawyers met with the federal prosecutors to review her case. (JA 191-92, 234). Judge Pomrenke was aware of these events. (JA 116N, 234).

During the summer and fall of 2015, Bowman repeatedly asked Mrs. Pomrenke whether she had received a target letter because of his experience with Copeland improperly withholding that information. (JA 150, 187). Mrs. Pomrenke consistently (and falsely) denied she had received a target letter when asked by Bowman. (*Id*.). Neither she nor her husband ever disclosed the target letter to Bowman or gave any indication she was being investigated. (JA 157, 186-87, 191-92). Bowman did not learn of the target letter until Mrs. Pomrenke was tried in federal court. (JA 187).

By letter dated August 21, 2015, Mrs. Pomrenke's lawyers advised the BVU Board that her employment contract forbade the Board from firing her. (JA 295-97). It advised that only the President of BVU could fire her and only under certain circumstances. (*Id*.). The Board's counsel provided Bowman with a copy of the August 21 letter. (JA 171). Judge Pomrenke knew about the August 21, 2015, letter at the time it was sent to the BVU Board. (JA 116N, 257-58). He was aware that Bowman, as President, was the only person who could fire his wife. (JA 258).

On October 26, 2015, Mrs. Pomrenke was indicted on multiple counts of corruption and tax fraud. (JA 116N). She was arrested and brought before United States Magistrate Judge Pamela M. Sargent for a bond hearing. (JA 404-19). As a standard condition of bond, Magistrate Judge Sargent ordered Mrs. Pomrenke, verbally and by written order, not to contact potential witnesses without the presence of her lawyers. (JA 413, 421). Judge Pomrenke attended the October 27, 2015, hearing and heard and understood the order to his wife. (JA 263-64).

Bowman consulted with the BVU Board's counsel and was advised he could not fire Mrs. Pomrenke before conviction without causing substantial financial exposure to the authority. (JA 151). Under the terms of her contract, termination before conviction could result in payment to her of $ 2.5 million. (JA 172). Bowman did not want to risk BVU incurring such a large debt. (JA 182).

When Mrs. Pomrenke returned to work a couple of days after her release on bond, Bowman met with her. (JA 152-53). Bowman informed her that she could take a paid leave of absence or she could continue to work. (JA 175). She chose to continue working. (*Id*.). Mrs. Pomrenke's presence at BVU until her trial was "awkward," was not "normal," but Bowman "made the best of it." (JA 153, 157, 168).

On November 18, 2015, Judge Pomrenke sent a handwritten note to Bowman at his BVU office. (JA 298-300). The note included the Judge's judicial business card. (*Id*.). The note read as follows:

> Hi Don:
>
> I just wanted to sincerely thank you for your kindness and understanding and support for Stacey during these horrible times. By now I am sure you would agree she is absolutely honest, truthful, ethical, and innocent! It is horrible what our government is doing to her. She will be proven innocent. Thank you for believing in her.
> KURT POMRENKE

(*Id*., underscore and exclamation point in original). Bowman was "shocked" by the note with judicial card attached, and found it "disturbing." (JA 148-49, 177). He believed that receiving the note at work with the judicial card attached, with the trial only a couple of months away, and from an employee's spouse, was shocking. (*Id*.). He believed the contents of the note were disturbing as follows:

> I didn't think she was honest, I didn't think she was particularly hard-working like – and I didn't think that she would be found innocent. I, in fact, felt like she would most likely be guilty, in fact, I talked to her that she might want to really talk to the feds and try to get the best deal. It was really hard to reconcile a lot of the tax issues that they were looking at.
>
> Then, as a military veteran who served almost 21 years, and 5 on active duty and 15 reserves, I think I was most offended by the statement it is horrible what our government is doing for them. My parents are veterans, I am a veteran, my sister is in law enforcement with the IRS -- ….Just that tone of horrible government.

(JA 177-78).

Bowman testified he had given no one reason to believe he thought Mrs. Pomrenke was "absolutely honest, truthful, ethical, and innocent." (JA 152). He testified he had given no one reason to believe he had been emotionally supportive or understanding of Mrs. Pomrenke other than being courteous to her. (JA 150, 152-53). As a lawyer, Bowman believed it was inappropriate for a judge to communicate with him because he was a potential witness in Mrs. Pomrenke's then-imminent trial. (JA 346). He was so disturbed by receiving the note that he immediately drove to Abingdon to deliver it personally to the federal prosecutor. (JA 149-50).

Bowman testified that the Judge had no direct power over him, but had "influence" over him by virtue of the Judge's past association with the BVU board and its prior counsel, and generally having "very powerful political influences" in a small community with few people. (JA 184-85). Bowman testified that he "certainly wouldn't want to make Judge Pomrenke mad at me." (JA 185). Bowman viewed the note as an attempt to influence his behavior as CEO and as a potential witness. (JA 148-49).

Mrs. Pomrenke's trial originally was scheduled to begin in January, 2016, but was continued to Tuesday, February 16, 2016.[3] Judge Pomrenke left a voicemail message on Connie Moffatt's business cell phone on Saturday, February 13, 2016. (JA 116-O). Moffatt was a BVU employee and friend of Mrs. Pomrenke. Judge Pomrenke admitted leaving the following message:

> Hey Connie, this is Kurt, um, when you're testifying in that trial there might be a couple of things that you could do that would really help Stacey. If you could kinda slip in when you have a chance just little remarks like, how Stacey did a great job, or Stacey was the one that took care of the employees, or Stacey is just an honest ... just any, any kind of little comments you can make to support her or, Stacey was the one that always looked out for the employees, or, just just something like that even though it's not directly in response to the questions, if you could figure out a way to, to do that I really think that would help and make a huge difference. I'm sorry you're caught up in this, but we feel real good about the outcome and sure appreciate your help. Thank you, bye.

(JA 301).[4] Moffatt was not called to testify at Mrs. Pomrenke's corruption trial, but she knew that she, and possibly all, BVU employees might be

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[3] In early January, the Judge and his wife received discovery showing that Bowman was to be subpoenaed for her trial. (JA 116M-N). Bowman was on a witness list received by the Judge and his wife in early February. (*Id*.). However, Bowman was not called as a witness in her corruption trial. (JA 161).

[4] A copy of the audio recording of the message is on a compact disc, filed in this Court as part of the record of Commission exhibits, identified as Commission Exhibit 5.

called as witnesses in the ongoing prosecutions. (JA 362-63). Moffatt saved the recording and provided it to the federal prosecutor because she believed it asked her to do something wrong and might get her into trouble. (JA 360-62).[5]

United States District Judge James P. Jones presided over Mrs. Pomrenke's jury trial on corruption charges. On the third day of trial, the federal prosecutor filed a motion to revoke Mrs. Pomrenke's bond, based in part on the note Judge Pomrenke had sent to Bowman on November 18. (JA 302-08). The motion alleged that Judge Pomrenke's note, with the inclusion of his judicial card, had no purpose other than to attempt to chill Bowman's cooperation with the government and influence any potential testimony he might provide against the defendant, Mrs. Pomrenke. (JA 303-04).[6]

Judge Pomrenke knew about the motion to revoke bond and its contents. (JA 319-20). The motion and the Judge's note to Bowman were reported widely in the media. *See, e.g.*, "Prosecutors Ask Judge To Revoke Stacey Pomrenke's Bond; Use 'Thank You' Card, Email To Make

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[5] In Mrs. Pomrenke's later contempt trial in federal court, Moffett testified that it would have been wrong for her to "insert anything" into her questioning at the trial as the Judge had requested. (JA 362).

[6] District Judge Jones held a hearing on the motion, but then continued the matter. (JA 309-16).

Case," http://wjhl.com/2016/02/18/prosecutors-ask-judge-to-revoke-stacey-pomrenkes-bond-use-thank-you-card-and-email-to-make-case/ (Feb. 18, 2016) (last visited 8/24/17).

On February 26, 2016, the jury found Mrs. Pomrenke guilty of fourteen of fifteen charges of corruption and fraud. On February 29, 2016, District Judge Jones ordered the filing of criminal contempt charges against Mrs. Pomrenke based on the facts alleged in the motion to revoke bond. (JA 317-18).[7]

In March, 2016, after the media had published the contents of the Judge's note to Bowman and the prosecutor's arguments about Judge Pomrenke attempting to influence a witness, Judge Pomrenke telephoned Commission counsel. In an unsolicited letter to Commission counsel dated March 16, 2016, the Judge explained, in his view, that he had done nothing wrong or unethical. (JA 319-21).

On June 21, 2016, Magistrate Judge Sargent entered a Memorandum Order concerning Mrs. Pomrenke's motion to quash a search warrant issued in her forthcoming criminal contempt prosecution. (JA 322). In that Order, the Magistrate Judge described a June 7, 2016, hearing over which she had presided, in which the federal prosecutor had

[7] The trial on Mrs. Pomrenke's criminal contempt case was conducted in August, 2016. (JA 335).

provided evidence of both the note to Bowman and the voice message to Moffatt. (JA 329). In her Memorandum Order, the Magistrate Judge found, in part, as follows:

> At the June 7 hearing, the Government admitted that it was investigating both Mrs. and Mr. Pomrenke for witness tampering. In issuing the Search Warrant, the court found that the Government had shown probable cause that Mrs. Pomrenke had violated 18 U.S.C. §§ 401 and 1512. I find that the evidence provided with the Government's response to the Motion, if contained in a sworn pleading, would establish probable cause that Mr. Pomrenke, too, had engaged in witness tampering and/or obstruction of justice.

(JA 329). On July 11, 2016, the federal prosecutor formally supplemented the charges of criminal contempt with the evidence of Judge Pomrenke's voicemail message to Moffatt. (JA 331-32).

On August 9, 2016, District Judge Jones presided over the criminal contempt trial, wherein Bowman and Moffatt testified. (JA 335). District Judge Jones found Mrs. Pomrenke guilty of contempt, but on grounds other than Judge Pomrenke's communications with potential witnesses. Specifically, he found the government had failed to show beyond a reasonable doubt that Mrs. Pomrenke knew about her husband's communications with the potential witnesses:

> I do not believe that the card sent to Mr. Bowman or the voice mail left with Ms. Moffatt are adequate evidence of the defendant's guilt of contempt. There could be a supposition that Mr. Pomrenke sent those messages with the knowledge

> and consent of the defendant, but I do not believe that that has been shown beyond a reasonable doubt.
>
> Whether or not it was proper for Mr. Pomrenke to so contact those witnesses is another question, and I do not resolve that at this time. It is not before me and, because I, again, believe that there has not been a connection sufficient to Mrs. Pomrenke, the defendant, in this contempt proceeding.

(JA 378-79).

Only after Mrs. Pomrenke's trial and sentencing had concluded did the Commission contact Judge Pomrenke about complaints it had received regarding the Bowman and Moffatt communications. It directed counsel to send the Judge a letter about the complaints, inviting him to respond in writing. Commission counsel sent that letter to the Judge's attorney on October 12, 2016. (JA 3-12). Judge Pomrenke responded through his counsel in a letter dated December 2, 2016, insisting the Judge had done nothing wrong or unethical. (JA 13-26). The Commission formally charged Judge Pomrenke on January 17, 2017. In his February 8, 2017, Answer to the charges, filed by his counsel, the Judge again insisted he had violated no ethical rule. (JA 87-96).

In his Answer filed in this Court on August 1, 2017, the Judge appears to accuse the Commission of improper conduct. In footnote 1, he asserts he was "repeatedly responsive" to the Commission regarding its "investigation" of "the complaint," and *before* he had retained counsel. (JA

116L). The footnote gives the misleading impression the Commission was soliciting information from the Judge to use against him. Any such assertion is erroneous. The Judge admitted under oath in the June 13, 2017, Commission hearing that it was he, not Commission counsel, who initiated communications. (JA 266-67).

Neither the Commission nor its Counsel initiated *any communication* with the Judge before the October 12, 2016, letter to his attorney informing him for the first time that complaints had been filed, and inviting him to voluntarily provide a written response to the allegations. Even then, the Commission expressly advised the Judge in writing that he was under no obligation to do so because the Commission had not yet decided whether to charge him. (JA 4).

The Judge initiated calls to Commission counsel in March of 2016, after the media reported his "thank you" note to Bowman and the federal prosecutor's motion to revoke bond accusing the Judge of unethical behavior. The Judge sent Commission Counsel unsolicited letters and emails in defense of his actions. (JA 19-26).[8]

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[8] At the time the Judge was calling and emailing Commission counsel defending his actions with respect to the note he sent to Bowman, his voicemail message to Moffatt had not yet been made public, was not known to Commission counsel, and was not mentioned by Judge Pomrenke. (JA 19-26).

At the hearing before the Commission on June 13, 2017, the Judge drastically reversed course on his position concerning his conduct regarding Bowman and Moffatt. He expressly admitted under oath, and for the first time, that he had violated Canons 1, 2A, and 2B, by sending the note to Bowman and leaving the voice message on Moffatt's cell phone. (JA 255).

The Judge testified that he had come to this realization only at the last moment, he was "dead wrong," and he would try to not repeat his conduct in the future. (JA 231, 251-52). The Judge, however, refused to admit that he had tried to influence any potential witness, admitting only that he could see how those potential witnesses, and "the community," might see it that way. (JA 231, 272-74). He insisted he gave no thought to the Canons or his judicial obligations while his wife was on trial, and only thought of himself as a husband, "desperately doing everything I could to try to help her," and "focused on trying to keep her out of prison." (JA 264-66). He testified that he did not understand the Canons and did not follow them. (JA 230). He testified that he was "mad" and "upset" because his wife had been indicted. (JA 273). He testified that still, to this day, he does not always think of himself as a Judge. (*Id*.).

STANDARD OF REVIEW

The Commission concluded that the charges set forth in the Notice were "well founded" and constituted violations of Canons 1, 2A, and 2B. It found the violations of sufficient gravity to constitute the basis for retirement, censure or removal. (JA 116). Pursuant to Rule 2M of the *Rules of the Judicial Inquiry and Review Commission*, "well founded" means "that the Commission has found based upon clear and convincing evidence and supported by facts and sound judgment that the misconduct has occurred."

This Court's standard of review of a Commission Complaint is well-established:

> We first state the Constitutional and statutory authority on which our consideration of these charges is based. When the Commission files a formal complaint in this Court against a judge, we are charged with the duty to conduct a hearing in open court to determine whether the judge has "engaged in misconduct while in office, or . . . has persistently failed to perform the duties of [the] office, or . . . has engaged in conduct prejudicial to the proper administration of justice." Va. Const. art. VI, § 10. We make this determination by considering the evidence and making factual determinations *de novo. Judicial Inquiry & Review Comm'n v. Peatross,* 269 Va. 428, 443, 611 S.E.2d 392, 400 (2005); *Judicial Inquiry & Review Comm'n v. Lewis,* 264 Va. 401, 405, 568 S.E.2d 687, 689 (2002).
>
> We do not accord any particular weight to the Commission's findings or to their credibility determinations. Instead, we give the Commission's findings only such weight as we consider appropriate in the individual case before us. *Peatross,* 269 Va.

> at 444, 611 S.E.2d at 400. We employ this approach because the Commission's function is limited to determining whether "the charges [are] well-founded, and sufficient to constitute the basis for retirement, censure, or removal of a judge," thereby resulting in a complaint being filed in this Court. Code § 17.1-902; *see also* Va. Const. art. VI, § 10; *Peatross,* 269 Va. at 444, 611 S.E.2d at 400.
>
> Because this type of case invokes the original jurisdiction of this Court, *see* Va. Const. art. VI, § 1, we conduct an independent review of the record created by the Commission to determine whether there is clear and convincing evidence of a violation of the Canons as charged in the Commission's complaint. *Peatross,* 269 Va. at 444, 611 S.E.2d 400; *see Lewis,* 264 Va. at 405, 568 S.E.2d at 689. If we find clear and convincing evidence in the record before us, we are required to censure the judge or to remove the judge from office. Va. Const. art. VI, § 10; *Peatross,* 269 Va. at 444, 611 S.E.2d at 400. Those are the only sanctions that we may impose. Va. Const. art. VI, § 10; *Peatross,* 269 Va. at 444, 611 S.E.2d at 400.
>
> The term "clear and convincing evidence" is defined as "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and *unequivocal." Peatross,* 269 Va. at 444, 611 S.E.2d at 400 (quoting *Middleton v. Johnston,* 221 Va. 797, 803, 273 S.E.2d 800, 803 (1981) (emphasis in original)); *see also Lewis,* 264 Va. at 405, 568 S.E.2d at 689. The Commission bears the burden of proving its charges by clear and convincing evidence. *Peatross*, 269 Va. at 444, 611 S.E.2d at 400; *Lewis,* 264 Va. at 405, 568 S.E.2d at 689.

Judicial Inquiry and Review Commission v. Shull, 274 Va. 657, 669-70, 651 S.E.2d 648, 655-56 (2007).

ARGUMENT

I. The Commission Has Established By Clear and Convincing Evidence That Judge Pomrenke Violated Canon 1.

Canon 1 of the Canons of Judicial Conduct provides as follows:

> A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.
>
> A. An independent and honorable judiciary is indispensable to justice in our society. 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. The provisions of these Canons are to be construed and applied to further that objective.

The Commentary to Canon 1 provides as follows:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of these Canons. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Canon diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

The facts are not in dispute. Judge Pomrenke intentionally and improperly contacted two potential witnesses in his wife's upcoming trial, one of whom also held the power to terminate his wife's employment at any time. Such conduct unquestionably violates Canon 1, and the Judge expressly admitted his violation at the hearing. (JA 255).

The Bowman Note

Under the guise of thanking Bowman, the Judge took the opportunity to literally "play his judge card" in an attempt to influence Bowman in any action he might take with respect to the Judge's wife. Judge Pomrenke selected Bowman as the recipient of his message because he knew Bowman, and only Bowman, had the authority to fire his wife at any time.

The evidence is inescapable that Judge Pomrenke knew Bowman was a potential witness for the government in his wife's trial. The CEO of BVU - a man responsible for all the Utilities' record-keeping and who had been working earnestly and publicly with federal law enforcement investigators to provide the BVU records that enabled the United States government's criminal prosecution of BVU employees, officers, and contractors – undeniably was a potential witness in Mrs. Pomrenke's trial for financial corruption at BVU. *See United States v Misla-Aldarondo* 478 F.3d 52, 69 (1st Cir.) (key is not whether defendant knows or does not know that someone is a "witness," but rather whether he is intending to head off the possibility of testimony in an "official proceeding."), *cert. denied*, 552 U.S. 856 (2007). At the time he sent his note and judicial card, Judge Pomrenke knew:

- his wife had received a "target letter" four months earlier;
- his wife had been indicted three weeks earlier;

- in the interim between the "target letter" and indictment, other employees of BVU had been indicted, pleaded guilty, and were being sentenced based on evidence gathered from BVU through Bowman's assistance to the government;
- Bowman was the CEO and President of BVU and alone held the authority to fire his wife;
- Bowman had been working closely with the federal investigators;
- Bowman publicly had been asserting his open cooperation with the investigation in the media;
- Bowman had been working with the Judge's wife at BVU to answer federal subpoenas on behalf of BVU; and
- Bowman had granted the investigators office space, physically flanking his wife's office at BVU.

The Judge's knowledge of these facts undermines any assertion that he was merely thanking Bowman for kindness to his wife. In 2009, this Court rejected Judge Ramona Taylor's self-serving attempt to avoid the obviously coercive intent behind her direction to a deputy clerk. *See Judicial Inquiry and Review Commission v. Taylor*, 278 Va. 699, 716-18, 685 S.E.2d 51, 62-63 (2009) (Judge Taylor asserting there could be no intent to coerce because the Judge never specifically directed a clerk to deny a litigant's right to appeal, and the Judge had no supervisory power over the clerk). This Court should reject Judge Pomrenke's same failure to acknowledge the obvious: he was using his judicial status to try to influence a person who was both a potential witness in his wife's trial and one he knew could fire his wife at any time before the trial. A Commission

member, who saw and heard the Judge testify, adroitly observed, "I think you were trying to use your status and influence the witness, and I don't think you have come clean on that yet." (JA 272).

Of course, the note the Judge sent to Bowman speaks volumes. It went far beyond a simple "thank you." It was a "transparent attempt[] to ingratiate himself" with its recipient. *See Inquiry into the Conduct of Murphy*, 737 N.W.2d 355, 361 (Minn. 2007) (finding violation of Canons for attempting to influence testimony of witness in judicial commission investigation). The words that followed the initial "thank you" sentence, coming as they did from a person who was not a social friend, who was not even a frequent acquaintance, and who made clear he was a Judge by attaching his judge card, would be received by any reasonable person as inherently coercive:

> By now I am sure you would agree she is absolutely honest, truthful, ethical, and <u>innocent</u>! It is horrible what our government is doing to her. She will be proven innocent. Thank you for believing in her.

(JA 49, underscore and exclamation point in original). Any reasonable recipient of the Judge's note would have seen it as a thinly-veiled threat or command to "agree" that his wife was "absolutely honest, truthful, ethical, and <u>innocent</u>!," that "[i]t is horrible what our government is doing to her," that "she will be proven innocent," and, further, that the reader must

"believe… in her." In fact, in the Commission hearing, the Judge agreed that these words would be seen as coercive by most people. (JA 272-73, 277).

In 2008, the Massachusetts Supreme Court commented on a judge who sent letters in official judicial envelopes to a newspaper, attempting to pressure the paper to settle a lawsuit between the judge and the paper. In one of the letters, the judge told the paper it had no chance of prevailing on appeal. The court observed:

> To a reasonable person, this content, combined with the emphasis and the language selected by the judge, could be viewed as an attempt by a judge to exert inappropriate pressure. For a sitting judge to state with repeated emphasis that he knows with complete certainty what will happen in a case is a misuse of the power and prestige of judicial office; the judge's use of an official court stationery envelope to mail the message exacerbated the misuse. Viewed as a whole, considering content and tone, the judge's two letters plainly crossed the line between permissible and inappropriate communication. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen.

In the Matter of Murphy, 897 N.E.2d 1220, 1225 (Mass. 2008) (footnote, internal quotation marks, and citation omitted). Judge Pomrenke's note and judicial card likewise "crossed the line."

Bowman's testimony before the Commission about his contemporaneous reaction to the note only reinforces and corroborates the coercive nature of the documents themselves. *See U.S. v. Wilson*, 796 F.2d 55, 57 (4th Cir. 1986) (witness tampering found where each witness justifiably reacted adversely to defendant's statements; relying on Congressional intent to " 'reach thinly-veiled threats that create justifiable apprehension' in a witness"). Bowman saw the note and card as shocking and disturbing, causing him immediately to drive to Abingdon to hand-deliver them to the prosecutor.[9]

<u>The Voicemail Message to Moffatt</u>

Certainly, the voice message to Moffatt was more naked, but not any more ethically offensive, than the note and card sent to Bowman at his place of work, and the Judge had no defense to it in the Commission hearing.[10] Judge Pomrenke unabashedly directed Moffatt to subvert any

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[9] It should make no difference whether the recipient of an attempted threat from a judge feels threatened or intimidated because the question "is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *In the Matter of Murphy*, 897 N.E.2d at 1225.

[10] The Judge strongly insisted he had done nothing improper up to the time of the hearing: in his March 16, 2016, letter to counsel (JA 319-21); in his December 2, 2016, response to the Commission's informal inquiry (JA 11-17); and in his February 8, 2017, Answer to the Notice of charges. (JA 88-95).

testimony she might give, to "kinda slip in" favorable testimony about his wife if called to testify, and even if not responsive to any question. (JA 301). The Judge's own character witness at the hearing testified that he wished the Judge had called him before making the phone call to Moffatt so that the witness could have told the Judge, "are you nuts, you don't do that, you shouldn't do that." (JA 107). And if there were any doubt about the coercive, improper nature of the Judge's message, none could exist after Moffatt, the Judge's wife's own friend and fellow employee, testified in federal court that she was so upset by the message and the fact the Judge was asking her to do something wrong, she was compelled to report it to the federal prosecutor for fear it might have caused her legal trouble. (JA 359-61).

Judge Pomrenke Violated Canon 1

District Judge Jones found the government failed to show that Mrs. Pomrenke knew her husband was contacting potential witnesses in contravention of the court's order to her not to do so. This Court, however, has more than clear and convincing evidence that Judge Pomrenke violated that order. He knew his wife had been ordered not to contact potential witnesses without the presence of her lawyers. His decision to circumvent that order by doing something his wife had been ordered not to

do, whether or not with her knowledge, and whether or not contemptible as to Judge Pomrenke, constitutes clear judicial misconduct. *See In re Dean*, 717 A.2d 176, 196 (Conn. 1998) (considering judge's failure to comply with a court order directed to the judge in his personal life, and the judge's defense that he could do so because the order was not punishable by contempt, the court held, "whether a judge's conduct compromises the integrity of the court or lessens public confidence in the judicial system cannot turn on whether contempt can lie" and "although the conduct … is private, as opposed to official or judicial conduct, it relates directly to the system of justice in which he, in his official capacity, plays a central role.").

Judge Pomrenke admitted he knew and understood the very commonly-issued condition of bond in his wife's case, was present at the hearing when the order was issued to her, and, as a judge himself, was very familiar with the condition of bond. (JA 263-64). His actions in contacting Bowman and Moffatt constituted intentional disobedience of a court order. Judge Pomrenke finally admitted he violated Canon 1 (JA 255), but stated he "wasn't thinking clearly" at the time, a defense not recognized in the Canons. (JA 264).

Under Canon 1, a Judge who violates the law undermines public confidence in the integrity and impartiality of the judiciary. *See Taylor*, 278

Va. at 721, 685 S.E.2d at 64; *see also* Commentary, Canon 1 (judges "must comply with the law"); *In the Matter of Van Susteren*, 348 N.W.2d 579, 815 (Wis. 1984) (judge demonstrates "disdain, if not outright contempt, for the very system which he, as a judge, has sworn to administer" if he ignores a court order "even though acting in a private capacity"). Indeed, a Judge who disobeys such a routine bond order as the one here, cannot expect to have any respect given to his own orders in his own cases, especially where the litigants before him have the same excuse – they were trying to help out a friend or family member.

Any hint of interference with a potential witness strikes at the very heart of our judicial system that relies on witnesses giving accurate and truthful testimony, uninfluenced by any party. *See Rowan v. Tractor Supply Company*, 263 Va. 209, 215, 559 S.E.2d 709, 712 (2002) (the prohibitions against witness tampering reflect the goal of prohibiting interference with the administration of justice and protecting the public from a flawed legal system).[11] It should go without saying that a judge is the protector of the

[11] Witness harassment was a crime at common law and is an offense in Virginia and elsewhere by statute. *See* Va. Code § 18.2-460; 18 U.S.C. § 1512; *see also* 39 Am. Jur., Obstructing Justice, § 6, p. 504 ("It is an offense against the very object and purpose for which courts are established"); 67 C.J.S., Obstructing Justice, § 8, p. 53 ("The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice.").

justice system, including potential witnesses. Clearly, a judge who engages in conduct that attempts to interfere with a potential witness' obligations violates both the letter and spirit of Canon 1 that demands judges maintain and enforce high standards of conduct, comply with the law, and avoid doing "injury to our system of government under law." *See* Canon 1; *see also* Commentary, Canon 1.

II. The Commission Has Established By Clear and Convincing Evidence That Judge Pomrenke Violated Canon 2A.

Canon 2A provides as follows:

> A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.
>
> 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.

The Commentary to Canon 2A provides, in pertinent part, as follows:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
>
> The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Canons. Actual improprieties

> under this standard include violations of law, court rules or other specific provisions of these Canons. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity and impartiality is impaired.

Canon 2A focuses on a judge's duty to remain above reproach in all aspects of his life, professional and personal. It calls upon a judge to accept limitations not expected of non-judges, and to do so "freely and willingly." It demands that a judge follow the law, the Canons, and avoid even the perception of an impairment of his integrity.

Canon 2A requires every judge to recognize that he always is seen as a judge in the public's eye, whether or not acting in an official capacity. It prohibits any defense that a judge did not mean to be acting as a judge when he engaged in misconduct. As the New Jersey Advisory Committee on Judicial Conduct correctly has observed, "[i]t is not simply a matter of switching hats. Respondent is, at all times, a member of the Judiciary. His representation of the Judiciary does not cease when he steps off the bench…." *See* Addendum*, In the Matter of Baptista*, ACJC 2009-063, N.J. Advisory Committee on Judicial Conduct (Mar. 10 Presentment at 18-19) (unpub.), *findings and recommendation adopted*, 15 A.3d 323, 324 (N.J. 2011). Judge Pomrenke violated these important precepts of judicial ethics.

He testified he gave no thought to his judicial status or the Canons when he wrote to Bowman and called Moffatt. (JA 264). He testified he was acting solely for the benefit of his family member, doing everything he could to keep her out of prison. (JA 266). He expressly admitted he violated Canon 2A. (JA 255). Even though Canon 2A contains no exception for circumstances when a judge's judicial status might not be known, Judge Pomrenke made sure his was known when he attached his judicial card to his letter to Bowman and when he called a family friend, Moffatt, who was well aware he was a judge. (JA 369).

As argued above, Judge Pomrenke clearly failed to respect and follow the law when he contacted potential witnesses to his wife's trial without the presence of her lawyers, in contravention of a court order. That conduct violates Canon 2A as well as Canon 1. Indeed, the United States Magistrate Judge found that the conduct of contacting Bowman and Moffatt, if contained in a sworn pleading, would constitute probable cause to believe he engaged in witness tampering and/or obstruction of justice. (JA 329).

There can be no doubt about the fact that Judge Pomrenke's conduct would create in reasonable minds a perception that the judge's ability to carry out his judicial responsibilities with integrity and impartiality

was impaired, even if his subjective testimony that he did not intend to intimidate anyone were credited. (JA 238). *See Inquiry into the Conduct of Murphy*, 737 N.W.2d at 362 (even if good faith were assumed in judge's attempt to influence testimony of witness, it was an "alarming lack of judgment" and violated Canon 2A because "[a] judge's contact with a witness … outside of work hours, outside of the work setting, for the purpose of discussing the investigation, does not promote public confidence in the integrity and impartiality of the judiciary."). Judge Pomrenke's behavior certainly created a perception in the minds of Bowman, Moffatt, a federal prosecutor, a United States Magistrate Judge, and the seven-member Judicial Inquiry and Review Commission, that the judge's ability to carry out his judicial responsibilities with integrity and impartiality was impaired.

The public naturally and reasonably would expect a judge to understand the basic principle that no one should try to interfere with a potential witness. The Judge's violation of Canon 2A is shown by clear and convincing evidence.

III. The Commission Has Established By Clear and Convincing Evidence That Judge Pomrenke Violated Canon 2B.

Canon 2B provides, in pertinent part, as follows:

> A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES.
>
> B. …. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others …. A judge shall not testify as a character witness.

The Commentary to Canon 2B provides, in pertinent part, as follows:

> Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. 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 …. 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, 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….

Avoidance of even the possibility of coercion is at the heart of Canon 2B.

The Judge's conduct, however, flagrantly ignored this command.

<u>The Bowman Note</u>

Judge Pomrenke repeatedly insisted prior to the Commission hearing that Canon 2B only prohibited the use of judicial letterhead while conducting personal business, not the use of his judicial business card.

(JA 320-21, 14-17, 93).[12] At the hearing, he admitted for the first time that the use of his judicial business card was as "damaging as a letterhead would be" because of the perception "[t]hat you are trying to influence them or you are trying to use your judicial position for some improper purpose." (JA 256). He expressly admitted he took the actions he did to advance the interests of his wife. (JA 266). He expressly admitted he violated Canon 2B. (JA 255). The Judge's latest assessment is the correct one.

As argued above, his letter to Bowman was much more than a "thank you" note. Any reasonable person would have understood its imperative language, coupled with the enclosed judge card, to be disturbing and shocking. It was an implied threat to Bowman to refrain from firing his wife and to think twice before working against her in the ongoing investigation. And when the Judge proclaimed in his note to Bowman that his wife was "honest, truthful, ethical, and innocent!" (JA 300), he further violated Canon 2B's prohibition against providing character testimony. His misuse of his judicial status to advance the interests of his wife by leaning on a potential

[12] In his March 16, 2016, letter to Commission counsel, the Judge asserted that Bowman was not an attorney or licensed in Virginia, lived with his parents, and had no children. (JA 321) The Judge's calculated attempt to discredit a potential witness before the Commission undoubtedly was improper under Canon 2B's prohibition against giving character testimony. It also was not accurate: Bowman is a lawyer licensed in Virginia, and was such during all the times covered by the events involving the Judge. (JA 134).

witness, leaning on her employer, and vouching for her character, shows by clear and convincing evidence a violation of Canon 2B.

The Voicemail Message to Moffatt

Judge Pomrenke repeatedly insisted prior to the hearing that Canon 2B did not prohibit his call because Moffatt was a personal friend and *he* believed everything he told her to say. (JA 14, 91, 94). At the hearing, he expressly admitted he violated Canon 2B (JA 255), he was trying to get Moffatt to help his wife (JA 242, 264), and he was "dead wrong" in doing so. (JA 230). Clearly his latest assessment is the correct one.

The weight of authority that came with his judicial position, and its inherent potential for coercive abuse, was evident, and Moffatt's response of grave concern was justified. Additionally, the Judge's specific opinions about his wife's caring and honest nature amounted to prohibited character testimony. The call to Moffatt shows by clear and convincing evidence a violation of Canon 2B.

Judge Pomrenke Violated Canon 2B

In several Judicial Ethics Advisory Opinions, this Court's Committee has addressed the misuse of judicial prestige under Canon 2B. In JEAC 00-8, the Committee opined that a judge may not, consistent with Canon 2 and 2B, initiate a telephone call or letter to the Virginia State Bar supporting

the reinstatement of an attorney's law license. Such an action, it opined, would create the potential of lending the prestige of the judge's judicial office in support of the private interests of the attorney, and constitute testimony as a character witness.

In JEAC 03-2, the Committee opined that a judge may not, consistent with Canon 2B, write a letter or place a phone call on behalf of a candidate for judicial office to a candidate screening committee appointed by a legislator when the request is made by the candidate. The Committee opined that such action would be improper as it would be tantamount to testifying as a character witness and would lend the prestige of his judicial office to advance the private interests of another.

In JEAC 06-1, the Committee opined that a judge may write a letter of recommendation under certain narrow circumstances but cautioned against doing so in a way that might be seen as coercive or misusing his judicial status. It opined that a judge who uses judicial letterhead should clearly mark the letter as "unofficial and personal." After an extensive discussion, the Committee warned:

> Although judges may choose not to send any letters of recommendation, those doing so must consider carefully the situation, the means of transmission, the appearance of the letter they send and the substance of their recommendation. In all of these steps, judges should strive to *avoid giving even the*

> *appearance* of lending the prestige of their judicial office to advance the private interests of others. (Emphasis added).

These opinions describe conduct far less harmful to the integrity and independence of the judiciary than that engaged in by Judge Pomrenke.

IV. The Court Should Impose The Appropriate Sanction.

Not one of the prior fourteen Commission cases in this Court presented the prospect of a judge interfering with a potential witness or leaning on a family member's employer. The Court can take comfort in the infrequency of such occurrences in Virginia, but should make clear that such conduct will not be condoned.

In assessing a proper sanction, this Court should consider the fact that Judge Pomrenke insisted for months that he had not violated the Canons of Judicial Conduct. It should consider the fact that his convenient about- face in the Commission hearing never genuinely came to terms with the inappropriateness of his misconduct. That eleventh hour admission still insisted he had no intent to influence anyone, but rather merely acknowledged that some people might have viewed his actions as coercive at the time. This Court should take into consideration the Judge's seeming persistence to fail to recognize the seriousness of his actions when imposing a sanction.

In 1973, this Court censured a judge who had misused his judicial status and engaged in inappropriate conduct that threatened the integrity of the judiciary when he 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. *See Judicial Inquiry and Review Commission v. Jordan*, Record No. 730725 (unpub. Order Oct. 8, 1973). In 2007, the Minnesota Supreme Court publicly reprimanded a judge, in part, for attempting to influence the testimony of a clerk during the investigation of the state's Judicial Standards Board. *See Inquiry into the Conduct of Murphy*, 737 N.W.2d at 361-62. In 2008, the North Carolina Supreme Court rejected its Judicial Standards Commission's recommendation of censure because the judge's attempt to influence the recollections of a clerk and attorney during the Commission's investigation of misconduct constituted willful misconduct. The court accordingly censured and removed the judge, ordered him ineligible ever to hold judicial office, or to receive retirement benefits. *See In re Badgett*, 666 S.E.2d 743, 748-49 (N.C. 2008). As the Virginia Inquiry and Review Commission found, Judge Pomrenke's actions merit either of the sanctions permitted by Virginia law: censure or removal.

CONCLUSION

The Commission has demonstrated by clear and convincing evidence that Judge Pomrenke violated Canons 1, 2A, and 2B, and the bedrock principles driving them. The Court should find that Judge Pomrenke engaged in misconduct while in office or in conduct prejudicial to the proper administration of justice, and impose an appropriate sanction. *See* Va. Const. art. VI, § 10.

Respectfully submitted,
JUDICIAL INQUIRY and REVIEW
COMMISSION OF VIRGINIA,
Petitioner herein.

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Certificate Of Transmission And Service

On September 5, 2017, the required copies of this Brief of the Commission and Joint Appendix were filed with this Court electronically and hand delivered to the Clerk's Office in compliance with Rules 5:26 and 5:32. Pursuant to Rules 5:26(e) and 5:32(a)(3)(i), copies of the Brief of the Commission and Joint Appendix were emailed to counsel for Respondent at: john.lichtenstein@lichtensteinlawgroup.com.

s/Katherine B. Burnett, Commission Counsel

ADDENDUM

D-83-10
(067767)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2009-063

IN THE MATTER OF DENNIS BAPTISTA, JUDGE OF THE MUNICIPAL COURT	**PRESENTMENT**

The Advisory Committee on Judicial Conduct ("Committee" or "ACJC") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against Dennis Baptista, Judge of the Municipal Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that the Respondent be publicly reprimanded.

On December 7, 2009, the Committee issued a Formal Complaint in this matter, which accused Respondent of violating Canons 1, 2A, and 2B of the Code of Judicial Conduct and Rule 2:15-8(a)(6) of the New Jersey Court Rules as a result of his conduct in a private matter relating to damage caused to his minor son's car, which was registered in Respondent's name.

Respondent filed an Answer to the Complaint on January 11, 2010 in which he admitted certain of the factual allegations of the Formal Complaint and denied others.

Prior to the issuance of the Presenter's Complaint, Respondent participated in an Informal Conference with the Committee, conducted in accordance with Rule 2:15-11 of the New Jersey Court Rules.

Respondent waived his right to a formal hearing in this matter. Exhibits were offered by the Presenter and accepted into evidence by the Committee. Both the Presenter and Respondent offered legal memoranda in support of their respective positions, which were also considered by the Committee.

After carefully reviewing all of the evidence, the Committee made factual determinations, supported by clear and convincing evidence, which form the basis for its Findings and Recommendation.

I. FINDINGS

A. Factual and Procedural Background

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1985. At all times relevant to these matters, Respondent served as a part-time judge in the Municipal Court of Phillipsburg, a

position he continues to hold. Respondent is the only municipal court judge in the Phillipsburg Municipal Court.

During the 2008-09 school year, Respondent's son, C.B., was a junior at Phillipsburg High School. On or about Wednesday, October 29, 2008, a senior student at the same school, K.H., damaged C.B.'s vehicle while it was parked in the school's parking lot. At the time of the incident, K.H. was eighteen years of age, and C.B.'s vehicle was registered to Respondent. Later that same day, C.B. filed an incident report with the Phillipsburg Police Department regarding the damage to his car. P-1.

After the accident, Respondent wished to speak to K.H.'s parents about the matter but was unable to ascertain the phone number of K.H.'s parents from the school. P-22 at T6-9 to 25. Respondent went to the Phillipsburg Police Department on Friday, October 31, 2008 to "follow up" on the report filed by his son and to attempt to ascertain contact information for K.H.'s parents. P-2. Patrolman Robert Marino of the Phillipsburg Police Department informed Respondent that he could not release the sought information to Respondent. The Officer further indicated, however, that he "would try and make contact" with K.H.'s parents. Id. See also P-19 at T5-17 to T6-4.[1]

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[1] Respondent now claims that he only entered the "Records Room" to obtain the police report, and that he happened to "run into"

Respondent gave Officer Marino permission to give K.H.'s parents his telephone number. P-19 at T7-21 to T8-5. He also told the Officer that if he did not hear back from K.H.'s parents by the end of that day, he was going to file a complaint against K.H. P-2; P19 at T15-3 to 10. Officer Marino was already familiar with Respondent at the time of Respondent's visit to Police Headquarters as Officer Marino would appear before Respondent "quite often" to testify in cases before Respondent. P-19 at T3-14 to 22.

Immediately following his discussion with Respondent, Officer Marino both telephoned and traveled to K.H.'s residence "to try and speak with the parents" but was unsuccessful. P-2; P-19 at T6-7 to 14. He did leave a voicemail message. P-19 at T15-20 to 25. He subsequently called Respondent and informed him of his efforts. Id. at T15-15 to 23.

Later in the evening that same day, Respondent spoke with another officer of the Phillipsburg Police Department, Patrolman Justin Koeller, via telephone. P-20 at T7-12 to 20; T8-10 to 24. Officer Koeller was also familiar with Respondent from

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Officer Marino and "a fellow officer by the front door of Town Hall" on his way back to his car. See Answer, ¶10; Respondent's Brief in Opposition to Complaint at p.5. This allegation, however, is supported neither by the police report Officer Marino prepared after discussing the matter with Respondent (P-2) nor by Officer Marino's sworn testimony given in connection with this matter (P-19 at T4-8 to T5-16).

having appeared before him on cases. Id. at T4-9 to 20. Respondent and Officer Koeller discussed the difficulty Respondent was having in contacting K.H.'s parents, and Respondent informed Officer Koeller he was contemplating filing a complaint. Id. at T7-1 to 11. Respondent informed the Officer that he wanted to be "treated like a normal citizen." Id. at T8-10 to 24.

On November 1, 2008, Officer Marino made contact with K.H.'s mother, J.H., via telephone. He informed her that her son was accused of "punch[ing] a dent in a Mercedes that belongs to Judge Dennis Baptista the Municipal Court Judge in Phillipsburg," and that "Judge Baptista wanted to speak" to her. P-9 at ACJC 016. J.H. authorized Officer Marino to give Respondent her contact information and took Respondent's phone number down as well. Id.

Approximately one to two hours later, J.H. received a phone call on her cell phone from Respondent. Id. Respondent questioned J.H. about why she had not contacted him earlier and advised her that he wanted her to pay for the damage to his car. Id. at ACJC 017. He brought up J.H.'s participation in the Kiwanis organization, opining that if she perhaps spent "less time" working with the Kiwanis group and "more time" with her son, perhaps her son would not have such "problems." Id. See also P-22 at T23-7 to 12. Respondent pointed out what he saw as

"the glaring irony that [J.H] is a past president of the Kiwanis whose mission statement is making the world a better place one child at a time." P-22 at T9-19 to 25. According to Respondent, he was attempting to "embarrass" J.H. "into doing the right thing." Id. at T23-7 to 12. J.H. informed Respondent that her son was "18 years old and he would be responsible for the damage he caused . . . ." P-9 at ACJC 017. Respondent replied, "'Some parent you are.'" Id.

On November 14, 2008, subsequent to learning that the Phillipsburg Police Department would not be pursuing criminal charges against K.H., Respondent filed a lawsuit against K.H. and J.H. in the Special Civil Part of the Superior Court in Warren County. P-15 at ACJC 050-052. The first two counts of Respondent's complaint asserted claims against K.H., respectively, for "intentionally and maliciously" and "negligently" causing damage to his car. Id. at ACJC 050-051. The third count asserted a claim against J.H. for failing "to adequately control, supervise or otherwise parent" K.H. Id. at ACJC 051.

Respondent reported his involvement in litigation to the Administrative Office of the Courts on November 19, 2008. P-11. That report prompted Chief Justice Stuart Rabner of the New Jersey Supreme Court to issue an order dated December 8, 2008 transferring the matter to the Middlesex County Special Civil

Part. P-12. Unfortunately, that Order was not received and processed until after the matter had been tried in the Warren County Special Civil Part on December 16, 2008.[2] During the trial, J.H. indicated that Respondent did not refer to or otherwise mention his judicial office during the course of their interactions. P-22 at T10-2 to 7. The Warren Special Civil Court thereafter vacated its decision and transferred the file to the Middlesex County Superior Court.

On December 6, 2008, Respondent returned to the Phillipsburg Police Department with his son to amend his son's October 29, 2008 complaint. P-7.

On January 27, 2009, Respondent's suit against K.H. and J.H. was mediated in the Middlesex County Superior Court, and a settlement was reached. P-16 and P-17. Pursuant to the Settlement Agreement, K.H. and J.H. agreed to pay Respondent $600, and J.H. agreed to file a claim with her Homeowners' Insurance. P-17.

On June 25, 2009, Respondent testified before the ACJC in connection with this matter during a Rule 2:15-11 Informal Conference. On that occasion, Respondent admitted the following: (1) speaking with police officers of the Phillipsburg

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[2] The trial court in the Warren County Special Civil Part dismissed the First and Third Counts of Respondent's complaint and awarded judgment in Respondent's favor in the amount of $616.00. See P-15 at ACJC 053.

Police Department in connection with his efforts to get in touch with K.H.(P-22 at T6-23 to T8-22); (2) making an "ironic" reference to K.H.'s participation in the Kiwanis organization given her son's involvement in the damage caused to Respondent's car (P-22 at T9-19 to 25) and indicating that if she had spent less time with the Kiwanis organization and more time with her child, the incident might not have happened (P-22 at T23-7 to 12); (3) making intentional statements to J.H. during the course of the trial in Warren County that "probably hurt her feelings largely because they were based in truth" (P-22 at T14-1 to 7); (4) asserting the negligent supervision allegation against J.H. as a means of "keeping the mother in the case" and to provide him with additional "leverage" (P-22 at T16-19 to T17-14); and (5) that the Phillipsburg Police officers were aware that Respondent was the Phillipsburg Municipal Court judge as they dealt with him in connection with the underlying incident (P-22 at T16-3 to 10).

During the Informal Conference, Respondent was specifically questioned about the tactics he pursued to ascertain J.H.'s contact information before involving the Phillipsburg police. Respondent indicated that he attempted to get the information through the Phillipsburg school, and that he does not recall if he asked K.H. for the information even though Respondent was communicating with K.H. via text message. P-22 at T31-16 to

T32-23. When asked if J.H.'s phone number was located in the public telephone directory, Respondent responded, "I don't know." Id. at T34-6 to 8. He immediately changed his testimony, however, and stated, "I do know. No, they're not in the phone book." Id. at T34-10 to 14.

Respondent further testified that although he employed "aggressive" strategies when pursuing his case against J.H., he did so as J.H.'s "adversary" and not as a judge:

> I made some arguments that were designed to embarrass her, but that was not - - in no way could that be confused with a judicial capacity. And as far - - okay, so I have a dual status now and that comes with the turf and you have to take it whether you like it or not. Yes, you have to be . . . held to a higher standard if you hold a judicial office and there's certain things that you can't do even though you may have a right to do those, and I understand that. . . . But, I have a right and I had an obligation, I believe, to vigorously argue my case, but what I did, I did it rationally, I did it polished and I did it very professionally.

Id. at T35-5 to 20.

Finally but notably, Respondent assumed a different position in his brief in opposition to the ACJC's Complaint than he did during the Informal Conference regarding his efforts to track down J.H. In his brief, he asserts he attempted to locate J.H.'s information "through an internet search" but was unsuccessful, and also that he does not possess a hard copy of the public telephone directory nor has he used one in several

years. Respondent's Opposition Brief at p. 4. In contrast, the Presenter offered Exhibit P-8, which features an excerpt of the "White Pages" referencing J.H. and her contact information (ACJC 012) as well as J.H.'s contact information as ascertained and printed from www.whitepages.com.

B. Analysis

The Formal Complaint in this matter advances three charges against Respondent: (1) that by appearing at the Phillipsburg Police Department and discussing his son's complaint with police officers who regularly appear before him and by using the Police Department to ascertain J.H.'s contact information instead of other means available, Respondent violated Canons 1, 2A and 2B of the Code of Judicial Conduct (Count I); (2) that by insulting J.H.'s parenting skills during his telephone conversation with her and by using arguments designed to embarrass her, Respondent violated Canons 1 and 2A of the Code (Count II); and (3) that by demonstrating a lack of candor when testifying during his Informal Conference about his efforts to locate J.H.'s contact information, Respondent violated Canons 1 and 2A of the Code (Count III). We find that each charge is supported by clear and convincing evidence, and, consequently, that Respondent's

conduct violated the cited Canons of the Code of Judicial Conduct.[3]

1. Count I

Count I charges Respondent with violating Canons 1, 2A and 2B of the Code of Judicial Conduct as a result of his personal interaction with the Phillipsburg Police Department in connection with his son's complaint against K.H. for damage to a vehicle registered to Respondent.

Canon 1 requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary is preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. Canon 2B provides that a "judge should not lend the prestige of office to advance the private interests of others," nor should a judge "convey the impression that they are in a special position of influence." The commentary to Canon 2 of the Code of Judicial Conduct provides that judges "must avoid all impropriety and appearance of

[3] Each of the three counts of the ACJC Complaint also charged Respondent with violating Rule 2:15-8(a)(6) of the New Jersey Court Rules. In accordance with the Supreme Court's recent instruction in In re Boggia, 203 N.J. 1, 10, n.1 (2010), that Rule 2:15-8 "not be used as a basis for a substantive ethical violation" in future ACJC matters, the Committee will not consider Rule 2:15-8 as a basis for an ethical violation in this matter.

impropriety and must expect to be the subject of constant public scrutiny."

Although Respondent belatedly disputed the details of his interaction with at least two officers of the Phillipsburg Police Department, the evidence demonstrates clearly and convincingly that Respondent contacted that Department on two or three separate occasions and spoke, minimally, with Officers Marino and Koeller in connection with the damage caused to his vehicle by K.H. The evidence further demonstrates Respondent contacted those officers to "follow up" on the police report his son filed and for assistance in contacting K.H.'s mother, J.H. See P-2 and P-19. Indeed, the pertinent police reports and the sworn testimony of the involved officers all indicate that Respondent "wanted to know how he [could] go about getting in touch with the kid or the kid's parents," and that Respondent spoke to the officers in furtherance of this desire. P-19 at T5-8 to 24; P-20 at T6-18 to T7-4. See also P-2.

While Respondent's act in visiting or calling the Phillipsburg Police Department in connection with a private matter is not *per se* offensive given the underlying incident's occurrence in Phillipsburg, his purposeful solicitation of the assistance of the police officers in tracking down J.H. is. We are persuaded that J.H.'s contact information was available through a means other than involving the police. It appears

clear that her information was accessible both on the internet and in the public telephone directory. See P-8. If Respondent did not possess a public telephone directory, he should have made efforts to acquire one or found one in his public library. Since Respondent was in contact with K.H. via cell phone, he could have asked K.H. for the phone number. Alternatively, Respondent could have asked his wife or his son to "follow up" and assist in locating J.H.

Rather than pursue any of those options, however, Respondent chose to go to the police department of the town in which he presides as municipal court judge to solicit their assistance in a wholly private matter. When he chose to do so, he created the very real possibility, if not reality, that the police officers would be affected by his judicial office and stature. See In re Rivera-Soto, 192 N.J. 109 (2007) (adopting ACJC Presentment in ACJC 2007-097) ("Respondent should have known that because of his official position . . . his call to [the Police Chief] would be interpreted as one of importance, perhaps some urgency, and deserving of special attention. . . . Respondent's call to [the Township Police Chief] . . . created the significant and unacceptable risk that the Respondent's judicial office could be an influential factor in the handling of a private matter relating to Respondent and his family."). We know for certain that the officers made several phone calls

to J.H. and several visits to her home in response to Respondent's discussions with them. When Officer Marino finally got in touch with J.H., he specifically identified Respondent as the Phillipsburg Municipal Court judge. Respondent's judicial office was therefore undeniably invoked in the police's handling of the matter. While the officers in question dispute being impacted by Respondent's judicial office, that denial is not dispositive of the issue with which we are confronted. For our purposes, it is enough to find, as we do, that by personally and unnecessarily soliciting the assistance of the Phillipsburg police, Respondent created a situation where his judicial office could, and may have, come to bear on the police's handling of his purely private matter. Such conduct violates Canon 2B of the Code of Judicial Conduct.

Consequently, as in Rivera-Soto, we find that Respondent's decisions and actions were an abuse of the power and prestige of his judicial office in violation of Canon 2B of the Code of Judicial Conduct and created an appearance of impropriety. By violating Canon 2B, Respondent likewise violated Canons 1 and 2A of the Code. Such conduct brings the Judiciary into disrepute and reduces public confidence in the Judiciary's overall integrity and independence.

2. Count II

Count II of the Formal Complaint charges Respondent with "gratuitously insulting" J.H.'s parenting skills in his initial telephone discussion with her and with purposefully attempting to embarrass her when pursuing his lawsuit against her in violation of Canons 1 and 2A of the Code of Judicial Conduct.

The evidence demonstrates that Respondent directed various remarks to J.H. about her outside interests and her involvement with her own children when dealing with her about the damage to his car. According to J.H., those comments were as follows:

- "'Well if you would spend less time with Kiwanis and more time with your son maybe you wouldn't have these problems. You claim to change the world one child at a time with Kiwanis; maybe you should start with your own kid.'"
- "'[I]f you were a better parent, maybe your son wouldn't have so many problems.'"
- "'Why don't you try spending more time being a better parent and watching what your kid is doing instead of running around with Kiwanis?'"
- "'So you're telling me you are not going to pay for your son's damage? . . . Some parent you are.'"

P-9 at ACJC 017. The evidence further demonstrates that Respondent asserted a claim against J.H. for negligent

supervision of her son, who was eighteen (18) years of age at the time the claim was asserted. See P-15 at ACJC 051. The specific language of Respondent's allegation as contained in the Special Civil Complaint reads: "At all times material to the within cause of action, Defendant [J.H.] knew, or in the exercise of due care, should have known that her son had become incorrigible and was engaged in a course of anti-social behavior. Defendant [J.H.] failed to adequately control, supervise or otherwise parent the Defendant [K.H.] . . . ." P-15 at ACJC 051. Defendant disputes neither sarcastically invoking the Kiwanis organization in his discussions with J.H. nor that his arguments both in and out of court were purposefully designed to "embarrass" J.H.

In our consideration of this matter, it is wholly irrelevant that Respondent's conduct occurred in his private life as opposed to on the bench. The Supreme Court's decision in In re Blackman, 124 N.J. 547, 551 (1991) is instructive in this regard:

> [Canon 2] makes clear that judges have responsibilities with regard to their personal conduct that greatly exceed those of ordinary citizens. The Canon specifically points out that judges must accept restrictions of their personal activities that other citizens might find burdensome and intrusive. The understanding of the Canon is that judges have a special responsibility because they are 'the subject of constant public scrutiny;' **everything judges do can**

> **reflect on their judicial office.** When judges engage in private conduct that is irresponsible or improper, or can be perceived as involving poor judgment or dubious values, 'public confidence in the judiciary is eroded.'

(Emphasis added.) Part-time municipal court judges, like Respondent, must be particularly alert to the impressions that even their private conduct may convey to members of the public. See In re Murray, 92 N.J. 567, 571 (1983) ("A municipal court judge must at all times be sensitive to the public's perception of his actions. . . . Part-time municipal court judges such as respondent, who maintain private practices, must be particularly circumspect.").

We find Respondent's conduct as discussed in Count II deeply offensive and highly inappropriate. Respondent chose to deliberately and negatively comment on J.H.'s parenting skills and question her involvement in a civic organization in a private matter resulting from $600 worth of damage to his vehicle. It goes without saying that J.H.'s participation in the Kiwanis organization and how she chooses to spend her time generally have nothing to do with Respondent and are none of Respondent's concern. Even more disturbing, however, is that Respondent's ignorant and ill-mannered judgments and comments about J.H. and her private life reflected negatively on Respondent in the context of his judicial office. We know for

certain that J.H. questioned how "someone in [Respondent's] position" could have treated her so disrespectfully. P-9 at ACJC 015. We are left with the same question. To be capable of such off-putting conduct in his private life leads to serious questions about Respondent's demeanor and abilities on the bench. Such questions are unacceptable and uphold neither the independence nor integrity of the Judiciary, nor the public's confidence in the Judiciary, in violation of Canons 1 and 2A of the Code of Judicial Conduct.

Our finding in this regard is also tied to the fact that, in our view, Respondent asserted a frivolous cause of action against J.H. in his Special Civil lawsuit. See Rule 1:4-8 of the New Jersey Court Rules. We cannot fathom how Respondent's theory that J.H. owed a duty of care based on her purported failure to "adequately control, supervise or otherwise parent" her eighteen-year old son is a claim warranted by existing law. In fact, Respondent himself admitted that the claim was merely a tactical way of "keeping [J.H.] in the case" and deliberately intended "to embarrass her." While Respondent attempted to excuse his conduct by indicating that his comments were advanced in his role as an advocate and not as a judge, we reject that distinction. It is not simply a matter of switching hats. Respondent is, at all times, a member of the Judiciary. His representation of the Judiciary does not cease when he steps off

the bench, and even his conduct as an advocate reflects on his judicial office. See In re Santini, 126 N.J. 291, 296 (1991) ("Municipal judges must remember, however, that their desire to serve their clients must yield to the restrictions of their judicial office.") To us, his frivolous claim and admission under oath that he intended to embarrass J.H. reflects on the entire Judiciary and does so poorly. Rather than underscoring the Judiciary's integrity, Respondent's conduct tarnished it.

We conclude that Respondent's conduct as discussed herein undermined the integrity and impartiality of the Judiciary as well as the public's confidence in the Judiciary in violation of Canons 1 and 2A of the Code of Judicial Conduct.

3. Count III

Count III of the Formal Complaint asserts that Respondent was less than candid with the Committee when he testified before it regarding the accessibility of J.H.'s telephone number in violation of Canons 1 and 2A of the Code of Judicial Conduct.

The evidence demonstrates that during his Informal Conference, Respondent initially testified he did not know if J.H.'s contact information was located in the public telephone directory; he quickly changed his mind, however, and indicated that he did, in fact, know the answer to that question, and that J.H.'s information was not available in the public telephone directory. At no time during the Informal Conference did

Respondent mention attempting to look up J.H.'s information via the Internet. Through the Committee's own investigation in this matter, it was determined that J.H.'s contact information was, in fact, public information and readily accessible via the Internet and the Phillipsburg public telephone directory. See P-8.

Based on the foregoing, we have no choice but to conclude that Respondent was less than candid with the Committee concerning the public availability and accessibility of J.H.'s contact information. Clearly, such information was available. See P-8. Moreover, Respondent's testimony on this subject was inconsistent and not reflective of the truth.

Respondent's conduct in failing to be forthcoming with the members of the ACJC is distasteful and offends the longstanding principles of integrity and independence on which the Judiciary was founded. We determine that such conduct undermined the integrity and impartiality of the Judiciary as well as the public's confidence in the Judiciary in violation of Canons 1 and 2A of the Code of Judicial Conduct.

II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respondent's conduct in involving the Phillipsburg Police in a purely private matter was needless, avoidable, and created the

significant risk, if not reality, that the Phillipsburg Police Department would handle the matter differently or more deferentially because of Respondent's position and stature. His treatment of J.H. both in and out of the courtroom was caustic, offensive and poorly reflective of the Judiciary. Finally, we have found that Respondent was less than forthcoming with the ACJC during his Informal Conference about his efforts to track down J.H. without involving the police. Such conduct cumulatively violated Canons 1, 2A and 2B of the Code of Judicial Conduct.

For all of these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

March 10, 2011 By: Alan B. Handler /JMN
Alan B. Handler, Chair