E 2006-30

(51)

THE COMMISSION ON JUDICIAL CONDUCT

SEP 12 2007

IN RE: JUDGE ERNEST B. MURPHY

COMPLAINT NOS. 2006-9 & 2006-30

NOTICE OF ANTICIPATED EVIDENCE AND PROPOSED STANDARDS OF LAW

1. Now comes the Commission on Judicial Conduct, in the above-captioned matter, and respectfully states that it has issued formal charges against Judge Ernest B. Murphy that allege that he violated the following Canons of the Code of Judicial Conduct:

   a. CANON 1A: FAILURE TO MAINTAIN AND OBSERVE HIGH STANDARDS OF CONDUCT

   b. CANON 2: FAILURE TO AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

   c. CANON 2A: FAILURE TO ACT IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY

   d. CANON 2B: LENDING THE PRESTIGE OF JUDICIAL OFFICE TO ADVANCE HIS OWN PRIVATE INTERESTS

   e. CANON 4A(1): FAILURE TO CONDUCT EXTRA-JUDICIAL ACTIVITIES SO THAT THEY DO NOT CAST DOUBT ON THE JUDGE'S CAPACITY TO ACT IMPARTIALLY AS A JUDGE

   f. CANON 4D(1): FAILURE TO REFRAIN FROM FINANCIAL AND BUSINESS DEALINGS THAT TEND TO REFLECT ADVERSELY ON HIS IMPARTIALITY, INTERFERE WITH HIS JUDICIAL POSITION OR THAT MAY BE REASONABLE PERCEIVED TO EXPLOIT HIS JUDICIAL POSITION

2. The Commission anticipates that it will present the following evidence in support of the Formal Charges:

   a. On June 3, 2002, Judge Murphy filed a libel suit against the Boston

Herald and its employees David Wedge, Jules Crittenden, Margery Eagan and David Weber in Suffolk Superior Court.

b. Sometime between September, 2003 and Spring, 2004, Judge Murphy and Patrick Purcell had a "principal to principal" meeting to discuss settlement of the libel suit. This meeting took place with the knowledge of the parties' attorneys (Howard Cooper and M. Robert Dushman) and was orchestrated through email correspondence between the attorneys before it took place.

c. This meeting did not progress into active settlement discussions. Patrick Purcell is expected to testify that Judge Murphy did most of the talking during this meeting and said that "the Herald would not prevail in the lawsuit and the case was going to take down the paper." Patrick Purcell is expected to testify that there was no agreement after this meeting that he and Judge Murphy would continue to have ongoing direct contacts without the authorization of counsel.

d. There was a second meeting between Judge Murphy and Patrick Purcell "sometime before trial" of the libel suit. The meeting took place between August, 2004 and January, 2005. This meeting was also orchestrated with the knowledge and participation of the parties' lawyers. Patrick Purcell is expected to testify that Judge Murphy, once again, did most of the talking during this meeting. Patrick Purcell is also expected to testify that there was no agreement after this meeting that he and Judge Murphy would continue to have ongoing direct contacts without the authorization of counsel.

e. The libel suit filed by Judge Murphy went to trial and, on February 18, 2005, the jury returned a verdict in favor of Judge Murphy against the Boston Herald and David Wedge for $2,090,000.

f. Judge Murphy used official Superior Court letterhead to handwrite a letter addressed to Patrick J. Purcell, Publisher of the Boston Herald, dated February 20, 2005 (two days after the jury verdict), regarding his personal litigation.

g. Judge Murphy used official Superior Court letterhead to handwrite a post-script to the letter dated February 19, 2005, regarding his personal litigation.

h. Judge Murphy enclosed the letter dated February 20, 2005 and its post-script, dated February 19, 2005, in a Superior Court envelope on which he handwrote "Murphy, J." above the printed return address. Judge Murphy mailed this envelope to Patrick Purcell at the Boston Herald.

i. Patrick Purcell is expected to testify that he did not respond to this letter from Judge Murphy and that there was no authorization from counsel for this communication.

j. On March 18, 2005, an article appeared in the Boston Globe that referenced Judge Murphy's libel judgment and connected it to efforts to cut costs at the Boston Herald.

k. Judge Murphy wrote another letter to Patrick J. Purcell regarding his personal litigation, dated March 18, 2005. This letter was written on plain stationery but was enclosed in an official court stationery envelope. On this envelope, Judge Murphy crossed out "Walter F. Timilty, Clerk of Courts" and handwrote "Murphy, J. Superior Court" above the Norfolk County Court return address. Judge Murphy mailed this letter directly to Patrick Purcell at the Boston Herald. This letter appeared to reference the March 18, 2005 article in the Boston Globe.

l. On December 20, 2005, copies of Judge Murphy's letter dated, February 20, 2005, postscript dated February 19, 2005, and letter dated, March 18, 2005, were filed in Suffolk Superior Court in support of a motion by the defendants in *Ernest J. Murphy v. Boston Herald, Inc. and David Wedge et al.* to vacate the judgment and dismiss the complaint.

m. On December 21, 2005, the Boston Herald published excerpts from these letters in the print edition of the Boston Herald and published the entire letters on their website.

3. In order to properly address the respondent's request for specificity, the Commission proposes that the hearing officer adopt the following legal standards in determining what evidence is relevant to the question of whether Judge Ernest B. Murphy has violated the Massachusetts Code of Judicial Conduct:

   a. *It is not relevant to the question of whether Judge Murphy violated any of the Canons of the Massachusetts Code of Judicial Conduct that Patrick Purcell knew Ernest B. Murphy was a judge at the time Judge Murphy sent the letters at issue.*

      In the case, In the Matter of Donald M. Mosley, the Nevada Supreme Court relied heavily on a decision of the Alaska Supreme Court[1] for

[1] Canon 2 of the Alaska Code of Judicial Conduct is very similar to the Massachusetts Code and reads, in part, "Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities. 2A. In all activities, a judge shall exhibit respect for the rule of law, comply with the law, avoid impropriety and the appearance of impropriety, and act in a manner that promotes public confidence in the integrity and the impartiality of the judiciary. 2B. A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not use or lend the prestige of judicial office to advance the private interests of the judge or others. A judge shall not knowingly convey or permit others to convey the impression that anyone is in a special position to

guidance in deciding if a judge violated Canon 2B[2] of the Nevada Code of Judicial Conduct (NCJC) by sending letters on judicial stationery to persons who already knew he was a judge. The Nevada Supreme Court wrote:

> "An Alaska Supreme Court justice sent three letters on judicial chambers stationery to opposing counsel regarding a personal matter. The court held that it was irrelevant that the 'intended recipients of the letters were not influenced in facts by the chambers stationery.' The court noted that using judicial stationery for personal reasons would likely cause the public to believe that the justice is 'unable to distinguish his judicial activities from his personal ones. This failure to maintain separate interests could lead a reasonable person to believe that petitioner's judicial decision- making ability similarly might be flawed.'
>
> In interpreting the judicial canons, we adopt the objective reasonable person standard. In applying that standard, we conclude that there was clear and convincing evidence produced at the evidentiary hearing that an objective reasonable person could conclude Judge Mosley wrote letters on his judicial letterhead to his son's school in an attempt to gain personal advantage in violation of NCJC Canon 2B.[3]

The California Commission on Judicial Conduct (CCJC) has, similarly, ruled that it is irrelevant whether the recipient of a letter on judicial stationery already knew that the person sending it was a judge. In the Matter Concerning Judge Joseph E. DiLoreto, California Commission on Judicial Performance, June 13, 2006 The CCJC wrote, "The propriety of using judicial stationery in personal disputes does not turn on whether or not the recipient already knows the author is a judge. Rather, the use of judicial stationery is prohibited under the canons in question because, in such circumstances, such use involved lending the prestige of office or the judicial title to advance personal or pecuniary interests."

b. *To the extent it can be argued that the letters at issue in this case were communications sent as part of confidential settlement discussions between litigants, such an argument is irrelevant to the question of*

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influence the judge. A judge shall not testify voluntarily as a character witness, except that a judge may testify as a character witness in a criminal proceeding if the judge or a member of the judge's family is a victim of the offense or if the defendant is a member of the judge's family."

[2] Canon 2B of the NCJC provides, in part, "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

[3] In the Matter of Donald M. Mosley, 102 P.3d 555, Nevada Supreme Court (May 17, 2001), quoting Inquiry Concering a Judge, 822 P.2d 1333, 1336 (Alaska 1991).

whether Judge Murphy violated any of the Canons of the Massachusetts Code of Judicial Conduct.

It is not an element of any of the Canons with which Judge Murphy is charged that his conduct become known to the public or become subject to media scrutiny or attention. Rather, Judge Murphy's actions must be evaluated from the perspective of the "hypothetical reasonable objective person."

In the Alaska case, Inquiry Concerning a Judge, the Alaska Supreme Court addressed to what extent the judge's intent matters when evaluating whether he or she has committed misconduct, "We decide whether the [judge] failed to use reasonable care to prevent a [hypothetical] reasonably objective individual from believing that an impropriety was afoot."[4]

"The United States Supreme Court, in interpreting a section of the federal judicial code, has held that a judge is not to be evaluated by a subjective standard, but by the standard of an objective reasonable person, because 'people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.'"[5]

c. *Though it is not a threshold requirement, it is relevant for the hearing officer to consider evidence that Judge Murphy failed to exercise "reasonable precautions" when he chose to send the letters at issue to the Publisher of the Boston Herald and that this conduct contributed to and aggravated his violations of the Canons with which he is charged.*

The Commentary to Rule 2A of the Massachusetts Code of Judicial Conduct states, "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 Inquiry Concerning a Judge, 532 P.2d 716 (1990), the Alaska Supreme Court cited a decision of the Massachusetts Supreme Judicial Court (SJC) and held, "The duty to avoid creating the appearance of impropriety is one of taking 'reasonable precautions' to avoid having a negative effect on the confidence of the thinking public in the administration of justice."[6]

In the Massachusetts case, In the Matter of Morrissey, 366 Mass. 11 (1974), the SJC held that a "careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety"

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[4] Inquiry Concering a Judge, 822 P.2d 1333, 1340 (Alaska 1991).
[5] In the Matter of Donald M. Mosley, 102 P.3d 555, Nevada Supreme Court (May 17, 2001), quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 (1988).
[6] Inquiry Concerning a Judge, 532 P.2d 716 (1990), quoting In the Matter of Bonin, 375 Mass. 680 (1978).

was sufficient to support a finding of misconduct. In the Matter of Morrissey, 366 Mass. 11, 16 (1974).

4. The Commission will present evidence that the above conduct was, in light of the above legal standards, a violation of Canons 1, 2, 2A, 2B, 4A(1) and 4D(1) because of the overall content of the February 20, 2005 letter and postscript, because it was sent by Judge Murphy to the opposing side in a legal dispute in which Judge Murphy was personally involved, because the letter and post-script were on official Superior Court letterhead, and because the envelope the letter and post-script were sent in was a Superior Court envelope.

5. The Commission will present evidence that Judge Murphy's March 18, 2005 letter further violates Canons 1, 2, 2A, 2B, 4A(1) and 4D(1) because of the overall content of the letter, because it was sent by Judge Murphy to the opposing side in a legal dispute in which Judge Murphy was personally involved, and because it was mailed to Patrick Purcell using an official Superior Court envelope on which Judge Murphy handwrote "Murphy, J." above the printed return address.

6. The Commission anticipates that it will present evidence and make arguments that the following portions of the letters at issue, in context of events taking place at that time, and in light of the applicable standards of law, constituted violations of the above indicated Canons:

   a. *With respect to the February 20, 2005 letter:*

      i. Judge Murphy wrote, "I trust you continue (as do I) to honor the privacy of our personal communications in the nature of what is generically referred to as 'settlement discussions' in my business."

      ii. Judge Murphy wrote, "As you no doubt clearly recollect, ole Mike Ditka here warned you against playing 'the Team from Chicago' in this particular SuperBowl."

      iii. Judge Murphy wrote, "The reason I write now is that I think you a smart and honorable guy. And since every single thing I told you about what was going to happen in this case thusfar, has happened, maybe, just maybe, I have some credibility with you at this point."

      iv. Judge Murphy then wrote, "I'd like to meet you at the Union Club on Monday, March 7. (No magic to the date.) (But it needs to be early in that week.) Here's what will be the price of that meeting. You will have one person with you at the meeting. I suggest, but do not insist, that such a person be a highly honorable and sophisticated lawyer from your insurer. Under NO circumstances should you involve Brown, Rudnick in this meeting. Or notify that firm that such a meeting is to take place. I will have my attorney

(either Owen Todd or Howard Cooper) at the meeting. The meeting will be AB-SO-LUTE-LY confidential and 'off the record,' between four honorable men. You will bring to that meeting a cashier's check, payable to me, in the sum of $3,260,000. No check, no meeting. You will give me that check and I shall put it in my pocket."

v. In the conclusion to his post-script, Judge Murphy wrote, "I am simply trying to exit this matter NOW, to my maximum advantage, and what I believe, Pat, is yours as well. It would be a mistake, Pat, to show this letter to anyone other than the gentleman whose authorized signature will be affixed to the check in question. In fact, a BIG mistake. Please do not make that mistake."

vi. This letter and post-script were sent by Judge Murphy directly to Patrick Purcell two days after the jury in his libel suit returned a verdict in his favor against the Boston Herald and David Wedge for $2,090,000.

vii. Judge Murphy's request that Patrick Purcell bring a check for $3,260,000 was made at the same time one of Judge Murphy's own lawyers, David Rich, was reporting, as quoted in a February 20, 2005 Boston Globe article, that the value of the jury verdict, with interest (accruing at an annual rate of 12%), was $2,700,000.

viii. One of Judge Murphy's lawyers in his libel suit, Attorney Howard Cooper wrote a letter, dated October 19, 2005, which stated that the judgment stood at $2.9 million and "interest continues to accumulate at approximately $27,000 *per month*."

ix. When the Boston Herald lost its appeal and paid the judgment on the jury verdict, they paid Judge Murphy $3.4 million. Judge Murphy's lawyer, David Rich, was quoted in an article in the Boston Globe on June 12, 2007. He said that the $3.4 million reflected the $2.01 verdict, plus $1.4 million in interest.

x. "Brown Rudnick" was the law firm that defended the Boston Herald in the libel suit brought by Judge Murphy.

xi. As of February 20, 2005, all communication or discussion of "settlement" between Patrick Purcell and Judge Murphy had been orchestrated by, and with the knowledge of, the Boston Herald's lawyers at Brown Rudnick.

b. CANON 1

i. The commentary to Canon 1 reads, "[Judges] must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by adherence of each judge to this responsibility...violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law."

ii. In context of events at the time, the above portions of Judge Murphy's February 20, 2005 letter, which encourage Patrick Purcell not to appeal the jury verdict in a civil lawsuit in which Judge Murphy was personally involved as the Plaintiff, which appear to give an opinion regarding the Boston Herald's chances of success on appeal, and which appear to demand a premium on the jury verdict served to diminish public confidence in the impartiality of the judiciary in violation of Canon 1.

iii. The above excerpts also constitute violations of other Canons of the Code of Judicial Conduct, which necessarily implicates a further violation of Canon 1 of the Massachusetts Code of Judicial Conduct.

c. CANON 2, 2A, 2B

i. The commentary to Canon 2A states, "A judge must avoid all impropriety or the appearance of impropriety." (emphasis added). The Commentary further states, "The test for imposition of sanction for violation of this Canon 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."

ii. The use of judicial letterhead in a judge's personal business is specifically proscribed in the Commentary to Canon 2B: "Judicial letterhead and the judicial title must not be used in conducting a judge's personal business."

iii. The above portions of Judge Murphy's February 20 letter created an "appearance of impropriety" in violation of Canon 2A.

iv. This conduct also constituted a "failure to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary" in violation of Canon 2A and "len[t] the prestige of judicial office for the advancement of the private interests of the judge" in violation of Canon 2B.

v. The tenor of the above-cited portions of Judge Murphy's February 20 letter is an effort to persuade Mr. Purcell that it is in "[his] distinct business interest" to pay Judge Murphy $3.26 million rather than appeal the jury verdict. Judge Murphy's use of official judicial stationery to express a legal opinion and apply pressure to drop an appeal in the context of his own personal civil suit against the Boston Herald "len[t] the prestige of judicial office for the advancement of the private interests of the judge."

vi. Judge Murphy's demand on Superior Court Judicial letterhead for approximately $1.2 million dollars more than the jury in his libel suit had awarded just two days prior 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 violation of Canon 2A.[7]

vii. Judge Murphy's statement, "As you no doubt clearly recollect, ole Mike Ditka here warned you against playing 'the Team from Chicago' in this particular SuperBowl," would violate Canon 2A by creating "in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." This statement, in context, suggests that Judge Murphy has a special insight into the court system and a special influence over it. This statement would also violate Canon 2B as this statement, written on judicial stationery, "len[t] the prestige of judicial office for the advancement of the private interests of the judge" in violation of Canon 2B.

viii. Judge Murphy's written demand: "Under NO circumstances should you involve Brown, Rudnick in this meeting. Or notify that firm that such a meeting is to take place" would further violate Canon 2A, by creating "in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

ix. Judge Murphy's written statement in his post-script, "It would be a mistake, Pat, to show this letter to anyone other than the gentleman whose authorized signature will be affixed to the check in

[7] Where a Judge "is 'unable to distinguish his judicial activities from his personal ones. This failure to maintain separate interests could lead a reasonable person to believe that petitioner's judicial decision-making ability similarly might be flawed.'" In the Matter of Donald M. Mosley, 102 P.3d 555, Nevada Supreme Court (May 17, 2001), quoting Inquiry Concering a Judge, 822 P.2d 1333, 1336 (Alaska 1991).

question. In fact, a BIG mistake. Please do not make that mistake" would also further violate Canon 2A.

This statement had an arguably threatening tone and, on official judicial stationery, "lend[s] the prestige of judicial office for the advancement of the private interests of the judge," suggesting the possibility that the Ernest Murphy might use his role as a judge to harm the Boston Herald in further violation of Canon 2B.

x. Judge Murphy's own statements in this letter suggest that there was not an explicit agreement for continuing confidential settlement discussions. Judge Murphy's opening statement would be unnecessary in the presence of an explicit agreement for continuing confidential settlement discussions, "I trust you continue (as do I) to honor the privacy of our personal communications in the nature of what is generally referred to as 'settlement discussions' in my business."

As such, Judge Murphy's decision to send a letter containing the above statements to the publisher of a major newspaper constituted a "careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety" in violation of Canon 2. Judge Murphy failed in his duty to "[take] 'reasonable precautions' to avoid having a negative effect on the confidence of the thinking public in the administration of justice.'"[8]

d. CANON 4A(1), 4D(1)

i. The content of this letter strongly and very colorfully expresses Judge Murphy's opinion regarding the Boston Herald's chances on appeal in a case in which Judge Murphy was personally involved as the plaintiff. As such this letter involved Judge Murphy's "extrajudicial activities."

Judge Murphy used official court stationery to write and send the letter containing the above statements to Patrick Purcell. These statements express a legal opinion and appear to be an attempt to convince Mr. Purcell that his appeal cannot succeed. This letter advised Mr. Purcell, "I am simply trying to exit this matter NOW, to my maximum advantage, and what I believe, Pat, is yours as well."

As such, by sending this letter, Judge Murphy failed to conduct his "extrajudicial activities so that they do not . . .cast doubt on [his] capacity to act impartially as a judge" in violation of Canon 4A(1).

[8] Inquiry Concerning a Judge, 532 P.2d 716 (1990), quoting In the Matter of Bonin, 375 Mass. 680 (1978).

ii. The content of this letter strongly expresses Judge Murphy's legal opinion regarding the Boston Herald's chances on appeal in a case in which Judge Murphy was personally involved as the plaintiff. As such, this letter involved Judge Murphy's "extrajudicial activities."

Judge Murphy used official court stationery to write and send the letter containing the above statements to Patrick Purcell. These statements express a legal opinion and appear to be an attempt to convince Mr. Purcell that his appeal cannot succeed.

As such, by sending this letter on official judicial stationery, Judge Murphy failed to "refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality . . .[and] that may reasonably be perceived to exploit the the judge's judicial position" in violation of Canon 4D(1).

e. *With respect to the March 18, 2005 letter*:

i. Judge Murphy wrote,

> "Read the article in the Globe today. Believe me, I take no joy from your troubles.
>
> I'm going to, once again, principal to principal, as "settlement negotiations" – off the record – just between you and me – tell you something for nothing which may help you in your decision-making. Something for nothing.
>
> And that is . . . you have ZERO chance of reversing my jury verdict on appeal. Anyone who is counseling you to the contrary . . . is WRONG. Not 5% . . . ZERO.
>
> AND . . . I will NEVER, that is as in NEVER, shave a dime from what you owe me.
>
> You and/or your insurer want to pay me $331,056 /yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts . . . be my guest.
>
> You are lucky, Mr. Purcell, that the jury came back at 2 million. I was betting on 5."

f. CANON 1

i. The commentary to Canon 1 reads, "[Judges] must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by adherence of each judge to this responsibility...violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law."

ii. In context of events at the time, the above portion of Judge Murphy's March 18, 2005 letter, which encourages Patrick Purcell not to appeal the jury verdict in a civil lawsuit in which Judge Murphy was personally involved as the Plaintiff, and which appears to strongly and colorfully communicate Judge Murphy's opinion regarding the Boston Herald's chances of success on appeal served to diminish public confidence in the impartiality of the judiciary in violation of Canon 1.

iii. The above excerpt also constitutes a violation of other Canons of the Code of Judicial Conduct, which necessarily implicates a further violation of Canon 1 of the Massachusetts Code of Judicial Conduct.

g. CANON 2, 2A, 2B

i. Judge Murphy's use of an official judicial envelope to send this March 18, 2005 letter is specifically proscribed in the Commentary to Canon 2B: "Judicial letterhead and the judicial title must not be used in conducting a judge's personal business."

ii. Moreover the content of this letter, which strongly and very colorfully expresses Judge Murphy's opinion regarding the Boston Herald's chances on appeal, 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 violation of Canon 2A. This is particularly so given that it was sent in an official judicial envelope.

iii. Judge Murphy's use of an official Superior Court envelope to send this letter, which strongly expressed a legal opinion and encouraged Patrick Purcell to drop his appeal, "len[t] the prestige of judicial office for the advancement of the private interests of the judge."

iv. Judge Murphy's own statements in this letter suggest that there was <u>not</u> an <u>explicit</u> agreement for continuing confidential

settlement discussions. Judge Murphy's opening statement would be unnecessary in the presence of an explicit agreement for continuing confidential settlement discussions, "I'm going to, once again, principal to principal, as 'settlement negotiations' – off the record – just between you and me – tell you something."

Judge Murphy sent this letter to Patrick Purcell after received no response from Patrick Purcell to his prior letter of February 20.

Judge Murphy's statement, "I will NEVER, that is as in NEVER, shave a dime from what you owe me" suggests that, notwithstanding his attempt to characterize this letter as "settlement negotiations," his intent was not to communicate an "offer to compromise" but to put pressure on Patrick Purcell not to pursue an appeal at a cost of "$331,056 /yr for the next two or three years."

As such, Judge Murphy's decision to send a letter containing the above statements to the publisher of a major newspaper constituted a "careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety." Judge Murphy failed in his duty to "[take] 'reasonable precautions' to avoid having a negative effect on the confidence of the thinking public in the administration of justice.'"[9]

h. CANON 4A(1), 4D(1)

i. The content of this letter strongly and very colorfully expresses Judge Murphy's opinion regarding the Boston Herald's chances on appeal in a case in which Judge Murphy was personally involved as the plaintiff. As such this letter involved Judge Murphy's "extrajudicial activities."

Judge Murphy used official court stationery to send the letter containing the above statements to Patrick Purcell. These statements express a legal opinion and appear to be an attempt to convince Mr. Purcell that his appeal cannot succeed.

As such, by sending this letter, Judge Murphy failed to conduct his "extrajudicial activities so that they do not . . .cast doubt on [his] capacity to act impartially as a judge" in violation of Canon 4A(1).

ii. The content of this letter strongly and very colorfully expresses Judge Murphy's opinion regarding the Boston Herald's chances on appeal in a case in which Judge Murphy was personally involved

[9] Inquiry Concerning a Judge, 532 P.2d 716 (1990), quoting In the Matter of Bonin, 375 Mass. 680 (1978).

as the plaintiff. As such this letter involved Judge Murphy's "extrajudicial activities."

Judge Murphy used official court stationery to send the letter containing the above statements to Patrick Purcell. These statements express a legal opinion and appear to be an attempt to convince Mr. Purcell that his appeal cannot succeed.

As such, by sending this letter in an official judicial envelope, Judge Murphy failed to "refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality . . .[and] that may reasonably be perceived to exploit the judge's judicial position" in violation of Canon 4D(1).

7. CONCLUSION

a. The Commission respectfully requests that the Hearing Officer adopt the proposed standards of law.

b. The Commission submits that, if the Hearing Officer does accept the proposed standards of law for evaluating whether respondent has violated the Canons with which he is charged, this Notice will provide sufficient specificity to the respondent.

c. This notice is intended to provide the respondent with a general framework of the evidence and arguments the Commission intends to present at the formal hearing of this matter.

d. The Commission anticipates, but cannot guarantee, that the evidence and arguments described in this notice will be presented at the formal hearing of this matter. This notice is not intended to be an exhaustive description of all evidence and arguments the Commission will present.

e. The Commission reserves the right to present additional evidence and arguments based on new evidence that comes into its possession and based on the discovery materials provided by the respondent.

Respectfully Submitted
For the Commission on Judicial Conduct

by: _____
Howard V. Neff, III
Staff Attorney 9/12/07

Westlaw

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Supreme Court of Nevada.
In the Matter of the Honorable Donald M. MOSLEY, District Court Judge, County of Clark, State of Nevada.
The Honorable Donald M. Mosley, District Court Judge, County of Clark, State of Nevada, Appellant,
v.
Nevada Commission on Judicial Discipline, Respondent.
No. 39336.

Dec. 21, 2004.

Background: In a judicial discipline proceeding against a state district court judge, the Commission on Judicial Discipline imposed a public reprimand and a $5,000 fine, and required judge's attendance at ethics course.

Holdings: The Supreme Court, Shearing, C.J., held that:
(1) judge improperly used his judicial letterhead for two letters to principals at his child's school;
(2) judge's conduct in issuing, without notice to district attorney, own recognizance (OR) release of former employee of judge's friend did not violate judicial conduct rules;
(3) judge improperly conducted ex parte communication with criminal defendant's attorney;
(4) judge should have recused himself immediately upon learning that criminal defendant had information relevant to judge's child custody dispute with his former girlfriend; and
(5) statements that Commission's Executive Director made in newspaper article were proper.
Affirmed in part and reversed in part.

Maupin, J., filed an opinion concurring in part and dissenting in part, in which Becker, J., and Puccinelli, District Judge, sitting by designation, concurred.

Rose, J., filed an opinion concurring in part and dissenting in part.

Gibbons, J., filed a dissenting opinion.

West Headnotes

[1] Judges ⇐11(2)
227k11(2) Most Cited Cases
State district court judge's conduct in using his judicial letterhead for two letters to principals at his child's school, stating that judge had been awarded custody of his and his former girlfriend's child and asking school to prohibit former girlfriend from visiting child at school, violated judicial conduct rule prohibiting a judge from lending the prestige of judicial office to advance the judge's private interests; objective reasonable person could conclude the judge was attempting to gain a personal advantage, even if principals had already known the judge was a district court judge and even if the principals did not provide special treatment to judge. Code of Jud.Conduct, Canon 2, subd. B.

[2] Judges ⇐11(4)
227k11(4) Most Cited Cases
Requiring the state district court judge to attend a general ethics course for judges, at his own expense, was warranted as disciplinary sanction for judge's conduct in using his judicial letterhead for two letters to principals at his child's school stating that judge had been awarded custody of his and his former girlfriend's child and asking school to prohibit former girlfriend from visiting child at school, in violation of judicial conduct rule prohibiting a judge from lending the prestige of judicial office to advance the judge's private interests. Code of Jud.Conduct, Canon 2, subd. B.

[3] Judges ⇐11(2)
227k11(2) Most Cited Cases
When determining whether a judge has violated the judicial conduct rule prohibiting a judge from

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lending the prestige of judicial office to advance the judge's private interests, the judge is not to be evaluated by a subjective standard, but by the standard of how an objective reasonable person would view the judge's conduct. Code of Jud.Conduct, Canon 2, subd. B.

[4] Judges ⇐11(2)
227k11(2) Most Cited Cases
State district court judge's conduct in issuing, without notice to district attorney, own recognizance (OR) release of former employee of judge's friend, who had been arrested pursuant to bench warrant for failing to comply with requirements of plea bargain in case in which former employee was awaiting sentencing from another judge, did not violate judicial conduct rules requiring judges to maintain high standards of conduct, requiring judges to comply with the law and to promote public confidence in integrity and impartiality of
judiciary, and prohibiting ex parte communications, where it was common practice for district judges to respond to calls from the public for OR releases, and district attorneys had acquiesced in the policy of issuing OR releases ex parte. Code of Jud.Conduct, Canon 1, 2, subd. A, 3, subd. B(7).

[5] Judges ⇐11(2)
227k11(2) Most Cited Cases
State district court judge's conduct in meeting in his chambers with attorney representing criminal defendant whose sentencing following plea bargain had been assigned to judge and who was living with judge's former girlfriend, with whom judge was in bitter custody dispute regarding judge's and former girlfriend's child, violated judicial conduct rule prohibiting ex parte communications; neither attorney nor judge notified district attorney, judge and attorney discussed merits of criminal defendant's case, i.e., criminal defendant's alleged cooperation with police, which would be relevant to criminal defendant's sentencing, and attorney intended to gain procedural advantage by causing judge to recuse himself from sentencing if criminal defendant and his wife testified in child custody matter. Code of Jud.Conduct, Canon 3, subd. B(7).

[6] Judges ⇐11(4)
227k11(4) Most Cited Cases
Public censure was warranted as disciplinary sanction for state district court judge's conduct, in violation of judicial conduct rule prohibiting ex parte communications, in meeting, without notice to district attorney, in his chambers with attorney representing criminal defendant whose sentencing following plea bargain had been assigned to judge and who was living with judge's former girlfriend, with whom judge was in bitter custody dispute regarding judge's and former girlfriend's child. Code of Jud.Conduct, Canon 3, subd. B(7).

[7] Judges ⇐11(2)
227k11(2) Most Cited Cases

[7] Judges ⇐49(1)
227k49(1) Most Cited Cases
State district court judge, to whom sentencing after plea bargain had been reassigned with respect to criminal defendant who was living with judge's former girlfriend with whom judge was involved in bitter custody battle regarding judge's and former girlfriend's child, was required, under judicial conduct rules requiring judges to maintain high standards of conduct, requiring judges to promote public confidence in integrity and impartiality of judiciary, and prohibiting judges from allowing relationships to influence judicial judgment, to recuse himself immediately upon learning that criminal defendant and his wife had information relevant to the custody case, rather than waiting for day of child custody hearing at which criminal defendant and defendant's wife would testify. Code of Jud.Conduct, Canons 1, 2, subds. A, B.

[8] Judges ⇐11(4)
227k11(4) Most Cited Cases
Fine of $5,000 was warranted as disciplinary sanction for judge's failure to recuse himself immediately, in violation of judicial conduct rules requiring judges to maintain high standards of conduct, requiring judges to promote public confidence in integrity and impartiality of judiciary, and prohibiting judges from allowing relationships to influence judicial judgment, as soon as judge learned that criminal defendant, whose sentencing

following plea bargain had been assigned to judge, had information relevant to judge's child custody dispute with judge's former girlfriend, with whom criminal defendant was living. Code of Jud.Conduct, Canons 1, 2, subds. A, B.

[9] Judges ⇐11(7)
227k11(7) Most Cited Cases
State district court judge did not have due process right to present expert testimony, at Commission on Judicial Discipline's disciplinary hearing, regarding whether judge had violated judicial conduct rules, even if the hearing presented issues of first impression; Commission determined it did not need expert assistance, and expert's testimony could well have been cumulative because both sides had elicited from witnesses opinions on judicial ethics. U.S.C.A. Const.Amend. 14; West's NRSA Const. Art. 1, § 8; West's NRSA 50.275.

[10] Evidence ⇐508
157k508 Most Cited Cases
The goal of expert testimony is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity. West's NRSA 50.275.

[11] Judges ⇐11(5.1)
227k11(5.1) Most Cited Cases
Statements that Executive Director of Commission on Judicial Discipline made in newspaper article, that every state has a judicial discipline commission, that constitutionality of Nevada's commission had been upheld by the court, and that Executive Director did not know of any judicial discipline commission that had been held unconstitutional, were permissible statements clarifying procedural aspects of disciplinary proceedings.
*557 Dominic P. Gentile, Ltd., and Dominic P. Gentile, Las Vegas; Neil G. Galatz & Associates and Neil G. Galatz, Las Vegas; Thomas F. Pitaro, Las Vegas, for Appellant.

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

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

Before the Court En Banc. [FN1]

FN1. The Honorable Andrew J. Puccinelli, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. Nev. Const. art. 6, § 4. The Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.

OPINION

SHEARING, C.J.

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

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

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

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

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

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court judge;

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

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

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

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

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

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

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

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

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

DISCUSSION

Standard of review

Rule 25 of the Procedural Rules for the Nevada Commission on Judicial Discipline (CPR) provides that "[c]ounsel appointed by the commission to present the evidence against the respondent have the burden of proving, by clear and convincing legal evidence, the facts justifying discipline in conformity with averments of the formal statement of charges." In *Goldman v. Nevada Commission on Judicial Discipline*, this court held that *559Article 6, Section 21 of the Nevada Constitution "does not contemplate this court's *de novo* or independent review of factual determinations of the commission on appeal." [FN2] This court went on to say:

> FN2. 108 Nev. 251, 267, 830 P.2d 107, 117-18 (1992), *overruled on other grounds by Matter of Fine*, 116 Nev. 1001, 1022 n. 17, 13 P.3d 400, 414 n. 17 (2000); *see also* Nev. Const. art. 6, § 21.

To the contrary, the constitution confines the scope of appellate review of the commission's factual findings to a determination of whether the evidence in the record as a whole provides clear and convincing support for the commission's findings. The commission's factual findings may not be disregarded on appeal merely because the circumstances involved might also be reasonably reconciled with contrary findings of fact. [FN3]

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FN3. 108 Nev. at 267, 830 P.2d at 118.

Counts I & II: Use of judicial letterhead

[1][2] The evidence adduced at the hearing established that Judge Mosley and his ex-girlfriend, Terry Mosley, who is also referred to as Terry Figliuzzi, have a child named Michael. Judge Mosley and Figliuzzi have been involved in a bitter child custody dispute. In June 1998, Judge Mosley was awarded custody of Michael. After that custody order was issued, Judge Mosley sent two letters to Michael's school. Both of those letters were written on Eighth Judicial District Court letterhead. The letters explained that Judge Mosley had been awarded custody of his son, and asked that the school prohibit Figliuzzi from visiting Michael at school.

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

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

NCJC Canon 2B provides, in pertinent part:

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

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

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

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

*560 [3] The United States Supreme Court, in interpreting a section of the federal judicial code, has held that a judge is not to be evaluated by a subjective standard, but by the standard of an objective reasonable person, because "people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." [FN4] In *Inquiry Concerning a Judge*, an Alaska Supreme Court justice sent three letters on judicial chambers stationery to opposing counsel regarding a personal matter. [FN5] The court held that it was irrelevant that the "intended recipients of the letters were not influenced in fact by the chambers stationery." [FN6] The court noted that using judicial stationery for personal reasons would likely cause the public to believe that the justice is "unable to distinguish his judicial activities from his personal ones. This failure to maintain separate interests could lead a reasonable person to believe that petitioner's

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judicial decision-making ability similarly might be flawed." [FN7]

FN4. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864-65, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

FN5. 822 P.2d 1333, 1336 (Alaska 1991).

FN6. *Id.* at 1341.

FN7. *Id.*

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

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

[4] District Judge John McGroarty testified that in 1999 he was assigned a criminal case concerning Robert D'Amore. According to Judge McGroarty, the case originally involved a burglary and a theft, which was eventually negotiated to attempted theft. Judge McGroarty stated that the plea bargain required D'Amore to make restitution payments of $10,000 a month. Additionally, Judge McGroarty testified that because D'Amore failed to attend some hearings or make payments, he issued a bench warrant for $10,000. At the time Judge McGroarty issued the bench warrant, D'Amore had entered a plea but had not been sentenced. D'Amore was eventually arrested on the bench warrant.

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

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

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

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

The Commission found that Judge Mosley violated NCJC Canons 1, [FN8] 2, [FN9] 2A and 3B(7) [FN10] by engaging in an ex parte communication with Orcutt regarding D'Amore's arrest and release and violated NCJC Canons 1, 2, 2A and 2B by ordering the release of D'Amore on his OR at Orcutt's request, without notifying the district

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attorney's office. The discipline that the Commission ordered for the violations in Counts III and IV was "a strongly worded censure."

FN8. NCJC Canon 1 provides, in pertinent part: "A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

FN9. NCJC Canon 2 provides, in relevant part:
A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.

FN10. NCJC Canon 3B(7) provides:
A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. (e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

Judge Mosley contends that the special prosecutor did not provide clear and convincing evidence that he engaged in an improper ex parte communication with Orcutt. Instead, he asserts that his ex parte communications were expressly authorized by law. According to Judge Mosley, it was common practice in the Eighth Judicial District for a district judge to respond to calls from the public, police, district attorneys, and defense attorneys regarding OR releases. Judge Mosley also asserts that under the totality of the circumstances, [FN11] including the common practice in the district and the fact that his conduct in speaking to Orcutt was not considered unethical by the other district judges, he should not be found to have violated the code of conduct.

FN11. *See In re Greenberg*, 457 Pa. 33, 318 A.2d 740, 741 (1974) (noting that it is the court's "duty to consider the totality of all the circumstances when determining questions pertaining to professional and

judicial discipline").

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

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

Judge Mosley's contact with Orcutt and his release of D'Amore was within the spirit of the local practice. It is true that the local practice violated the Canons to the extent that the general public may not have known about the procedures available and OR releases were frequently granted upon the requests of a judge's family or friends, thus creating an appearance of special favors. But, because of the custom and practice in Clark County, however flawed, with the acquiescence of the district attorneys, we reverse the Commission's finding that Judge Mosley violated NCJC Canons 1, 2, 2A and 3B(7) as alleged in Counts III and IV. [FN12]

FN12. Although we reverse the findings of the Commission in this instance, nothing in our decision should be read to suggest the judges in Clark County may continue the practices that do not comply with the recently enacted Rule 3.80 of the Rules of Practice of the Eighth Judicial District Court.

Counts VI, VII, and VIII: Ex parte communication and delayed recusal

[5][6][7][8] Joseph McLaughlin was charged with first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, burglary with use of a deadly weapon and cheating at gambling. McLaughlin was represented on these charges by attorney Catherine Woolf. Pursuant to plea negotiations, McLaughlin pleaded guilty to robbery and burglary without the use of a deadly weapon, and agreed to testify against his co-defendant. In July 1997, McLaughlin's case was transferred to Judge Mosley.

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

Woolf subsequently met with Judge Mosley in his chambers. Only Woolf and Judge Mosley were present, and neither Woolf nor Judge Mosley notified the district attorney. Woolf testified that she stated at the beginning of the meeting that McLaughlin had been assigned to his chambers for sentencing. Woolf testified that she informed Judge Mosley that District Judge Gene Porter had taken McLaughlin's plea and that McLaughlin "was cooperating with the authorities on this case" and on another case. Woolf also testified that McLaughlin's sentencing date had been continued due to his cooperation in the other criminal case.

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Woolf testified that they then discussed the information that McLaughlin and his wife had concerning Michael. Woolf testified that Judge Mosley asked Woolf to meet with Judge Mosley's attorney, Carl Lovell. Woolf stated that Judge Mosley never indicated at this meeting that he was planning to recuse himself from McLaughlin's criminal case.

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

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

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

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

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

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

Substantive matters in McLaughlin's case were discussed at the ex parte meeting, and Judge Mosley

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

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

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

Judge Mosley asserts that a recusal is not required at any particular time so long as it is accomplished. Judge Mosley also argues that judges do not have a duty to recuse themselves unless a clear and valid reason exists for doing so. [FN13] Therefore, Judge Mosley argues that he was not unreasonable in waiting to determine whether the McLaughlins' testimony was genuine before he recused himself.

FN13. *See Ham v. District Court*, 93 Nev. 409, 414, 566 P.2d 420, 423 (1977) (noting that " '[a] judge *has a discretion* to disqualify himself as a judge in a case if he feels he cannot properly hear the case because his integrity has been impugned' " (quoting *State v. Allen Superior Court No. 3*, 246 Ind. 366, 206 N.E.2d 139, 142 (1965))).

We conclude that Judge Mosley is wrong. Judge Mosley should have recused himself immediately after he received a telephone call from Woolf notifying him that the McLaughlins had information about his custody case and that Mr. McLaughlin was assigned to his chambers for sentencing. As the Wisconsin Supreme Court observed in *Disciplinary Proceedings Against Carver*, [FN14] there is a danger that a judge's failure to immediately recuse himself would lead others to conclude that the judge was not going to do so. A reasonable, objective observer could conclude that the judge was using his position for personal advantage, thereby diminishing public confidence in the integrity and impartiality of the judiciary. Therefore, we conclude that the Commission did not err in determining that Judge Mosley violated NCJC Canons 1, 2, and 3B(7).

FN14. 192 Wis.2d 136, 531 N.W.2d 62, 69 (1995).

Expert witness

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

[10] Under the Commission rules, the Nevada rules of evidence apply. NRS 50.275 provides that an expert may testify "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." We have held that "[w]hether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion." [FN15] The goal of expert testimony "

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'is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity.' " [FN16] The Commission determined that its members did not require expert assistance to decide whether Judge Mosley's conduct violated the canons. The Commission had that discretion. As an article in the *Judicial Conduct Reporter* states:

> FN15. *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).
>
> FN16. *Prabhu v. Levine*, 112 Nev. 1538, 1547, 930 P.2d 103, 109 (1996) (quoting *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987)).

Judicial conduct organizations often have the difficult job of determining ethical issues of first impression in their states, or perhaps, nationally. That important job should not be delegated to an expert witness in a proceeding. No legal scholar or judge familiar with the customs of a judicial community possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members of the judicial conduct organization. By relying on their own expertise *565 as representatives of the public and legal community, rather than the opinions of experts, a judicial conduct commission fulfills its official public responsibility to formulate the appropriate ethical standards for their states. [FN17]

> FN17. Marla N. Greenstein & Steven Scheckman, *The Judicial Ethics Expert Witness*, Jud. Conduct Rep., Winter 2001, at 1.

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

Hypothetical questions

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

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

The Commission's public statements

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

CPR 7 provides:

> In any case in which the subject matter becomes public, through independent sources, or upon a finding of reasonable probability and filing of a formal statement of charges, the commission may issue statements as it deems appropriate in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the respondent to a fair hearing without prejudgment, and to state that the respondent denies the allegations. At all times, however, the commission, its counsel and staff shall refrain

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> from any public or private discussion about the merits of any pending or impending matter, or discussion which might otherwise prejudice a respondent's reputation or rights to due process.

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

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

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

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

*566 *CONCLUSION*

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

AGOSTI, J., concurs.

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

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

For many years, magistrates and district judges in Clark County have released persons charged with nonviolent offenses based upon ex parte communications with attorneys and persons from the community at large, governed by the considerations set forth in NRS 178.4853. This practice has continued with the tacit agreement of the Clark County District Attorney's Office under the administrations of Roy Woofter, George Holt, Bob Miller, Rex Bell and Stewart Bell. However, this practice was generally restricted to situations in which the accused had not been brought before a magistrate for an initial appearance, and it was generally understood that such relief would be denied when another judge had been assigned to the case. With the reservations noted by the majority, the practice provided essential compliance with our judicial canons, and very few abuses of the practice have been documented. In fact, the police and the district attorneys have for many years frequently relied upon ex parte applications for release of inmates in aid of law enforcement initiatives. [FN1]

> FN1. I am the first to admit that the general practice was in part flawed because the general public did not have access to the practice except through persons acquainted with municipal judges, justices of the peace and district court judges. This court, in its recent changes to the Rules of Practice for the Eighth Judicial District, specifically delineated the circumstances under which judges may reduce bail without contact with the state pursuant to ADKT 340. In my dissent, I noted my preference for creating an "on-call" system for judges and deputy district attorneys and deputy city attorneys to review informal applications for bail

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(Cite as: 102 P.3d 555)

> reductions; in this way, general access to bail reductions prior to an initial appearance would be achieved.
> *In the Matter of the Proposed Eighth Judicial District Court Rule (EDCR 3.80) Regarding Release From Custody or Bail Reduction*, ADKT 340 (Order Adopting Rule 3.80 of the Rules of Practice for the Eighth Judicial District Court of the State of Nevada, May 23, 2003).

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

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

BECKER, J. and PUCCINELLI, D.J., concur.

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

I concur with the majority's conclusion, except that I do not believe that there was clear and convincing evidence produced to support the allegations made in Count VII, concerning the ex parte communications in Lovell's office. The record indicates that during Mr. Pitaro's cross-examination of Woolf, he specifically asked Woolf whether the communication in Lovell's office as alleged in Count VII was an improper ex parte communication. Woolf responded negatively and explained that nothing about the case was discussed other than the fact that McLaughlin was a defendant in front of Judge Mosley. Thus it appears that, although Judge Mosley did engage in communications with McLaughlin and Woolf absent the presence of, or notification to, the State, the communications at Lovell's office did not pertain to the merits of McLaughlin's pending criminal proceeding. The Commission was presented with no testimony to show that the merits of McLaughlin's case were discussed during the communications at Lovell's office. To the contrary, other than Woolf's mention of the procedural posture of McLaughlin's case, it appears that Judge Mosley's communications with McLaughlin and Woolf were limited to the subject of Terry Figlinzzi's parenting of Michael, and these communications did not affect the substance or merits of the State's prosecution of McLaughlin. [FN1] While Judge Mosley may have been using his position as a judge presiding over McLaughlin's case to obtain favorable evidence in his custody case with Terry Figliuzzi, that is not the charge brought against him. Therefore, I conclude that there was by definition no violation of the ban on ex parte contacts concerning a pending or impending proceeding, and Judge Mosley did not violate NCJC Canon 3(B)(7) as regards Count VII.

> FN1. *See Matter of Varain*, 114 Nev. 1271, 1277, 969 P.2d 305, 309 (1998) (observing that the judge's brief communication with the defendant did not affect the substance or merits of the State's prosecution).

GIBBONS, J., dissenting.

I respectfully dissent from the majority's conclusion that we should affirm the decision of the Nevada

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Commission on Judicial Discipline.

We have previously held that precluding the admission of evidence that supports an expert's opinion may constitute an abuse of discretion. [FN1] In *Born v. Eisenman*, [FN2] a patient sued two surgeons for medical malpractice in performing an abdominal surgery. The surgeons' experts testified that the patient's injuries could not have resulted from the surgeons' negligence because such result was medically impossible. [FN3] Judge Mosley, as the presiding district judge, precluded the patient's expert from referring to a prior Colorado case describing a similar surgical event, and the jury found for the surgeons. [FN4] We reversed Judge Mosley's decision and concluded that he abused his discretion by prohibiting the patient's expert from referring to the Colorado case while allowing the surgeons' experts to testify as to medical impossibility. [FN5]

FN1. *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227 (1998).

FN2. *Id.* at 855-56, 962 P.2d at 1228.

FN3. *Id.* at 858, 962 P.2d at 1229-30.

FN4. *Id.* at 857-58, 962 P.2d at 1229-30.

FN5. *Id.* at 861, 962 P.2d at 1231.

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

In *Pineda v. State*, we held that a defendant is entitled to call an expert witness *568 when the expert's testimony will be helpful to the trier of fact and corroborates the theory of defense. [FN6] We held that " '[t]he due process clauses in our constitutions assure an accused the right to introduce into evidence *any* testimony or documentation which would tend to prove the defendant's theory of the case.' " [FN7] Judge Mosley planned to call Professor Stempel to testify regarding whether Judge Mosley violated the code of judicial conduct. Professor Stempel's testimony was intended to advance Judge Mosley's theory of the case. Accordingly, due process requires that Judge Mosley be allowed to present that testimony.

FN6. 120 Nev. 204, —, 88 P.3d 827, 833-34 (2004).

FN7. *Id.* at —, 88 P.3d at 834 (quoting *Vipperman v. State*, 96 Nev. 592, 596, 614 P.2d 532, 534 (1980) (emphasis added)).

The majority cites to an article from the *Judicial Conduct Reporter* to support its decision to deny Judge Mosley's right to due process. The authors of that article conclude that "[n]o legal scholar or judge ... possesses unique knowledge of ethical standards that is more reliable than the independent decision-making of the members of the judicial conduct organization." [FN8] I disagree. Judge Mosley's right to procedural due process trumps the authors' opinions.

FN8. Marla N. Greenstein & Steven Scheckman, *The Judicial Ethics Expert Witness*, Jud. Conduct Rep., Winter 2001, at 1.

Apart from due process considerations, there are other valid justifications for admitting expert testimony on judicial ethics. West Virginia University College of Law Professor Carl M. Selinger has detailed three such justifications: (1) the inaccessibility of legal ethics law, (2) the advantage of objectivity, and (3) the advantage of cross-examination. [FN9]

FN9. *See* Carl M. Selinger, *The Problematical Role of the Legal Ethics Expert Witness*, 13 Geo. J. Legal Ethics 405, 409-18 (2000). Though Professor Selinger ultimately concluded that other ethical concerns outweigh these justifications, he did not suggest that the justifications are without merit. Rather, his

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> article endorsed the use of ethics experts as advocates, as opposed to expert witnesses, as a better means of determining whether particular activities constitute ethical violations. *Id.*

First, the relative inaccessibility of legal ethics law supports the admission of expert testimony. "[A]s more ethics rules are drafted to cover only lawyers in particular practice contexts, it is possible for such rules to be much more accessible to, and readily understood by some lawyers than others." [FN10] Such inaccessibility may support the admission of expert testimony even where the decision maker is relatively familiar with the rules at issue. This is true because the decision to consider expert testimony, subject to cross-examination, is "superior to relying only on the judge's, or a law clerk's, independent research, or on the arguments of non-scholar advocates." [FN11] I suggest that this proposition is also applicable to cases tried before the Commission on Judicial Discipline.

FN10. *Id.* at 411.

FN11. *Id.*

Further, the admission of expert testimony provides the advantage of objectivity. "From the point of view of achieving justice, the main advantage that can be cited for the admission of legal ethics expert testimony is that it provides decisionmakers with more objective analysis of the issues than they would gain from advocacy alone." [FN12] This is true because the scholar expert has no attorney-client relationship with the accused; thus, he has no duty to tailor his testimony regarding the alleged ethical violations to fit the defense's theory of the case. Indeed, such tailoring would ruin the scholar's reputation as an expert in the field whose opinions could be trusted by courts and disciplinary bodies. [FN13]

FN12. *Id.* at 414.

FN13. *Id.*

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

> "[I]f an expert testifies before the court, cross-examination is available. Thus, the *569 bases of the expert's conclusions can be tested. However, if the court simply reads law review articles or books written by that same expert, cross-examination is not available and it is more difficult to attack the reliability of the opinions expressed." [FN14]

FN14. *Id.* at 417 (quoting Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. Va. L.Rev. 645, 672 (1990)).

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

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

END OF DOCUMENT

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUDGE JOSEPH E. DI LORETO	DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT

This disciplinary matter concerns Judge Joseph E. Di Loreto, a judge of the Los Angeles County Superior Court since 1995, whose current term began in January 2003. Judge Di Loreto and his attorney, Edward P. George, Jr., Esq., appeared before the commission on May 10, 2006, pursuant to rule 116 of the Rules of the Commission on Judicial Performance, to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Di Loreto and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

Judge Di Loreto owns a vacant lot in Downey, California next to a commercial professional building he also owns. In November 2003, the City of Downey initiated a code enforcement action, based on an alleged violation of Downey Municipal Code sections 9144.08 and 9150.14 due to the presence of trailers and motor vehicles stored on the vacant property. In March 2004, Judge Di Loreto attended a meeting at the Downey Police Department regarding the alleged violations and agreed to remove the vehicles to avoid legal action. The city was represented at the meeting by a code enforcement officer, Mark Detterich, as well as the assistant director for community development/city planner, Ron Yoshiki, and the city prosecutor, John Cotti.

On December 29, 2004, Judge Di Loreto sent the following letter to the city planner, Ron Yoshiki:

The Superior Court
415 WEST OCEAN BOULEVARD
LONG BEACH, CALIFORNIA 90802
CHAMBERS OF
JOSEPH E. DI LORETO, JUDGE
(PERSONAL)

RECEIVED
JAN 03 2005
PLANNING

TELEPHONE
[illegible]
FAX
[illegible]

December 29, 2004

City of Downey
Building Department
Attention: Ron Yoshiki
P.O. Box 7016
Downey, CA 90241-7016

Dear Ron:

At our meeting on March 3, 2004 with yourself and Mr. Cotti, I agreed to remove my trailer from the vacant lot next to my law offices at 8607 East Imperial Highway. At the meeting, I anticipated my new building which will house my trailer would be completed by the end of this year. Unfortunately, due to many delays too numerous to explain, the actual work was not started until mid December, 2004.

My contractor, Norm Wilson & Sons, anticipates the construction should be completed by July or August 2005, barring unforeseeable weather. I will remove my trailer when the building is ready for occupancy.

I thank you for your kind patience in this matter.

Very truly yours,

JOSEPH E. DI LORETO

JED:lln

The judge's letter, on "chambers" judicial stationery, with "The Superior Court" printed at the top, and with the court's address and official seal, expressly identified Judge Di Loreto as a judge; the letterhead bore the inscription "Joseph E. Di Loreto, Judge". In the letter, Judge Di Loreto sought an extension of time within which to remove his trailer and, implicitly, the forbearance of legal action. This December 29, 2004 letter was referred to in subsequent correspondence by another city employee and the City Attorney on behalf of the City of Downey regarding the dispute.

Judge Di Loreto's prior use of chambers judicial stationery resulted in discipline. This prior matter, in 2001, involved the use of chambers judicial stationery in a personal dispute over

ownership of a racing car with a "long-time personal friend" of the judge, a Mr. Barton. The stationery used was identical to that used in the December 29, 2004 letter to Mr. Yoshiki in the dispute with the City of Downey.

The commission issued an advisory letter to Judge Di Loreto in 2001 that stated, in pertinent part, as follows:

> The commission expressed disapproval of your sending a letter on chambers judicial stationery to Robert Barton concerning a dispute between you and Mr. Barton with regard to ownership of a racing car. It was the commission's view that this letter, asserting lawful ownership of property that was the subject of a dispute and dictating your preferred resolution, constituted a use of judicial stationery to advance a personal or pecuniary interest. Accordingly, the commission concluded, your letter was inconsistent with Canon 2B(2) of the Code of Judicial Ethics, which states that a judge shall not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others, and with Canon 2B(4), which states that a judge shall not use the judicial title in any written communication intended to advance the judge's personal or pecuniary interests.

Judge Di Loreto's use of chambers judicial stationery in the current matter concerning a private dispute as a property owner with the City of Downey, again violated canons 2B(2) and 2B(4). The fact that the printed judicial letterhead included a parenthetical "personal" is irrelevant, given that the court stationery was being used in the judge's personal dispute with a governmental agency regarding his own property. Letters such as the one written by Judge Di Loreto regarding official governmental business typically are included in an official record that may be reviewed by other government employees and officials, and may be used as evidence in subsequent legal proceedings.

The propriety of using judicial stationery in personal disputes does not turn on whether or not the recipient already knows the author is a judge. Rather, the use of judicial stationery is prohibited under the canons in question because, in such circumstances, such use involves lending the prestige of office or the judicial title to advance personal or pecuniary interests.

In reaching its determination that public discipline was appropriate in this matter, the commission noted that Judge Di Loreto's use of chambers judicial stationery in his dispute with the City of Downey was the same conduct that resulted in his 2001 advisory letter, and that the judge continues to advance the same justification for the improper behavior – the addressee knew the judge was a judge – that the commission rejected in 2001. In Judge Di Loreto's opposition to the commission's preliminary investigation letter in this matter, he asserted that since Mr. Yoshiki knew the judge was a judge, the use of the letterhead was appropriate. Indeed, in the

judge's written objections under rule 116 to the proposed public admonishment, he persisted in making the same assertion, which he repeated during his oral presentation to the commission on May 10, 2006.

Judge Di Loreto's use of judicial stationery for his December 29, 2004 letter to Mr. Yoshiki was, at a minimum, improper action.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted for a public admonishment. Commission member Mrs. Crystal Lui did not participate.

Dated: June 13, 2006

/s/
Marshall B. Grossman
Chairperson

Citation: 375 Mass. 680
Parties: IN THE MATTER OF ROBERT M. BONIN.
County: Suffolk
Hearing Date: June 5-7, 9, 12-14, 20, 1978
Decision Date: July 8, 1978
Judges: QUIRICO, BRAUCHER, KAPLAN, WILKINS, & ABRAMS, JJ.

Receipt of a leased automobile by the wife of the Chief Justice of the Superior Court from a corporation which had formerly been a legal client of the Chief Justice and payment by the corporation for a reception and dinner for the Chief Justice after his appointment to that position did not, standing alone, constitute violations of the Code of Judicial Conduct or S.J.C. Rule 3:17 (2) [695]; however, the Chief Justice's subsequent conduct in appointing a relative of the corporation's president to a position in the office of the Chief Justice and his appointment of two secretaries who had performed gratuitous secretarial services for him and for the corporation while they and the Chief Justice were employed by the Attorney General of the Commonwealth constituted violations of Canon 3 (B) and Canon 2 of the Code of Judicial Conduct and S.J.C. Rule 3:17 (2) [696]. In the circumstances, neither the requirement that a judge exercise a measure of self-restraint in engaging in activities which may reflect on his impartiality nor a sanction for his failure to do so raised any serious question under the First or Fourteenth Amendment to the United States Constitution or corresponding provisions of the Constitution of the Commonwealth. [709-710] Following evidentiary hearings on charges against the Chief Justice of the Superior Court, a majority of this court concluded that it was not proved that the Chief Justice knew before his attendance at a meeting that the meeting was intended to raise funds in the interest of criminal defendants in certain cases pending before the Superior Court and that it was likely that there would be partisan comment on the cases at the meeting. [705] QUIRICO, J., and BRAUCHER, J., concurring; WILKINS, J., joined by ABRAMS, J., concurring.

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Following evidentiary hearings on charges against the Chief Justice of the Superior Court, this court concluded that, before attending a meeting that was intended at least in part as a partisan rally in the interest of criminal defendants in certain cases pending in the Superior Court, the Chief Justice had good reason to infer that the meeting would touch on matters pending in his court, that the Chief Justice was negligent almost to the point of wilfulness in ignoring information brought to his attention about the character of the meeting, and that in attending the meeting in these circumstances he violated Canons 2 (A) and 5 (B) of the Code of Judicial Conduct and S.J.C. Rule 3:17 (2). [705-707] In a proceeding against the Chief Justice of the Superior Court, it was not proved that the Chief Justice knowingly made false statements in a press release or in testimony under oath on deposition or that he sought to have an assistant make a statement which he knew would be false or

materially misleading. [710-711] QUIRICO, J., and BRAUCHER, J., concurring; WILKINS, J., joined by ABRAMS, J., concurring.

INFORMATION filed in the Supreme Judicial Court on May 4, 1978.

Robert W. Meserve & Mark L. Wolf, Designated Counsel.

Paul R. Sugarman & David J. Sargent for the respondent.

Ernest Winsor, James C. Hamilton, John Reinstein, Harvey A. Silverglate, Jeanne Baker & David Rosenberg, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

BY THE COURT. Robert M. Bonin, now Chief Justice of the Superior Court (Chief Justice), was admitted to the bar of this Commonwealth in 1954. He spent the next year as a teaching fellow and graduate student at a law school, followed by three years of active duty with the Judge Advocate General's Corps of the United States Army. After completing his military service he was employed in legal research, writing and editing for about one and one-half years, and thereafter he practiced law, first as an employee in a law firm, and later as a partner in a firm formed by him and an associate. That continued until January, 1975, when he was appointed First Assistant Attorney General for the Commonwealth. He occupied that position until March 2, 1977, when he was appointed to his present position. Prior to his

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appointment as Chief Justice he was engaged on a part-time basis in teaching at two law schools in the Boston area.

Some time in 1977 the Committee on Judicial Responsibility (Committee), established by S.J.C. Rule 3:17, as amended, 372 Mass. 925 (1977), commenced an investigation of alleged misconduct by the Chief Justice.[1] On December 21, 1977, this court, at the request of the Committee, appointed Robert W. Meserve, Esquire, as counsel to the Committee for that investigation and later authorized the Committee to engage Mark L. Wolf, Esquire, to assist Mr. Meserve in the investigation. On March 13, 1978, counsel submitted to the Committee a ninety-three page preliminary report on a number of matters investigated, with conclusions and recommendations of counsel thereon. The investigation by the Committee and its counsel continued after the filing of the preliminary report and was also extended to matters not covered in that report.

As the Committee's investigation progressed, the fact of the investigation as well as the nature and identity of some of the areas under investigation became the subject of comment in the news media and elsewhere. This occurred, notwithstanding the provisions of S.J.C. Rule 3:17 (2), 372 Mass. 925 (1977), that "[a]ll Committee proceedings shall be confidential and conditionally privileged except that, on request of any judge against whom proceedings have been initiated, the Committee may conduct such proceedings publicly." No such request was filed with the Committee by the Chief Justice. This court does not attribute the responsibility for the news media comments to any participants in the investigation, and recognizes that the public knowledge

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[1] Supreme Judicial Court Rule 3:17 (2), as amended, provides in part: "On its own motion, or on complaint by any person, the Committee shall inquire into and investigate the alleged physical or mental incapacity of any judge; allegations of misconduct or maladministration in office, wilful or persistent failure to perform duties, habitual intemperance or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute; and any alleged act which may violate the Code of Judicial Conduct (Rule 3:25)."

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of the fact of the investigation made public speculation and comment inevitable in the circumstances.

On April 11, 1978, following events of the preceding days to be described below, this court wrote to the Chief Justice suggesting that he remove himself voluntarily from all judicial and administrative duties until final resolution of then existing allegations, and implying no judgment on the merits of any of the allegations. On the next day the Chief Justice wrote to this court respectfully declining to suspend himself voluntarily and stating reasons therefor. He asked that this court give him and his attorneys an opportunity to be heard before proceeding further. On April 12, 1978, this court informed him that it would hear him and his attorneys on the following day, and that the hearing would be limited to the question "whether without regard to the merits of any matter which is now under consideration by this Court's Committee on Judicial Responsibility, the public interest, including the effective administration of the Superior Court and public confidence in the fair administration of justice requires [your] suspension." The hearing was held as scheduled, and thereafter this court, on April 13, 1978, entered an order temporarily enjoining the Chief Justice until further order of this court, from the performance of all judicial and administrative functions as Chief Justice of the Superior Court. The order has continued to this date.

As a result of its investigation the Committee concluded that formal proceedings should be instituted against the Chief Justice, and on April 20, 1978, it caused a written "Notice of Formal Proceedings" to be served on him advising him of the institution of the proceedings to inquire into the charges, and setting forth the charges against him.[2]

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[2] This procedure was in accordance with the following provision of the Rules of the Committee on Judicial Responsibility adopted by the Committee and approved by this court pursuant to S.J.C. Rule 3:17 (2), as amended, 372 Mass. 925 (1977): "Rule 13. Notice of Formal Proceedings. (a) After the preliminary investigation has been completed, if the Committee concludes that formal proceedings should be instituted, the Committee shall without delay issue a written notice to the judge advising of the institution of formal proceedings to inquire into the charges. . . . (b) The Notice shall state in concise language the charges against the judge including references to any sections of the Code of Judicial Conduct which the judge is charged with having violated, and the alleged facts upon which such charges are based."

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On April 21, 1978, the Committee filed a motion with a single justice of this court asking that the following material be made public: (a) a portion of the preliminary report filed with the Committee by its counsel on March 13, 1978, and (b) the "Notice of Formal Proceedings" which had been served on the Chief Justice on April 20, 1978. The only part of the preliminary report which the Committee asked be made public was that relating "to matters which were investigated and not found by the Committee to warrant further action." It thus did not seek disclosure of the part of the report relating to the charges which were described in the "Notice of Formal Proceedings." The Committee also asked that it be authorized, at its discretion, to turn over to the Attorney General certain material relating to one phase of its investigation. The motion was heard by a single justice on April 21, 1978, and allowed on April 27, 1978.

On May 3, 1978, a single justice reported to the full court for its consideration and decision the question "[w]hether the formal charges returned by the Committee against Chief Justice Bonin on April 20, 1978, shall be entered in the office of the Clerk of the Supreme Judicial Court for the Commonwealth, and there treated as an information to be heard, decided and disposed of by the Full Court." The question thus reported was argued before the full court on May 4, 1978, and on that day the full court entered an order answering the question in the affirmative. The order provided further that the Chief Justice file his answer or other pleadings thereto on or before May 12, 1978, and that hearings on the Information commence before the full court not

later than June 5, 1978. The required answer was filed on May 12, 1978. The Information and answer are appended as Appendices A and B. Hearings before the full court started on June 5, the presentation of evidence was completed

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on June 14, and final arguments were heard on June 20, 1978. Summary of Pleadings.

The pleadings in this proceeding consist of the Information and the respondent's answer thereto. The Information is based on the "Notice of Formal Proceedings" which the Committee caused to be served on the respondent on April 20, 1978. It includes nine separately numbered charges of alleged improper conduct by the respondent. Each charge consists of several numbered paragraphs of factual allegations followed by a concluding paragraph charging that by reason of the facts alleged the respondent violated one or more of the provisions of S.J.C. Rule 3:17, as amended, 372 Mass. 925 (1977), or of S.J.C. Rule 3:25, 359 Mass. 841 (1972), which prescribed a "Code of Judicial Conduct." The respondent answered each numbered charge separately. We summarize the charges and the answers thereto.

First charge. It may be helpful to state at this point that the first six charges stem from the respondent's attendance at a gathering (meeting) at the Arlington Street Church in Boston on April 5, 1978. It is alleged in all six charges that the respondent purchased tickets for the meeting which was for the benefit of the Boston/Boise Committee, that he in fact attended the meeting, and that the principal speaker was Gore Vidal whose subject was "Sex and Politics in Massachusetts." The respondent admits these allegations as to all six charges in which they are contained, and he adds that the price of admission to the meeting was five dollars per person.

The first charge continued with the following allegations. Before attending the meeting the respondent was informed, and should have known and knew that the proceeds of the ticket sales were intended to be used in part for the benefit of the defendants in a group of twenty-four criminal cases (the Revere cases) which he knew were then pending in the Superior Court, to assist the defendants in their defense of

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such cases and to assist witnesses and others involved in the cases.

The respondent denies these allegations.

Second charge. Before attending the meeting the respondent knew or should have known that the Revere cases would be or were likely to be discussed. Those and other criminal cases which the respondent knew might be heard in the Superior Court were discussed in his presence, and the discussion included statements concerning the merits of the cases, criticism of the administration of justice in relation to those cases, and expressions of doubt whether the defendants could receive a fair trial.

The respondent denies these allegations. He admits the accuracy of the transcripts of what was said at the meeting, but he adds that it is not alleged that he heard any "discussion" at the meeting, and that his sole purpose in attending was to hear Gore Vidal.

Third charge. Statements were made at the meeting in the respondent's presence concerning the status and merits of the Revere cases, denouncing them as improperly motivated, and indicating that it was unlikely that the defendants in the cases could or would receive a fair trial. It was stated that the proceeds of the ticket sales would be used largely for the benefit of the defendants and others involved in the Revere cases. There were also statements on the status and merits of other criminal matters which the respondent knew might be heard in the Superior Court. The respondent did not leave the meeting at any time until its conclusion.

The respondent admits the accuracy of the transcripts of the meeting and acknowledges that he did not leave the meeting before its conclusion. He again notes that it is not alleged "that the remarks and statements of all of the speakers were heard and understood," and specifically denies that he heard any remarks which imposed upon him any duty to leave the meeting. He states that "a reading of the entire

transcript of the event does not reveal any material that would under the law have imposed upon him any duty to leave."

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Fourth charge. After incorporating the first three charges, it is further alleged that the respondent met with Gore Vidal at the end of the meeting and engaged in a friendly conversation with him, knowing that this was likely to be photographed and knowing that this would give the appearance that he indorsed the criticism at the meeting of the administration of justice and that he indorsed the raising of funds for the benefit of the defendants in the Revere cases. The respondent's meeting and conversation with Vidal were photographed and publicized.

The respondent, in addition to his answer to the allegations in the first three charges, admits his meeting and conversation with Vidal and that it was photographed and publicized. He denies the additional allegations. He answers further that "this charge is repugnant to the basic fundamental rights of any person."

Fifth charge. On April 11, 1978, the respondent stated under oath that before going to the meeting he made no inquiry about the nature of the Boston/Boise Committee and was not advised that committee would use funds raised by the meeting for the benefit of the defendants or others involved in the Revere cases, that there was no reference at the meeting about the use of the funds derived therefrom, that there was no reference to the Revere cases prior to the remarks by one Thomas Reeves, and that the only remark by Reeves about the cases pertained to the age of the alleged victims. The above statements by the respondent were material to the investigation then being conducted, and he should have known and, in fact, knew that they were false. On April 7, 1978, the respondent issued a press release stating that he did not learn of the intended use of the funds derived from the meeting until the day after the meeting. The respondent should have known and, in fact, knew that the statement was false.

As to the alleged false testimony the respondent denies that he made any statement which he knew to be false and says that he testified in good faith to the best of his recollection.

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As to the press release he admits issuing it but denies that any statement in the release was false.

Sixth charge. After incorporating the first three charges, it is further alleged that the respondent knew before he attended the meeting on April 5, 1978, that his administrative assistant, Francis X. Orfanello, had advised him in substance and effect that the proceeds of the meeting would be used for the defense of defendants in the Revere cases. On April 6, 1978, the respondent sought to have Mr. Orfanello make a false and misleading statement to the effect that he had told the respondent only that the meeting was "for gays or gay people."

The respondent, in addition to his answer to the first three charges, denies all of the allegations of the sixth charge.

Seventh charge. We note that the seventh through ninth charges are unrelated to the first six. They allege improper conduct by the respondent as Chief Justice of the Superior Court in several matters relating to or involving the Richard J. Conboy Insurance Agency, Inc. (Conboy), and several of its officers and directors.

The respondent became Chief Justice of the Superior Court on March 7, 1977. Thereafter Conboy paid $385 for a reception held for the respondent on March 7, 1977, and $1,700 for a dinner given for the respondent on March 10, 1977. In 1977, Conboy paid over $1,800 for the rental of an automobile leased in the name of the respondent's wife and used by the respondent and his wife. Conboy's business includes the sale of multiple employer group life insurance to attorneys in Massachusetts and elsewhere.

The respondent admits that Conboy paid for the reception and dinner but denies that Conboy or anyone connected with Conboy was listed as a host or sponsor for either event. He admits the allegations about the automobile but states that "the cost was charged to individual officials of Conboy."

Eighth charge. The allegations of the seventh charge are incorporated by reference and the following are added

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thereto. The car rental payments by Conboy for the leased automobile were ultimately treated by Conboy as compensation to Martin J. Kelley and two other Conboy officials. Kelley is an officer and director of Conboy. In August, 1977, the respondent appointed Kelley's stepsister (half sister) as a secretary in the office of the Chief Justice of the Superior Court.

The respondent admits these allegations and says that the appointment of the half sister was made strictly on the basis of merit.

Ninth charge. The allegations of the seventh and eighth charges are incorporated by reference and the following are added thereto. While the respondent was the First Assistant Attorney General, Pauline Dionne Mastronardi and Mary Stanton were employed there as secretaries and worked for and under the supervision of the respondent. During that period the respondent rendered legal services to Conboy and an affiliated corporation (the Conboy matter) for which he received $25,000 at the rate of $1,000 per month. Also during that period Mastronardi and Stanton performed secretarial services in connection with the respondent's representation of Conboy, and an attorney working in the office of the Attorney General and under the respondent's supervision as his assistant performed services in the Conboy matter. Neither the two secretaries nor the attorney were compensated for their services in the Conboy matter. In August, 1977, the two secretaries, Mastronardi and Stanton, were appointed as secretaries in the office of the Chief Justice of the Superior Court.

The respondent admits these allegations but states the work by the three persons in question was done on a voluntary basis. He states further that the two secretaries were appointed to positions in the office of the Chief Justice of the Superior Court strictly on the basis of merit.

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Findings, Discussion and Conclusion.

Most of the objective facts alleged are admitted or were proved by evidence. The principal facts in issue relate to such questions as what the Chief Justice knew or should have known at critical times, or what connection there was between one admitted fact and another. We state and discuss the facts as we find them under two separate headings: (A) Charges Concerning the Chief Justice's Relationship with a Former Client, and (B) Charges Related to the Events at the Arlington Street Church on April 5, 1978. The facts so stated are established by a fair preponderance of the evidence, and are joined in by the entire court. Some Justices would make the additional findings indicated by their separate opinions. A. Charges Concerning the Chief Justice's Relationship with a Former Client.

Findings of Fact.

1. While the respondent was serving as First Assistant Attorney General, he performed legal services for the Richard J. Conboy Insurance Agency, Inc. (Conboy), its affiliate Northeast Administrators, Inc., and two officers of Conboy, in connection with an antitrust case pending in the United States District Court, District of Massachusetts.

2. The respondent, while First Assistant Attorney General, received $1,000 each month for his services in the antitrust case, and $25,000, totally, during the time he served as First Assistant Attorney General.

3. Conboy's business includes selling group life insurance to attorneys in Massachusetts and elsewhere. About 600 lawyers are persons insured through Conboy.

4. Martin J. Kelley is president and treasurer, a director, and one of the stockholders of Conboy. Roberta Downey (Downey) is a half sister of Kelley. They have a

close relationship. Kelley brought his half sister's interest in obtaining employment to the attention of the respondent while he was

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serving as First Assistant Attorney General. The respondent recommended that she be hired, and Downey was hired to work in the torts division of the Attorney General's office.

5. Pauline Dionne Mastronardi (Mastronardi) and Mary Stanton (Stanton) worked as secretaries in the office of the Attorney General for and under the direction of the respondent. While so employed, Mastronardi and Stanton performed secretarial services for the respondent in connection with the Conboy antitrust suit. Neither was compensated by the respondent or Conboy (or its affiliate) for those services. Some of these secretarial services were performed during working hours for which Mastronardi and Stanton were compensated by the Commonwealth.

6. During a portion of the time while he was First Assistant Attorney General, the respondent used the services of an assistant attorney general, who was working specifically for him, in the preparation of part of a memorandum to be filed in the Conboy antitrust case. The assistant attorney general performed some of these services during normal working hours. She was not compensated or offered compensation by the respondent or Conboy (or its affiliate). The Attorney General did not authorize the respondent to use the assistant on this private matter. The Attorney General had a rule against assistant attorneys general engaging in private practice, and the respondent as First Assistant Attorney General was assigned the responsibility of enforcing that rule. The Attorney General had made an exception to this rule in connection with the respondent's representation of Conboy, its affiliate, and officers in the Federal antitrust case.

7. On March 7, 1977, a reception was held at the State House following the swearing in of the respondent as Chief Justice of the Superior Court. Conboy subsequently paid $385, representing the cost of the reception, and treated the payment as a business expense. On March 10, 1977, a reception and dinner was given in honor of the Chief Justice. The invitations were printed as if the Attorney General and his wife were the host and hostess, but the Attorney General did not know who was paying for the function. Conboy

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paid the cost of the reception and dinner in an amount in excess of $1,700 and treated that amount as a business expense.

8. From March through September, 1977, Conboy paid in excess of $1,800 for the rental of a Ford LTD automobile leased in the name of the Chief Justice's wife. The Chief Justice and his wife used the vehicle. Initially, Conboy treated the payments as tax deductible, but later, on advice of its accountant, revised its records to show the payments as income to Kelley and two other Conboy officers. The Chief Justice considered the propriety of these payments under the Code of Judicial Conduct before they were made. There is no indication that Conboy, its affiliate, or officers had any cases pending in the Superior Court. The Chief Justice filed a report with the Executive Secretary to the Justices of this court on or before April 15, 1978, disclosing the rental payments as a gift.

9. In August, 1977, the Chief Justice appointed Downey, Kelley's half sister, as a secretary in the office of the Chief Justice of the Superior Court. She was hired at an annual salary almost $2,000 higher than she had been paid as a secretary at the Attorney General's office.

10. In August, 1977, the Chief Justice appointed Mastronardi and Stanton as secretaries in the office of the Chief Justice of the Superior Court. Each was hired at an annual salary approximately $1,000 higher than she had received in the Attorney General's office.

11. Although other individuals employed at the Attorney General's office asked the Chief Justice for employment in the Superior Court, the Chief Justice hired only

Downey, Mastronardi, and Stanton. There is no indication that any of these individuals is not a competent secretary. Discussion.

Canon 5 (C) (4) of the Code of Judicial Conduct, 359 Mass. 848 (1972), states that a judge or member of his family residing in his household should not accept a gift except in

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certain stated circumstances. One such circumstance, set forth in Canon 5 (C) (4) (c), permits the receipt of a gift by the judge or a member of his family residing in his household "if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C."[3] The Chief Justice made such a report on or before April 15, 1978, with respect to the payments made by Conboy, or its officers, on the motor vehicle lease.

Thus a judge may receive a gift having a value of more than $100 but must report the gift. However, the propriety of such a gift is not beyond scrutiny and criticism simply because it is not forbidden by Canon 5 (C) and is reported. In all his activities, a judge should not only avoid impropriety but also he should avoid the appearance of impropriety. Canon 2, 359 Mass. 842 (1972). The requirement of Canon 2 (A) that a judge "should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" may make a gift inappropriate.

In a proceeding concerning a gift made before the Code of Judicial Conduct was effective in this Commonwealth, we censured a judge, and ordered him to pay $5,000 to the Commonwealth as costs of the proceedings, where the judge received a gift of $4,000 from an individual after he made inquiry of a prosecuting officer concerning a case pending against that individual. Matter of Morrissey, 366 Mass. 11 (1974). We concluded that the judge's conduct constituted "a careless disregard" of the requirement that a judge's conduct avoid even the appearance of impropriety. Id. at 16.

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[3] Canon 6 (C), 359 Mass. 852 (1972), requires a judge to "report on or before April 15 of each year, with respect to the previous calendar year, the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received." The report should be filed with the Executive Secretary to the Justices of the Supreme Judicial Court as a public document.

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The drafters of the Code of Judicial Conduct adopted by the American Bar Association, on which our Code of Judicial Conduct is based, concluded that public disclosure of gifts exceeding $100 in value would encourage adherence to the principle of avoiding any appearance of impropriety. E. W. Thode, Reporter's Notes to the Code of Judicial Conduct 85 (1973). "If the judge and the donor are not willing for the transaction to be given the light of publicity, the judicial system is better served by not having the transaction consummated." Id.

As matters developed, the receipt of the gift of the leased automobile created the appearance of impropriety. During the period when Kelley and two other Conboy officers were making monthly payments on the leased automobile, the Chief Justice appointed Kelley's half sister to a position in the office of the Chief Justice at an annual salary of $2,000 above that which she was receiving as a secretary in the Attorney General's office. This act created the possibility that the public would regard judicial conduct of the Chief Justice (and by inference judicial conduct of other judges) as subject to influence based on personal favoritism. It did not promote "public confidence in the integrity and impartiality of the judiciary." Canon 2 (A). Moreover, the appointment of Downey in these circumstances reasonably could create the

impression that the Chief Justice engaged in "favoritism" in the exercise of his power to make appointments, acting contrary to the direction of Canon 3 (B) (4).[4]

The appointment of Mastronardi and Stanton as secretaries in the office of the Chief Justice of the Superior Court was, by itself, not improper. There is no suggestion that they were not competent to perform the duties of their positions. When, however, the Chief Justice appointed Mastronardi and Stanton, he knew that they had performed gratuitous secretarial services for him and indirectly for

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[4] Canon 3 (B) (4), 359 Mass. 842 (1972), provides in part: "[The judge] should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism."

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Conboy. Their appointments implied that the Chief Justice would favor persons who had contributed their services to him and to his former clients over others who had not. Only Mastronardi and Stanton, who worked on the Conboy antitrust case without compensation and Downey, who was related to the president of Conboy, were hired from the Attorney General's office, although others had sought to transfer from the Attorney General's office to the office of the Chief Justice. The Chief Justice's conduct in appointing Downey, Mastronardi, and Stanton created the impression that employment opportunities in the judicial branch of goverment were greater for persons and relatives of persons who had made gifts to, and done favors for, the appointing authority.

Conboy's payment of the cost of the State House reception and the cost of the dinner for the Chief Justice may not have been gifts to the Chief Justice. Conboy itself regarded the expenses as tax deductible expenditures. These expenditures were made in sincere appreciation of the Chief Justice's services as counsel for Conboy. However, the fact that Conboy made these payments, combined with the Chief Justice's subsequent reward of employment at higher salaries to Kelley's half sister and two persons who had worked gratuitously on the Conboy antitrust case, did not promote "public confidence in the integrity and impartiality of the judiciary." Canon 2 (A). These appointments created the impression that Conboy's officers were "in a special position to influence [the Chief Justice]." Canon 2 (B).

To deal with the particular charges:

The seventh charge is based on the claim that the receipt of the gift of the leased automobile and the payment by Conboy of the cost of the State House reception and of the dinner were violations of Canon 2, Canon 2 (B), and S.J.C. Rule 3:17 (2). These events, standing alone, are not violations as alleged, but they must be viewed also in relation to the eighth and ninth charges.

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The eighth charge concerns the appointment of Downey as a secretary in the office of the Chief Justice of the Superior Court. It cites Canon 3 (B), concerning the exercise of a judge's appointing power solely on the basis of merit; Canon 2, concerning the avoidance of impropriety or the appearance of impropriety; and S.J.C. Rule 3:17 (2), concerning misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute. The appointment of Downey, in light of the Conboy gift and the payments made by Conboy for events held in the Chief Justice's honor, was a violation as alleged in the eighth charge.

The ninth charge concerns the appointment of Mastronardi and Stanton as secretaries in the office of the Chief Justice of the Superior Court. This charge also rested on alleged violations of Canon 3 (B), Canon 2, and S.J.C. Rule 3:17 (2). In light of the Conboy gift and Conboy's payments for events held in the Chief Justice's honor, in the light of the rendering of uncompensated services on the Conboy antitrust matter by

Mastronardi and Stanton, and in light of the apparent preferential treatment given to Mastronardi and Stanton over other applicants for appointments (except Downey), the appointments by the Chief Justice were violations as alleged in the ninth charge. B. Charges Related to the Events at the Arlington Street Church on April 5, 1978.

Findings of Fact.

1. In December, 1977, the Boston/Boise Committee (committee) was organized as "a committee of outrage at the recent handling of 24 indictments for alleged sex acts between men and boys in the Boston area." The committee sponsored a fund-raising event at the Arlington Street Church on Wednesday, April 5, 1978, with Gore Vidal, a noted author, as the featured speaker. Before the event the committee had conferred with attorneys for some of the defendants in the criminal cases, sometimes referred to as

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"the Revere cases." The attorneys had budgeted $25,000 for a survey of attitudes of prospective jurors by the National Jury Project. On March 27, 1978, a co-chairman of the committee wrote one of the attorneys that "we will make a contribution from our General Fund shortly after April 5, to help toward the $25,000 total cost as indicated in the budget submitted by the NJP and forwarded to me by you."

2. On Sunday, April 2, 1978, the Boston Globe printed a brief announcement: "Author Gore Vidal will discuss `Sex and Politics in Massachusetts' Wednesday evening at the Arlington Street Church. Admission is $5 and the funds will be used to benefit the Boston/Boise Committee." The Chief Justice saw the announcement and after lunch on Monday, April 3, went with a friend to the church, where they purchased four tickets. He asked the woman who sold the tickets what Boston/Boise was all about, and she answered, "It was a committee that was formed to counteract the negative publicity that had resulted from the indictments in Revere in December, the discontinuance of the hotline which was effective, hotline had been instituted by District Attorney Mr. Byrne, apparently. I am not sure who instituted that hotline for anonymous tipsters, but they had been less effective in gathering information than in the thirty days that the hotline was in effect, getting that information destroyed or done away with." Two witnesses who were present either did not hear or failed to remember the inquiry and the response. The Chief Justice identified himself, asked if seats could be reserved, and left his card, with his office telephone number, to make an answer possible.

Later that day the Chief Justice had a conversation with people in his office about his attending a lecture to be given by Gore Vidal at the Arlington Street Church. There was reference to the church as a controversial church, of activities there including draft card burnings, and of the possibility that some motorcycle riders might be there. In that conversation the Chief Justice referred to Gore Vidal as a "gay," apparently meaning an avowed homosexual.

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3. On April 4, 1978, William P. Homans, counsel for one of the defendants in the Revere cases, received a telephone message from the Boston/Boise Committee informing him that the Chief Justice would be at the Gore Vidal lecture on April 5, 1978. After receiving that message, Mr. Homans called Mr. Brian McMenimen, counsel for another of the defendants in the Revere cases, informed him of the message and said that they owed it to the Chief Justice to advise him that this was a fund raiser, the proceeds of which would be used to benefit the defendants in the Revere cases. They then agreed that Mr. McMenimen would call either the Chief Justice or Mr. Orfanello to give them that information.

On April 5, 1978, Mr. McMenimen called Francis X. Orfanello, the administrative assistant to the Chief Justice. Mr. McMenimen told Mr. Orfanello that he understood the Chief Justice was planning to attend a lecture that night by Gore Vidal, sponsored by the Boston/Boise Committee. He referred to the Revere cases and said that the committee was formed for the benefit of those defendants, that the proceeds of the lecture were

going to be used to defray some of the legal costs associated with the defense of those cases. He said "that the Chief Justice couldn't possibly know that this is, in essence, a defense fund raiser or else he'd never in a million years go to it." There was discussion of the committee and its connection with the "gay rights movement." Mr. Orfanello said he would give the Chief Justice the message.

The Chief Justice was in a committee meeting in his office, and Mr. Orfanello told the Chief Justice's secretary that he would like to see the Chief Justice as soon as there was a break. He then told Francis M. Masuret, Jr., the associate administrative assistant, about the telephone call. He testified that he told Mr. Masuret that the lecture at the church was a fund raiser for criminal defendants, but Mr. Masuret testified that he did not remember mention of a fund raiser. Mr. Masuret did, however, recall reference to Mr. McMenimen as attorney for one of the criminal defendants.

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4. Shortly thereafter, there was a break in the meeting and the Chief Justice came out of his office and had a conversation with Mr. Orfanello lasting about thirty seconds. Mr. Orfanello told the Chief Justice about the call from Mr. McMenimen, including the fact that the Boston/Boise Committee was sponsoring the Gore Vidal lecture and that the committee was a "gay rights" or "gay benefit group." The conversation ended with the Chief Justice's asking how Mr. McMenimen knew that the Chief Justice was going to the lecture, and Mr. Orfanello saying that he did not know. Mr. Orfanello testified that he told the Chief Justice the meeting was for the defense of the criminal defendants. The Chief Justice denied that anything was said about a fund raiser or use of the funds for the benefit of any particular defendants.

After this conversation Mr. Orfanello said to Mr. Masuret that Mr. Orfanello did not think the Chief Justice would pay any attention to what he had been told. Later, after Mr. Orfanello had left for the day, the committee meeting in the Chief Justice's office ended, and the Chief Justice and Mr. Masuret left the court house together. Mr. Masuret did not think the Chief Justice should attend an affair sponsored by a "gay organization," and he tried to bring up the subject, referring to the "very strange call" from Mr. McMenimen and asking why people on the outside would be concerned enough to call the office. The Chief Justice said he didn't know what the excitement was all about, and asked, in substance, "What is this, a dictatorship or Nazi Germany?" Mr. Masuret felt rebuffed, and did not pursue the subject.

5. At this time the Chief Justice knew from news media reports that the Revere cases were pending in the Superior Court. He also knew that homosexual cases arising out of arrests at the Boston Public Library were pending in the Boston Municipal Court and might eventually be tried in the Superior Court. He was not scheduled to sit as a judge in any of these cases, and would not in regular course be called on to assign a judge to them unless there was a request or a special reason.

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The Chief Justice should have known that the meeting at the Arlington Street Church would at least in part be a partisan rally in the interest of criminal defendants in cases pending in the Superior Court, that the Revere cases were likely to be discussed, and that the proceeds of ticket sales might be used in part for the benefit of the defendants in those cases. The Chief Justice should also have known that his attendance would not promote public confidence in the judiciary, and that it might reflect adversely on his impartiality, interfere with the performance of his judicial duties, and bring the judicial office into disrepute.

6. On the evening of April 5, the Chief Justice, his wife and another couple attended the Gore Vidal lecture, arriving about 7:45 P.M. They were ushered to reserved seats in the second or third row, and remained throughout the program. The Chief Justice was asked whether he wanted to sit in the front row, and answered, "Why?" He was asked whether he wanted to be introduced, and answered that he did not.

Before Gore Vidal spoke there were several other speakers. There was discussion of the Revere cases and the Boston Public Library cases, of harassment of "gays" by the

district attorney and the police, and of the current "witchhunt" and "show trials." One of the speakers said that over 1,500 people were present and "most of this money will be going to the defense of the witnesses themselves, the so-called victims, their parents, and to the National Jury Project which has entered these cases in order to see that a fair trial can possibly exist."

Before Gore Vidal spoke there was a high degree of distraction and confusion, and the Chief Justice engaged in conversations with the others in his party. He and others testified that the proceedings were boring and that they heard only portions of the proceedings, although they could hear what was said from the pulpit when they listened. But he admitted hearing references to police arrests at the Boston Public Library, to the ages of the alleged victims in the Revere cases, and to police harassment, and we infer that he

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heard other statements about the Revere cases. He did hear what Gore Vidal said, and Gore Vidal discussed "very sinister" happenings in Boston attributable to the fact that 1978 is an election year, "the Revere Beach capers," a "witchhunt," and "entrapment" in the Boston Public Library arrests.

7. After the lecture the Chief Justice was taken into an anteroom and introduced to Gore Vidal. He told Gore Vidal that he enjoyed the speech, and said it was "wrong to assume judges are troglodytes" (cave dwellers). The Chief Justice knew that his picture was being taken during the evening, but did not realize that a picture was being taken when he was talking to Gore Vidal. Either just before or just after he spoke to Gore Vidal, the Chief Justice met Mr. McMenimen, who introduced himself. The Chief Justice asked whether he was the man who called Mr. Orfanello, and Mr. McMenimen answered, "Yes."

8. On the morning of Thursday, April 6, a Boston newspaper carried a picture of the Chief Justice on the front page and a news story with the headline, "Bonin at benefit for sex defendants." On page three of the same newspaper was additional material and a picture of the Chief Justice chatting with Gore Vidal. Both the Chief Justice and Mr. Orfanello read the story. Some time before 9 A.M. they had a brief conversation in which there was reference to the story. Also before 9 A.M. Mr. Orfanello called the senior associate justice of the Superior Court and at least one other associate justice and called attention to the story. In both calls he said he had told the Chief Justice before the lecture that the proceeds were to be used for the defense of criminal defendants. He also talked on the telephone to Mr. McMenimen and said he had given the Chief Justice the message.

Later the same day the Chief Justice told Mr. Orfanello that counsel for the Chief Justice wanted to talk to Mr. Orfanello. After that convesation, Mr. Orfanello had the impression that the Chief Justice wanted him to say that the Chief Justice only knew that the lecture was for a "gay"

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group and that the Chief Justice did not know it was for a defense fund. Subsequently he talked on the telephone to counsel for the Chief Justice, and said he had told the Chief Justice the lecture was for a "gay" group, but did not say that he had told the Chief Justice it was a fund raiser. Indeed, he told counsel that Mr. McMenimen had not told him anything about a fund raiser.

9. Early on the morning of Friday, April 7, counsel for the Chief Justice interviewed Mr. Orfanello. For the first time Mr. Orfanello told counsel that Mr. McMenimen had told him that the lecture was a fund raiser. He also said to counsel that he had omitted that fact in giving the Chief Justice the message, and had told the Chief Justice only that it was a "gay benefit." At counsel's request Mr. Orfanello wrote out and signed a statement of the events. The statement referred to Mr. McMenimen's statement that the talk was sponsored by a committee "which was raising money for the defense of some people who were involved with children in East Boston or Revere," but said only the following as to what Mr. Orfanello told the Chief Justice:

"I told him I had received a call from an attorney who said he had heard he was going to the Gore Vidal lecture that night and that it was a gay group, or gay benefit, or some other descriptive words implying gay people. I don't recall what description I used. The Chief asked me how the attorney knew and I said I didn't know." After Mr. Orfanello had written the statement, counsel said, "You could be accused of covering up for the Chief Justice," and he responded, "That's the way it happened."

Later on the same day, the Chief Justice issued a press release, drafted with the assistance of counsel, stating among other things, "Prior to my attending the lecture, I did not know that any of the funds from the ticket sales would be used in any defense fund, pending cases or, indeed, for any purpose other than as stated in the Globe or on the ticket. In fact, I did not learn of the intended use of these funds until reading it in the press on April 6, 1978, the day following the lecture."

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On April 7 or 8 the Chief Justice received a letter from the District Attorney for the Suffolk District, listing the twenty-four Revere cases, referring to the discussion of the cases at the Arlington Street Church, and requesting "that you not sit yourself on the following cases, and take no part in assigning the trial justice to them." The Chief Justice responded on April 10, pointing out that he would not ordinarily assign the cases unless specifically requested, stating that he had not participated in trial or assignment of any of the cases, referring to his public statement that he had no prior knowledge of the fund raising, and adding, "However, in view of the media coverage and to allay any possible public misconception, I will not participate in or assign any of these cases. Should any requests be forthcoming, they will be referred to the senior trial justice." The same day he wrote a similar letter to the chairman of the Committee on Judicial Responsibility, adding that he had in fact not been sitting on new cases for the past three weeks, had not assigned himself to sit for the month of April, and would not assign himself to sit until the committee issued its findings relative to the investigation.

10. On Tuesday, April 11, the Chief Justice testified under oath on deposition. The following questions and answers were part of his testimony:

(a) Q. "Did you make any inquiry of any of these people with whom you talked as to the nature of the Boston/Boise Committee?"

A. "No."

This testimony is contrary to our finding in paragraph 2 above.

(b) Q. "Did you receive from any source [before the meeting] information that this talk was being sponsored by a committee which was raising money for the defense of people involved in Revere?"

A. "I did not."

(c) Q. "In any of those preliminary remarks that you heard and listened to, was there any reference to the cases pending in the Suffolk Superior Court?"

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A. "No, I don't believe so. I believe there was reference to the Boston Public Library and police arrests at the Boston Public Library."

The Chief Justice then volunteered testimony that the speaker immediately preceding Mr. Vidal mentioned the Revere cases and the ages of the victims. In fact the speaker who mentioned those facts was Thomas Reeves, and he was followed by one John Mitzel, who introduced Mr. Vidal.

Q. "In any event, you remember no reference to the Revere cases prior to the introduction [by Reeves] of Mr. Vidal; is that correct?"

A. "Except as I have just mentioned."

Q. "I say, prior to the introduction of Mr. Vidal."

A. "Well, I would phrase it during the introduction of Mr. Vidal."

Q. "But before that, you had heard no mention of the Revere case?"

A. "That's true."

In fact, the Revere cases were mentioned before Mr. Reeves spoke.

(d) Q. "Was anything said about the funds, the use of the funds, to be derived from the meeting?"

A. "No. To date, having read the media, I do not know the use of the funds derived from the meeting since I have seen several conflicting media reports about it."

The answer, "No," is contrary to the fact.

(e) Q. "Now let me ask you, I think we got to the description of the introductory remarks by the gentleman who introduced Mr. Vidal, and I think you said that you thought that somewhere in those remarks there had been a reference to Revere."

A. "The only remark I can remember -- and I don't remember well because of not paying much attention -- was something about alleged victims being 22 or 20, and I don't know if that meant now or at the time of alleged offenses or what."

There were other relevant remarks.

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11. Mr. Orfanello knew on Thursday, April 6, and at all subsequent times, that his recollection of the events of April 5 was contrary to the statements he had made to counsel for the Chief Justice and contrary to the Chief Justice's press release of April 7. On Sunday, April 9, and thereafter Mr. Masuret urged him to inform the Chief Justice or his counsel of the discrepancy, but he did not do so. On Tuesday, April 11, after the deposition of the Chief Justice, a sworn statement was taken from Mr. Orfanello. About an hour before the statement was taken, Mr. Orfanello said to counsel for the Chief Justice, "Paul, if I testify to Mr. Meserve under oath, I will bury the Chief." Counsel responded, "Frank, why didn't you tell me this before?" Discussion.

First we state briefly what, in the opinion of a majority of the court, remains unproved. It is not proved that the Chief Justice actually knew or understood before he attended the meeting at the Arlington Street Church on April 5, 1978, that the meeting would be a fund raiser for, or would concern itself specifically with, the Revere cases pending in the Superior Court. Whatever Mr. Orfanello said to Mr. Masuret or the Chief Justice on April 5, it is not proved that he succeeded in making either of them aware that the meeting would be of that character. It is not proved that the Chief Justice on April 6 sought to have Mr. Orfanello make a statement which the Chief Justice knew would be false or misleading if made. It is not proved that the Chief Justice knew the press release of April 7 was false when issued. Nor is it proved that the Chief Justice knew on April 11, 1978, when he gave the testimony quoted in paragraph 10 of the foregoing findings, that that testimony was false in any material particular: any discrepancies between the testimony and the facts can be accounted for by the Chief Justice's inattention or uncertain memory.

It appears from the findings that the Chief Justice was negligent almost to the point of wilfulness in ignoring or

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brusquely dismissing information brought to his attention as to the character of the meeting -- that the Revere cases would likely come in for partisan discussion, and that part of the proceeds of the meeting would likely be destined for the benefit of the defendants in those cases. Although the Chief Justice is not shown to have known these things as he entered the meeting, he had earlier been put on sufficient inquiry to try to find out. In all events, he should have learned enough during the meeting, and in fact did learn enough the following morning, to realize that his attendance at the meeting might well be viewed as improper. He took some measures to moderate the public reaction, but they were not as prompt or as effective as they should have been.

Upon the findings, it is the unanimous opinion of the court that the Chief Justice's behavior was improper. The conclusion follows from traditional and accepted principles.

Clearly it would be improper for the Chief Justice to attend the meeting knowing

that the avails were to be used as a defense fund or knowing that the pending cases would be then made the subject of partisan comment. Indeed the Chief Justice has himself indicated his agreement that such knowing conduct would be improper. This appears not only in his statement for the press on April 7 and his letter of April 10 to the chairman of the Committee on Judicial Responsibility, but also in his cross-examination in the proceedings before us. But if knowing conduct would be an impropriety, then it seems to the court that it was likewise an impropriety, although a lesser one, for the Chief Justice, in his impatience or rashness, to fail to take heed of information and warnings which would have brought more definite knowledge to him if he had considered or pursued them seriously.

What was put in jeopardy by this neglect was the impartiality demanded of judges, as well as the appearance of impartiality, also demanded of them. A judge must distance himself from pending and impending cases by taking reasonable precautions to avoid extrajudicial contact with

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them. That duty is at the heart of the Code of Judicial Conduct. See S.J.C. Rule 3:25, Canons 2 (A), 3 (A) (4), 5, 359 Mass. 842, 848 (1972). The duty certainly falls with no less force on a Chief Justice with extensive administrative responsibilities than on a judge of the rank and file; and in the circumstances of the present case, and considering the matter from the viewpoint of reasonable members of the public, it can be no more than a quibble to contend that the Chief Justice could claim indulgence because he might not be called on to assign or try the relevant cases himself.

Certain of the evils flowing from disregard of the obligation of impartiality were realized conspicuously in the situation at bar. By his attendance at the meeting the Chief Justice not only exposed himself to ex parte or one-sided statements and argumentation on matters before his court, but further compromised his position by seeming to favor or to have particular sympathy with the views of the partisan group which sponsored the affair. Indeed, the Chief Justice shortly felt it necessary or desirable to disengage himself at least temporarily from official participation in the cases (see his letter of April 10 to the district attorney) -- a self-induced disqualification which was itself to be avoided. Compare Canon 5 (C) (3). There can be little doubt that the episode had -- and, we think, could have been expected to have -- a negative effect on the confidence of the thinking public in the administration of justice in the Commonwealth.

It was suggested during the proceedings that judges should not be deterred from informing themselves about contentious issues of social importance, and that judges are helped in their professional thought and judgment by acquainting themselves with ideas and feelings current in their communities. Hence, it was argued, the Chief Justice's attendance at the meeting of April 5, which included the announced lecture by Gore Vidal, was not only not exceptionable but was commendable. The argument went so far as to intimate that to discipline the Chief Justice in these circumstances would invade his constitutional rights as a citizen --

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which he did not renounce or forgo by becoming a judge -- to enjoy the benefits of free speech and of association with his fellow citizens.

We agree emphatically that "[c]omplete separation of a judge from extrajudicial activities is neither possible nor wise; he should not become isolated from the society in which he lives." ABA commentary[5] on Canon 5 (A). We agree that it is well for a judge's intellectual interests to extend to a comprehension of the attitudes and beliefs of minority groups, not excepting minorities which are defined by their sexual views or preferences or behavior. In ordinary circumstances the Chief Justice or any judge would be entirely free to attend a public lecture about sex and politics whether or not sponsored by a "gay" group. Nor is a judge under any duty in ordinary situations to inquire minutely into the sponsorship of public meetings before undertaking to attend them. Excessive caution, self-consciousness, or self-abnegation of this kind is

neither required nor desirable.

The special factor or difficulty in the present case -- the stone of stumbling -- which did call for caution was that the Chief Justice had good reason to infer that the particular meeting would trench on matters pending in his court; and so it did in fact. That called for a measure of abstention on his part. "A judge may participate in civic . . . activities," but on condition that they "do not reflect upon his impartiality." Canon 5 (B). Toward preserving evenhandedness, and the outward signs of that quality, a judge "must . . . accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." ABA commentary on Canon 2 (B); and see the remarks of this court in In the Matter of Troy, 364 Mass. 15, 71 (1973), quoted in the margin.[6] The circumstances existing

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[5] The reference is to the commentary published by the American Bar Association when it promulgated the Code of Judicial Conduct (1972), which was largely adopted by this court in rule 3:25.

[6] We said: "Unquestionably a judge is entitled to lead his own private life free from unwarranted intrusion. But even there, subjected as he is to constant public scrutiny in his community and beyond, he must adhere to standards of probity and propriety higher than those deemed acceptable for others. More is expected of him and, since he is a judge, rightfully so. A judge should weigh this before he accepts his office. He cannot thus engage rightfully in some commercial ventures, some public expressions, some pleasurable diversions, and in some social contacts which are open to others."

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on April 5 presented an occasion on which the Chief Justice was required to accept a "restriction."

As already noted, the Chief Justice like other judges is entitled to and can assert constitutional rights of speech and association (including assembly). Still it is clear that judges, in company with other public servants, must suffer from time to time such limits on these rights as are appropriate to the exercise in given situations of their official duties or functions. See Broderick v. Police Comm'r of Boston, 368 Mass. 33, 37, 42-43 (1975); Boston Police Patrolmen's Ass'n v. Boston, 367 Mass. 368, 374-375 (1975); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565, 567 (1973); Morial v. Judiciary Comm'n of La., 565 F.2d 295 (5th Cir. 1977) (en banc), cert. denied, 435 U.S. 1013 (1978);[7] Perry v. St. Pierre, 518 F.2d 184 (2d Cir. 1975); In re Gaulkin, 69 N.J. 185, 191 (1976). We acknowledge, as recently stated by the Supreme Court of the United States in In re Primus, 436 U.S. 412, 426 (1978), that "`broad rules framed to protect the public and to preserve respect for the administration of justice' must not work a significant impairment of `the value of associational freedoms.'" Any limits imposed must find affirmative justification in the particular facts, having in view the weight and significance of the constitutional values thus temporarily subordinated. Cf. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). After consideration of the full factual background developed in these proceedings,

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[7] The Morial case considered in some detail a problem that may be thought much more difficult than ours -- the constitutionality of a rule requiring that an elected State judge resign in order to run for election to a nonjudicial office. The Federal Court of Appeals upheld the rule, and review was refused by the Supreme Court of the United States.

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the court holds that there was ample justification for requiring of the Chief Justice the exercise of a mild self-restraint, in which he failed. Neither the requirement nor a sanction for the failure raises any serious question under the First or Fourteenth Amendment to the United States Constitution or corresponding provisions of the Constitution of the Commonwealth.[8]

To deal with the particular charges:

The first four charges of the information relate to the Chief Justice's attendance at the meeting of April 5 and the essential accusation is that he "should have known and knew," in advance, that the meeting was intended as a fund raiser for the pending cases at which it was likely there would be discussion of the cases, and as expected partisan discussion occurred. The assertion that the Chief Justice "knew" is not proved in the opinion of a majority of the court, but the rest is found in substance and effect. As the Chief Justice "should have known" the character of the meeting and its bearing on cases pending in his court, but nevertheless attended it, he violated Canons 2 (A) and 5 (B), in that he failed to conduct himself in a manner that promoted public confidence in the integrity and impartiality of the judiciary and engaged in extra-judicial activities which reflected adversely on his impartiality and interfered with the performance of his judicial duties, thus also violating S.J.C. Rule 3:17 (2) by engaging in conduct prejudicial to the administration of justice which brought the judicial office into disrepute. In considering these charges we have attached no additional significance or weight to the fact that, having chosen to attend the meeting, the Chief Justice remained to its close and met with the principal speaker thereafter.

In the opinion of a majority of the court, it is not proved that the Chief Justice knowingly made false statements in

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[8] We express thanks for a brief submitted by the Massachusetts Civil Liberties Union, as a friend of the court, which dealt with the constitutional issues.

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his press release of April 7 or in his testimony on April 11 (fifth charge), or that he sought to have his administrative assistant make a statement which he knew would be false or materially misleading (sixth charge). Disposition.

We conclude that the facts proved concerning the events surrounding the Chief Justice's attendance at the meeting at the Arlington Street Church and the facts established with respect to the eighth and ninth charges warrant a public censure of Chief Justice Bonin. The Chief Justice's conduct was improper and created the appearance of impropriety, bias, and special influence. A judge, particularly a chief justice, must be sensitive to the impression which his conduct creates in the minds of the public. The Chief Justice has manifested an unacceptable degree of insensitivity to those special obligations which are imposed on a person in his position. He has failed to perceive that the public often does not distinguish between a chief justice as a judge and a chief justice as a person. For example, to use his position as a chief justice to justify obtaining reserved seats at the meeting at the Arlington Street Church and then to expect that the public should view his presence there merely as that of a private citizen, shows an inclination to accept the benefits of his office unaccompanied by any of its burdens.

Robert M. Bonin is hereby publicly censured.

We recognize that the question whether the Chief Justice should continue to serve and to receive compensation as such is one which is not assigned to the judicial department under the Constitution of the Commonwealth. See Matter of Troy, 364 Mass. 15, 21-22 (1973); Matter of DeSaulnier (No. 4), 360 Mass. 787, 807-809 (1972). But we deem it appropriate, pursuant to our constitutional and statutory powers of supervision over the courts of the Commonwealth, that the suspension of the Chief Justice should

extend for a reasonable time to permit the executive and legislative branches to consider, if they wish, the question of the

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continuance of the Chief Justice in office, on the basis of such factors as they think appropriate, including, perhaps, the record before us and the conclusions we have drawn from it. A transcript of this proceeding and the exhibits are available to the Governor and the Legislature on request. The order of suspension shall continue in effect until further order of this court, but that order will be continued only for a reasonable period, as described above.

So ordered.

APPENDIX "A"

BEFORE THE COMMITTEE ON JUDICIAL RESPONSIBILITY INQUIRY CONCERNING A JUDGE
NOS. 77-67 and 77-108

NOTICE OF FORMAL PROCEEDINGS

The Committee on Judicial Responsibility hereby gives notice to Robert M. Bonin, Chief Justice of the Superior Court of the Commonwealth of Massachusetts (the "Respondent"), that it has concluded that formal proceedings shall be and hereby are instituted against him in connection with the charges set forth herein.

First Charge

1. On April 3, 1978, the Respondent purchased tickets for a meeting to be held on April 5, 1978, at the Arlington Street Church, Boston, Massachusetts, for the benefit of the Boston/Boise Committee at which the principal speaker was to be Gore Vidal addressing the subject of "Sex and Politics in Massachusetts" (the "Meeting").

2. On April 5, 1978, the Respondent in fact attended the Meeting.

3. Prior to attending the Meeting, the Respondent was informed, should have known and knew that the proceeds of

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the ticket sales were intended to be used in part for the benefit of the defendants in 24 criminal cases which he knew were then pending in the Superior Court (the "Cases") and to assist them in the defense of such Cases and for the assistance of witnesses and others involved in the Cases.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and Canon 5B, in that he engaged in extra-judicial activities which reflect adversely on his impartiality and interfere with the performance of his judicial duties. It is also charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Second Charge

4. Paragraphs 1 and 2 hereinabove are hereby incorporated by reference in this Second Charge.

5. Prior to attending the Meeting the Respondent should have known and knew that the Cases would be or were likely to be discussed.

6. The Cases and other criminal matters which Respondent knew might be heard in Superior Court were discussed in Respondent's presence at the Meeting. Such discussion included, among other things, statements concerning the merits of the Cases and such other criminal matters, criticism of the administration of justice in connection with

the Cases and expressions of doubt as to whether defendants in the Cases could receive a fair trial.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality

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of the judiciary; and Canon 5B, in that he engaged in extra-judicial activities which reflect adversely on his impartiality and interfere with the performance of his judicial duties. It is also charged that, by the foregoing acts, Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Third Charge

7. Paragraphs 1 and 2 hereinabove are hereby incorporated by reference in this Third Charge.

8. Remarks made at the Meeting in Respondent's presence included:

a. Statements denouncing the Cases as improperly motivated;
b. Statements concerning the status of the Cases;
c. Statements concerning the merits of the Cases;
d. Statements indicating that it was unlikely that defendants in the Cases could or would receive a fair trial;
e. A statement that the proceeds of the ticket sales would be used largely for the benefit of defendants in the Cases and of others involved in the Cases; and
f. Statements concerning the status and merits of other criminal matters which Respondent knew might be heard in Superior Court.

9. Respondent did not leave the Meeting after any and all of such statements and prior to its conclusion.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary; and Canon 5B in that he engaged in

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extra-judicial activities which reflect adversely on his impartiality and interfere with the performance of his judicial duties. It is also charged that, by the foregoing acts, Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Fourth Charge

10. Paragraphs 1 to 9 hereinabove are hereby incorporated by reference in this Fourth Charge.

11. At the conclusion of the Meeting, the Respondent met with the principal speaker at the Meeting and engaged in friendly conversation with him.

12. Respondent should have known and knew that the foregoing meeting and conversation were likely to be photographed and publicized and would give the appearance that he endorsed the criticism at the Meeting of the administration of justice and endorsed the raising of funds for the benefit of defendants in the Cases.

13. The fact of the foregoing meeting and conversation was photographed and publicized.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the

judiciary; Canon 2B, in that he lent the prestige of his office to advance the private interests of others and permitted them to convey the impression that they are in a special position to influence him; and Canon 5B, in that he engaged in extra-judicial activities which reflect adversely on his impartiality and interfere with the performance of his judicial duties. It is also charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

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Fifth Charge

14. Paragraphs 1 and 2 hereinabove are hereby incorporated by reference in this Fifth Charge.

15. On April 11, 1978, the Respondent, under oath, stated, in substance and effect, that:

a. He made no inquiry prior to the Meeting as to the nature of the Boston/Boise Committee;
b. He was not advised prior to the Meeting that the Boston/Boise Committee would use the funds raised by the Meeting for the benefit of the defendants or others involved in the Cases;
c. There was no reference to the Cases at the Meeting prior to the remarks of Thomas Reeves;
d. There was no reference at the Meeting to the use of funds derived from the Meeting; and
e. The only remark by Thomas Reeves, which related to the Cases, which Respondent recalled, pertained to the age of alleged victims. Each of the foregoing statements was material to the investigation then being conducted. Respondent should have known and, in fact, knew that each of the foregoing statements was false.

16. On April 7, 1978, the Respondent issued a press release which, among other things, stated, in substance and effect, that Respondent did not learn of the intended use of the funds raised by the Meeting until reading it in the press on April 6, 1978, the day following the Meeting. The Respondent should have known and, in fact, knew that this statement was false.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. It is also charged that, by the foregoing

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acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Sixth Charge

17. Paragraphs 1 to 3 hereinabove are hereby incorporated by reference in this Sixth Charge.

18. On or about April 6, 1978, the Respondent, for his own benefit, sought to have Francis X. Orfanello, Administrative Assistant to the Chief Justice of the Superior Court, make a statement relating to the matters which are the subject of the five charges previously set forth herein, which the Respondent knew would be false or materially misleading if made, in that Respondent said to Mr. Orfanello, in substance and effect: "Frank, it's important that I did not know that the money was for the defense of those defendants. It's important that I only knew it was for gays or gay people." At the time he made the foregoing statement, the Respondent should have known,

and knew, that prior to attending the Meeting he was actually advised by Mr. Orfanello, in substance and effect, that the proceeds of the Meeting would be used for the defense of defendants in the Cases.

THEREFORE, it is charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:25, Canon 2A, in that he failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary. It is also charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Seventh Charge

19. The Respondent has been Chief Justice of the Superior Court of the Commonwealth of Massachusetts since March 7, 1977.

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20. The Richard J. Conboy Insurance Agency, Inc. ("Conboy") is a corporation with its usual place of business in Boston, Massachusetts. Its business includes selling multiple employer group life insurance to attorneys in Massachusetts and elsewhere.

21. Subsequent to March 7, 1977, Conboy paid approximately $385 for a reception for Respondent held on March 7, 1977.

22. Subsequent to March 7, 1977, Conboy paid in excess of $1,700 for a dinner for Respondent held on March 10, 1977.

23. In 1977, Conboy paid in excess of $1,800 for the rental of a Ford LTD automobile leased in the name of Respondent's wife, Angela Bonin. Said automobile was used by the Respondent and his wife.

THEREFORE, it is charged that, by the foregoing acts, the Respondent has violated Supreme Judicial Court Rule 3:25, Canon 2, in that he failed to avoid impropriety or the appearance of impropriety; and Canon 2B, in that he lent the prestige of his office to advance the interests of others or permitted others to convey the impression that they are in a special position to influence him. It is also charged that, by the foregoing acts, Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Eighth Charge

24. Paragraphs 19 to 23 hereinabove are hereby incorporated by reference in this Eighth Charge.

25. Martin J. Kelley of Plymouth, Massachusetts, is an officer and director of Conboy. The car rental payments by Conboy described in paragraph 23 hereinabove were ultimately treated by Conboy as compensation to Martin J. Kelley and two other Conboy officials.

26. Roberta Downey of Canton, Massachusetts, is Martin J. Kelley's step-sister.

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27. In August 1977, Respondent appointed Roberta Downey as a secretary in the Office of the Chief Justice of the Superior Court.

THEREFORE, it is charged that, by the foregoing acts, the Respondent has violated Supreme Judicial Court Rule 3:25, Canon 3B, in that he failed to exercise his power of appointment only on the basis of merit; and Canon 2, in that he failed to avoid impropriety or the appearance of impropriety. It is also charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

Ninth Charge

28. Paragraphs 19 to 27 hereinabove are hereby incorporated by reference in this Ninth Charge.

29. The Respondent was employed by the Office of the Attorney General of the Commonwealth of Massachusetts from January 1975 to March 1977.

30. During all or part of the period in which the Respondent served as First Assistant Attorney General, Pauline Dionne Mastronadi [Mastronardi] of Revere, Massachusetts, and Mary Stanton of Boston, Massachusetts, were each employed as a secretary by the Office of the Attorney General of the Commonwealth of Massachusetts and worked for and under the supervision of the Respondent.

31. During the period in which he served as First Assistant Attorney General, the Respondent rendered legal services for Conboy and its affiliate, Northeast Administrators, Inc. ("Northeast"). The Respondent was paid $1,000 per month, amounting to a total of $25,000 for such services.

32. During the period in which each worked for the Respondent in the Office of the Attorney General of the Commonwealth of Massachusetts, Ms. Mastronadi and Ms. Stanton performed secretarial services in connection with the legal services Respondent was rendering to Conboy and

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Northeast; neither was compensated by the Respondent, Conboy or Northeast for such secretarial services.

33. During the period in which he served as First Assistant Attorney General, the Respondent caused an attorney employed by the Office of the Attorney General of the Commonwealth of Massachusetts, who was serving under his supervision as his assistant, to render legal services on behalf of Conboy and Northeast; said assistant was not compensated by the Respondent, Conboy or Northeast for such legal services. Ms. Mastronadi and Ms. Stanton also performed secretarial services for the said assistant in connection with such legal services; neither was compensated by the Respondent, Conboy or Northeast for such secretarial services.

34. In August 1977, Respondent appointed Ms. Mastronadi and Ms. Stanton as secretaries in the Office of the Chief Justice of the Superior Court.

THEREFORE, it is charged that, by the foregoing acts, the Respondent has violated Supreme Judicial Court Rule 3:25, Canon 3B, in that he failed to exercise his power of appointment only on the basis of merit; and Canon 2, in that he failed to avoid impropriety or the appearance of impropriety. It is also charged that, by the foregoing acts, the Respondent violated Supreme Judicial Court Rule 3:17(2), in that he engaged in misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute.

In accordance with the Operating Rules of the Committee on Judicial Responsibility, the Respondent is hereby advised that he may file a written answer to the foregoing charges within twenty days hereof.

COMMITTEE ON JUDICIAL RESPONSIBILITY
By its Chairman and Counsel
Allan G. Rodgers, Chairman
Robert W. Meserve, Counsel
Mark L. Wolf, Counsel April 20, 1978

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CERTIFICATE OF SERVICE

I, Mark L. Wolf, Counsel for the Committee on Judicial Responsibility, hereby certify that I have on this date made service of the foregoing Notice of Formal Proceedings upon Robert M. Bonin by mailing a copy thereof by registered mail to Robert M. Bonin, 18 Browne Street, Brookline, Massachusetts 02146.

Mark L. Wolf

April 20, 1978

APPENDIX "B"

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
No. 1425

IN THE MATTER OF AN INFORMATION -- HONORABLE ROBERT M. BONIN

RESPONDENT'S RESPONSE TO NOTICE OF FORMAL PROCEEDINGS

Now comes the Respondent, Robert M. Bonin, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, and answers the formal charges against him as follows:

First Charge

1. and 2. The Respondent admits the allegations in Paragraphs 1 and 2 except that he believed that he was attending a lecture and not a meeting. Further, the Respondent states that the article calling the "lecture" to his attention stated as

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follows (appearing in the April 2, 1978 edition of the Boston Sunday Globe): "Author Gore Vidal will discuss `Sex and Politics in Massachusetts' Wednesday evening at the Arlington Street Church. Admission is $5 and the funds will be used to benefit the Boston/Boise Committee."

3. Respondent denies the allegations in Paragraph 3. Further, the Respondent states that subsequent to April 5, 1978, he was informed and believes and therefore avers that no funds of the Boston/Boise Committee have in fact or will in fact be used for the benefit of any individual defendants and that the Boston/Boise Committee is not a defense committee, but a civil liberties and educational group.

WHEREFORE, the Respondent demands that this charge be dismissed.

Second Charge

4. No further answer required.

5. Respondent denies the allegations contained in Paragraph 5.

6. Respondent denies that he knew prior to attending the lecture that any cases would be discussed. The transcripts of the speakers at the lecture is a matter of record and the respondent does not deny the accuracy of those transcripts as reflecting what was actually said.

Since the Respondent admits the accuracy of the transcripts, they will speak for themselves. There is no averment that Respondent heard any "discussion." Further, the Respondent states that his sole purpose in attending the event was to hear Author Gore Vidal and that his attention was not fully directed to the remarks of other speakers who preceded Mr. Vidal.

Since the Respondent has admitted the accuracy of transcripts of the event, the characterizations as to what was said are so vague and imprecise as to be not capable of more specific response.

WHEREFORE, the Respondent demands that this charge be dismissed.

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Third Charge

7. No further answer required.

8. The Respondent has admitted the accuracy of the transcripts of the remarks of the

several speakers at the lecture on April 5, 1978 in paragraph 6 of this answer and again asserts that they correctly reflect what was actually said. The Respondent states, however, that materials contained in sections a., b., c., d., e., and f., are characterizations and conclusions as to what was said as interpreted by the drafters of the charges. The true characterization of statements made at the event are matters for the court to determine. The Respondent further points out that there is no allegation in the Third Charge that the remarks and statements of all of the speakers were heard and understood. (Reference is made to Respondent's answer to Paragraph 6) Respondent specifically denies that he heard and understood any matters requiring him to leave prior to the conclusion of the event.

9. Respondent admits that he did not leave the event prior to its conclusion and states that he did not hear any remarks which imposed upon him any duty to leave. In addition, the Respondent states that a reading of the entire transcript of the event does not reveal any material that would under the law have imposed upon him any duty to leave.

WHEREFORE, the respondent demands that this charge be dismissed.

Fourth Charge

10. No further answer required.

11. Respondent admits to being introduced to author Gore Vidal at the conclusion of the meeting and to having engaged in a very brief conversation lasting less than a minute.

12. Prior to meeting with Mr. Vidal, the Respondent did not know that such meeting would likely be photographed

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or publicized. The Respondent further states that under the circumstances it was not improper for him to be introduced to and meet a noted author and lecturer. Under no circumstances should such a meeting be termed improper conduct or an endorsement of any views of Mr. Vidal or other speakers. Further, the Respondent says that this charge is repugnant to basic fundamental rights of any person.

13. Respondent admits the allegations of Paragraph 13.

WHEREFORE, the Respondent demands that this charge be dismissed.

Fifth Charge

14. No further answer required.

15. Respondent admits that on April 11, 1978 he testified under oath.

a. Respondent states that the specific language is not set forth and a fair reading of the transcript does not justify the assertion and conclusion of section a.

b. Respondent admits the allegations of section b. and states that the statements are true.

c. Respondent states that the specific language is not set forth and a fair reading of the transcript does not justify the assertion and conclusion of section c.

d. Respondent admits the allegation of section d. and states that he recalls hearing no such reference.

e. Respondent states that the specific language is not set forth and a fair reading of the transcript does not justify the assertion and conclusion of section e.

As to the remaining allegations of Paragraph 15, the Respondent denies that he made any statement which he knew was false and states that he testified in good faith to the best of his recollection.

16. Respondent admits issuing the press release dated April 7, 1978 and admits that Paragraph 16 correctly summarizes

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a portion of the contents of such release but denies that any statement in such release was false.

WHEREFORE, the Respondent demands that this charge be dismissed.

Sixth Charge

17. No further answer required.

18. Respondent denies the allegations in Paragraph 18.

WHEREFORE, the Respondent demands that this charge be dismissed.

Seventh Charge

19. Respondent admits the allegations of Paragraph 19.

20. Respondent admits the allegations of Paragraph 20.

21. Respondent admits that the reception was held although the cost was not personally known to the Respondent. The Respondent further states that neither the Conboy Agency nor anyone affiliated with it was listed as a host or sponsor and therefore no "prestige" attached thereto, nor was any impression of special influence conveyed.

22. Respondent admits that the dinner was held although the cost was not personally known to the Respondent. The Respondent further states that neither the Conboy Agency nor anyone affiliated with it was listed as a host or sponsor and therefore no "prestige" attached thereto, nor was any impression of special influence conveyed.

23. Respondent admits the allegations of Paragraph 23 but states that the cost was charged to individual officials of Conboy as set forth in Paragraph 25. Respondent further states that he reported this gift together with all other matters required by him to be reported and that there was no impropriety in connection with the allegations of the Seventh Charge.

WHEREFORE, the Respondent demands that this charge be dismissed.

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Eighth Charge

24. No further answer required.

25. Respondent admits the allegation in Paragraph 25.

26. Respondent admits the allegation in Paragraph 26.

27. Respondent admits the allegations in Paragraph 27 and Respondent further states that when Ms. Downey was appointed there was a valid opening for the position and that the appointment was made strictly upon the basis of merit and respondent's familiarity with the work and capabilities of Ms. Downey.

WHEREFORE, the Respondent demands that this charge be dismissed.

Ninth Charge

28. No further answer required.

29. Respondent admits the allegations of Paragraph 29.

30. Respondent admits the allegations of Paragraph 30.

31. Respondent admits the allegations of Paragraph 31.

32. Respondent admits the allegations of Paragraph 32 except that the Respondent states that the work was done on a voluntary basis.

33. Respondent admits the allegations of Paragraph 33 except that the Respondent states that the work was done on a voluntary basis.

34. Respondent admits the allegation in Paragraph 34 and Respondent further states that when Ms. Mastronadi and Ms. Stanton were appointed there were valid openings in the positions and that the appointments were made strictly upon the basis of merit and Respondent's familiarity with the work and capabilities of Ms. Mastronadi and Ms. Stanton.

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WHEREFORE, the Respondent demands that this charge be dismissed. ROBERT M. BONIN Chief Justice, Superior Court Commonwealth of Massachusetts Counsel: PAUL R. SUGARMAN DAVID J. SARGENT

QUIRICO, J. (concurring). I concur with the opinion in so far as it states the facts found, and with the discipline imposed on the basis of those facts. However, as indicated below, on the basis of the entire evidence and the inferences drawn therefrom, I would find facts in addition to those found by the court in that part of the opinion identified as "B. Charges Related to the Events at the Arlington Street Church on April 5, 1978. Findings of Fact."

Finding 2. I would insert before the last two sentences of the first paragraph of this finding an additional finding that the ticket seller's answer to the Chief Justice's question about "what Boston/Boise was all about" was heard and understood by the Chief Justice.

Finding 4. I would insert after the first two sentences of the first paragraph of this finding an additional finding that as part of the conversation described in the first two sentences Mr. Orfanello told the Chief Justice that Mr. McMenimen represented a defendant in the Revere cases and that the meeting at the Arlington Street Church was to be a fund raiser in connection with those cases.

Finding 5. Based on the two additional findings suggested above, I would change the first sentence in the second paragraph of this finding to read as follows: "The Chief Justice knew before he went to the meeting at the Arlington Street Church that it would at least in part be a partisan rally in the interest of criminal defendants in cases pending in

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the Superior Court, that the Revere cases were likely to be discussed, and that the proceeds of ticket sales might be used in part for the benefit of the defendants in those cases."

Finding 8. I would insert after the first sentence in the second paragraph of this finding an additional finding that as a part of the same conversation described in the first sentence the Chief Justice showed Mr. Orfanello one of the tickets to the Gore Vidal lecture, said that it did not say it was for a defense fund, and that it was important to the Chief Justice that he knew only that the meeting was for a "gay" group or a "gay" affair; whereupon Mr. Orfanello said that if that was what the Chief Justice wanted him to say, he would say that.

Finding 9. I would add to the second paragraph of this finding an additional finding that the two sentences quoted from the Chief Justice's press release of April 7, 1978, were false and misleading.

Finding 10. As to question (a) and the answer thereto, quoted from the transcript of April 11, 1978, I would find that when purchasing the tickets at the Arlington Street Church on April 3, 1978, the Chief Justice made inquiry as to the nature of the Boston/Boise Committee, and that therefore his answer to question (a) is false.

As to question (b) and the answer thereto quoted from the same transcript, I would find that before attending the meeting at the Arlington Street Church the Chief Justice had been informed by Mr. Orfanello in effect that the meeting was to be a fund raiser for the benefit of defendants in the Revere cases. I would therefore also find that his answer of "I did not" to question (b) was false.

I recognize that the additional findings which I have suggested above depend on preliminary decisions concerning the credibility of the oral testimony of witnesses. Those are decisions which must be made by each of the Justices in his or her capacity as a finder of the facts in this proceeding. I respect the preliminary decision reached by my fellow Justices, but I differ from them to the extent stated above. If the additional findings which I propose were made, the

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disposition of this proceeding would, in my opinion, require that Chief Justice Bonin be suspended as a member of the bar of this Commonwealth, and probably would warrant consideration of even more severe discipline.

BRAUCHER, J. (concurring). In order to achieve consensus among views which inevitably differ in detail, the court has omitted from its opinion facts that seem important to me. Since others feel compelled, in good conscience, to record their differences, I state mine. I join in the court's opinion, as far as it goes.

Mr. Orfanello appeared before us as an honorable, loyal and reliable public servant, but as a witness whose memory was not always accurate. He had been appointed administrative assistant by the Chief Justice's predecessor in office, who had vigorously opposed and publicly denounced the appointment of Chief Justice Bonin. The Chief Justice did not have a high regard for the administrative assistant he had inherited, and Mr. Orfanello was aware of that fact and was concerned about his tenure. The two did not communicate easily and freely.

On the morning of Thursday, April 6, 1978, both men saw the front page news story with the headline "Bonin at benefit for sex defendants." The Chief Justice was under investigation on a variety of charges, most of which have since been dropped, and he had for several months been the subject of violent public criticism. He doubtless felt unfairly pursued and persecuted. On Wednesday he had treated friendly attempts to warn him as invasions of his privacy, reacting with the kind of stubborn resistance that produces self-inflicted wounds.

In this situation the Chief Justice made an attempt, with the aid of counsel, to reconstruct the events of Wednesday and to issue a press release that would square with what he could remember and with what he could ascertain. His reconstructed memory, based in part on Mr. Orfanello's written statement made on Friday morning, was more

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positive than it should have been, and some of his failures of memory seem too convenient. But I cannot make a finding of deliberate falsehood on the basis of his own testimony.

Meanwhile, Mr. Orfanello had told at least three people on Thursday morning that he had warned the Chief Justice on Wednesday that the Gore Vidal meeting was a fund raiser for Superior Court criminal defendants. Later on Thursday and on Friday morning he gave two quite different accounts to counsel for the Chief Justice. I have no doubt that his Thursday morning statements were honest, but there is little to corroborate them. He now says his Thursday afternoon and Friday statements were false. By Sunday, contrary to his testimony, he must have realized that he could be blamed if he had failed to warn the Chief Justice adequately, and he consulted counsel. As counsel, he chose the former Chief Justice. Thereafter, he resolved his dilemma, and told counsel for Chief Justice Bonin that if he testified under oath he would "bury" the Chief Justice.

We must be careful to distinguish large sins from small ones. Particularly dangerous is the escalation of misunderstanding, difference of recollection, and public clamor into charges of deliberate falsehood, false swearing and the like. On the record before us, I cannot sustain such charges on the basis of Mr. Orfanello's testimony. Without that testimony, such charges are baseless.

Apart from the charges that are not proved, there is sufficient proof of actual impropriety, as distinguished from "appearance of impropriety," to warrant the court's decision. The injunction of Canon 2 of the Code of Judicial Conduct against appearance of impropriety must not be read to require that a judge cater to popular misunderstanding or prejudice in his extrajudicial conduct. His duty "to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism." American Bar Association, Ethical Consideration 9-2, accompanying Canon 9 of the Code of Professional Responsibility, S.J.C. Rule 3:22, 359 Mass. 829 (1972). I should be

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reluctant to join in censure based solely on appearance of impropriety, and do not read

Matter of Morrissey, 366 Mass. 11, 16 (1974), as so based.

WILKINS, J. (concurring, with whom Abrams, J., joins). Although I agree with the disposition proposed in this matter and with most of the factual conclusions expressed in the opinion of the court, I believe that certain allegations were proved which some Justices of this court have not found to have been established. Specifically, I believe that Mr. Orfanello told the Chief Justice in their brief conversation in the afternoon of April 5, 1978, in some form of words, that the "gay" benefit at the Arlington Street Church was intended to raise funds to aid in the defense of certain criminal defendants. I am satisfied that the reference to the defense fund was brief and that its full import escaped the attention of the Chief Justice, who seemed concerned about how Mr. McMenimen learned that he was going to attend the meeting and about others advising him not to attend an event sponsored by a "gay" group. I agree with Justice Braucher's characterization of the Chief Justice's reaction to these friendly attempts to warn him.

On the following morning, the Chief Justice was acutely aware of the significance of what Mr. Orfanello told him the previous afternoon concerning a "defense fund." I am persuaded that Mr. Orfanello told the Chief Justice about the use of ticket proceeds for the defense of criminal cases because on the next day the Chief Justice did not question Mr. Orfanello about, or challenge him for, not telling him that a "defense fund" was involved.

When the Chief Justice answered certain questions under oath in the course of his April 11 deposition, his testimony was incorrect. He had inquired what the Boston/Boise Committee was and had been told. He had been told that the meeting was intended to raise funds to assist in the defense of certain criminal defendants. In this respect, the Chief Justice was plainly mistaken. However, considering

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the form and context of the specific questions asked of the Chief Justice, and considering the Chief Justice's very literal approach to questions, I conclude that he did not intentionally misrepresent facts when he testified under oath on April 11, 1978. He had heard something of the nature of the Boston/Boise Committee before attending the meeting but may well not have remembered his inquiry concerning it at the Arlington Street Church when he purchased the tickets. Although Mr. Orfanello told him that the meeting was a fund raiser for criminal defendants, I do not find that the Chief Justice received information concerning the use of the ticket proceeds of the precise character described in the applicable question put to him on April 11.

I believe that the press release of April 7, 1978, although literally true, was knowingly misleading. Perhaps, as he said, the Chief Justice "did not learn of the intended use of these funds until reading it in the press on April 6, 1978, the day following the lecture," but he did hear one representative of the Boston/Boise Committee say at the meeting "most of this money will be going . . . to the National Jury Project which has entered these cases in order to see that a fair trial can possibly exist." The press release may have been, as the opinion of the court states, a measure taken to moderate the public reaction. It was, however, less than a frank and complete statement of what the Chief Justice had been told and what he knew.

End Of Decision

Citation: 366 Mass. 11
Parties: IN THE MATTER OF FRANCIS X. MORRISSEY.
County: Suffolk
Hearing Date: June 24, 1974
Decision Date: July 12, 1974
Judges: TAURO, C.J., REARDON, QUIRICO, BRAUCHER, KAPLAN, & WILKINS, JJ.

The personal behavior of a State judge, who made inquiry of, without attempting to influence, a Federal prosecutor concerning a case pending against a friend and later accepted a $4,000 gift from that friend, was not "beyond reproach" and violated Canon Four, Canons of Judicial Ethics. [14-17]

INFORMATION filed in this court on September 10, 1973.

Evidence and arguments were heard by Hennessey, J., and a report of findings and rulings was filed by him.

Edward J. Barshak & David A. Barry, Designated Counsel.

Walter J. Hurley for the respondent Morrissey.

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BY THE COURT. Francis X. Morrissey has been a judge of the Municipal Court of the City of Boston since 1958. On May 17, 1973, there appeared in a Boston newspaper a news article containing allegations of possible improper conduct by Judge Morrissey. Those allegations arose principally from the fact that Judge Morrissey, in September of 1967, received and deposited to his account a check in the amount of $4,000 drawn by the Baltimore Paint and Chemical Corporation (Baltimore Paint), a corporation controlled by one Edward Krock. Inscribed on that check was the notation "Legal fees." In a subsequent, separate legal proceeding an attorney for Krock conceded that the $4,000 check was not a proper charge against Baltimore Paint but instead should properly have been charged to Krock's personal account. The newspaper article suggested the possibilities, first, that the check constituted compensation for Judge Morrissey's having intervened to influence a Securities and Exchange Commission (SEC) complaint against Krock which in 1967 was pending in a Federal Court, and second, that the check was compensation for legal services performed for Krock by Judge Morrissey.

On May 25, 1973, the Chief Justice of this court, on behalf of the full court, by letter instructed Chief Justice Jacob Lewiton of the Municipal Court of the City of Boston to conduct an investigation of the allegations contained in the article and thereafter to submit a report to this court. After conducting such an investigation Chief Justice Lewiton, on August 1, 1973, submitted a detailed report of his findings. Based on information obtained from interviews with seven individuals (including Judge Morrissey but not including Krock) and from an examination of the records of the United States Attorney for the District of Massachusetts, Chief Justice Lewiton found that Judge Morrissey had received a check in the amount of $4,000 drawn on the account of Baltimore Paint, that Judge Morrissey believed such check was a gift from Krock personally, and that such check was indeed a gift and was not given to Judge Morrissey as compensation for legal

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services rendered to Krock or for intervention in Krock's behalf in a Federal criminal investigation. Chief Justice Lewiton also found, however, that Judge Morrissey in 1967 had in fact inquired of the United States Attorney if the SEC had filed a criminal complaint against Krock. Based on these findings, Chief Justice Lewiton concluded that Judge Morrissey had violated no statute or applicable code of ethics.[1] He further concluded, however, that Judge Morrissey's conduct in accepting a substantial gift of money from an individual who was the subject of a Federal criminal complaint was "ill-advised."

On September 10, 1973, this court ordered that Chief Justice Lewiton's report be received by it as an "Information." On the same date the full court referred the matter to a single justice for further proceedings.

Between September, 1973, and March, 1974, an extensive investigation of the allegations against Judge Morrissey was conduced by two attorneys who had been designated as counsel and associate counsel for the court. A report of that investigation was filed with the court on March 25, 1974. After receiving that report, the full court ordered that evidence and arguments be heard by the single justice.[2] Such a hearing was held on May 16, 17 and 20, 1974,[3] during which the single justice heard testimony from five witnesses (including Judge Morrissey), heard summaries of the depositions of eleven additional witnesses (including Krock), and received several exhibits in evidence.[4]

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[1] The Code of Judicial Conduct (S.J.C. Rule 3:25, 359 Mass. 841), which prohibits the acceptance by judges of substantial gifts, was not adopted in Massachusetts until 1972, becoming effective on January 1, 1973.

[2] In addition to the matter investigated by Chief Justice Lewiton, the single justice also heard evidence on a second matter involving the receipt by Judge Morrissey of compensation for services performed for a New York corporation up to and including the year 1972. These services were not legal services. Judge Morrissey received no such compensation after January 1, 1973, the date on which the Code of Judicial Conduct became effective for Massachusetts judges. We agree with the conclusion of the single justice that there was nothing improper about Judge Morrissey's conduct with respect to this matter.

[3] An additional brief hearing was held on May 28, solely for the purpose of deciding an evidentiary matter.

[4] The single justice also received, for custody purposes only, the depositions of certain other witnesses which had been obtained by the court appointed counsel. Counsel declined to offer those depositions as evidence because they contained hearsay statements of doubtful reliability. We concur in the decision of the single justice not to accept those depositions as evidence.

Judge Morrissey was represented by counsel at this hearing. Following the conclusion of the hearing the single justice issued a comprehensive report of findings and rulings. We summarize his findings.

Judge Morrissey and his wife and Krock and his wife had been close friends for a number of years prior to and including 1967. In April of 1967, during a dinner party, Krock informed Judge Morrissey of the pending SEC investigation and expressed concern whether a complaint had been filed by the SEC with the United States Attorney in Boston. He made no request of Judge Morrissey that he take any action or make any request on his (Krock's) behalf. A few days later, however, Judge Morrissey did inquire of the United States Attorney whether such a complaint against Krock had been filed. A complaint had, in fact, been received in the United States Attorney's office just a few days before Judge Morrissey's inquiry. Other than some possible comments on the respective characters of Krock and the complainant in the SEC matter, Judge Morrissey

made no comment on the merits of the complaint and the United States Attorney did not construe the inquiry as an attempt to influence the handling of the case. Subsequent to this inquiry, Judge Morrissey's sole involvement in the SEC matter was to recommend several attorneys to Krock. In December of 1968, the United States Attorney in Boston decided not to prosecute the SEC complaint against Krock, a decision concurred in by the Chief of the Fraud Section of the Criminal Division of the United States Department of Justice. The decision not to prosecute was based on considerations having nothing whatsoever to do with Judge Morrissey.[5]

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[5] There was testimony by the former United States Attorney and by a former assistant United States Attorney that the case against Krock was weak and that there was substantial doubt as to the credibility of the principal complainant in the case. In addition, more serious charges were then pending against Krock in the office of the United States Attorney for the Southern District of New York, and the Justice Department decided to pursue those charges rather than the Massachusetts case.

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The $4,000 check which Judge Morrissey received from Baltimore Paint was issued by the corporation on orders from Krock. Krock's intent was to make a gift to the Morrisseys for the purpose of defraying the cost of a wedding of one of the Morrisseys' daughters which Krock had attended in July of 1967. Krock had previously made known to Judge Morrissey that he intended to make such a gift, and Judge Morrissey so construed the purpose of the check when he received it.[6] Krock had also informed Judge Morrissey that he controlled Baltimore Paint, that Baltimore Paint owed Krock the $4,000, and that the check would be charged against Krock's personal account.[7] In addition, Judge Morrissey knew that Krock was a very wealthy man, reputed to have an annual income of $1,000,000. In 1968 Krock stated to his accountant that the $4,000 check was a gift to help defray the Morrisseys' wedding expenses. At no time has Krock made any statement inconsistent with the conclusion that the check was intended as a gift.

This matter is now before the full court for final disposition. The record before us contains all the evidence heard by the single justice, including a transcript of the testimony, the depositions, and the other exhibits.[8] In this setting we believe that the proper standard of review is that which is applied in suits in equity where the evidence is reported and there is a report of material facts. See All

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[6] The single justice found it more likely than not that the notation "Legal fees" was on the check at the time Judge Morrissey received it. Judge Morrissey testified that he did not notice any such notation. There was evidence that, routinely, checks in payment for legal fees carried some explanation of the services rendered. There was no such explanation on this check.

[7] Krock was, in fact, involved in a scheme of improperly diverting corporate funds to his personal use. Judge Morrissey had no knowledge of this scheme in 1967.

[8] Counsel for the court and counsel for Judge Morrissey waived the opportunity for oral argument to the full court.

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Stainless, Inc. v. Colby, 364 Mass. 773, 775-776 (1974). Thus, we may examine the evidence and find facts not expressly found by the single justice, but we may reverse the single justice's findings of fact only if we are satisfied that they are plainly wrong. Richmond Bros. Inc. v. Westinghouse Bdcst. Co. Inc. 357 Mass. 106, 109 (1970). Reed, Equity Pleading & Practice, Section 1160 (1952) (Supp. 1973).

We have examined the evidence and have found no reason to disturb the findings of fact of the single justice. They are certainly not "plainly wrong." On the contrary we think they are plainly correct. Based on those findings we reach the following conclusions, which are substantially identical to the single justice's "Ultimate Findings." We conclude that: Judge Morrissey did not influence and made no attempt to influence the handling of the SEC complaint against Krock; Judge Morrissey at no time performed legal services for Krock; the $4,000 check was a gift from Krock to Judge Morrissey and was not payment for services rendered. But notwithstanding the foregoing conclusions, we conclude that Judge Morrissey acted improperly in two respects in that as an active judge he made inquiry of a prosecuting officer concerning a pending case and he accepted a gift of a substantial sum of money from the person who was the subject of the pending case. In these two respects we find that Judge Morrissey demonstrated insensitivity to the then controlling[9] Canons of Judicial Ethics which required that a judge's personal behavior "should be beyond reproach." Canon 4. It is clear, however, that we are not here dealing with illegal and corrupt acts on the part of a judge; rather, this is a case of careless disregard of the requirement that a judge's conduct be such as to avoid even the appearance of impropriety.

That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and

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[9] See Matter of Troy, 364 Mass. 15, 69 (1973).

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there should be strict adherence to them. Failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process. Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench.

We believe that the great majority of judges in the Commonwealth, past and present, have subscribed to this rigid code of personal and official conduct. Witness the fact that over generations of judicial service involving many hundreds of judges, only in a miniscule number of cases has it been necessary to discipline any of them. It is true that even these few instances should not have occurred. But it is also true that the resulting disciplinary measures have served to give assurance to the public that such conduct will not be tolerated and that the judiciary itself is ever ready to carry out the corrective process when necessary. It is in this spirit that this court has supported the concept of a constitutional amendment for the formation of a commission with the power necessary to investigate and establish facts concerning possible judicial misconduct. As an interim procedure, pending constitutional change, this court has supported legislation having, within constitutional limits, the same purpose and aim. When all the facts are brought forward in any situation the court will act decisively, with fairness and, when the circumstances warrant, with compassion.

By his unfortunate conduct as recited above, Judge Morrissey has shown a careless disregard of his obligation to the public and to the great number of judges who, on a daily basis, render dedicated and trustworthy service to the public. In doing so he has brought much harm to the courts.

Judge Morrissey did not, we are satisfied, attempt improperly to influence the outcome of a case in the Federal Court. Nor did he, with respect to that case, engage in the practice of law after his appointment to the bench.

In the circumstances, we feel that suspension from office or from the bar of the Commonwealth, or disbarment, are

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penalties too severe to inflict. Judge Morrissey should be and is hereby censured. Further, he is ordered to pay within ninety days the sum of $5,000, as costs in these proceedings, to the Treasurer of the Commonwealth.

In arriving at this determination, we have given due consideration to the fact that the acts complained of occurred more than seven years ago and prior to the establishment of our Code of Judicial Conduct.

So ordered.

End Of Decision

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822 P.2d 1333

INQUIRY CONCERNING A JUDGE.

No. S-3675.
Supreme Court of Alaska.
Dec. 6, 1991.

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George N. Hayes, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., for petitioner.

Philip R. Volland, Rice, Volland & Gleason for respondent.

Before CUTLER, CARPENETI, HODGES, SCHULZ, and TUNLEY, * JJ.

OPINION

CUTLER, Chief Justice, Pro Tem.

This is a petition to reject a determination made by the Judicial Conduct Commission on December 7, 1989. The Commission found that petitioner violated several

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judicial canons and recommended that petitioner be publicly admonished. Petitioner challenges the Commission's determination that there were violations as well as the Commission's recommendation for a public admonition. The petition is brought pursuant to Appellate Rule 406. We accept the Commission's recommendations in part and reject them in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was an officer, director and shareholder of City Mortgage Corporation (CMC). Petitioner also is a justice of the Alaska Supreme Court. Petitioner held both of these positions throughout 1987. Preceding and during 1987, CMC managed a portfolio of home and mobile home loans made by a state public finance corporation, the Alaska Housing Finance Corporation (AHFC). In 1987, AHFC sued CMC in state court for money that CMC had withheld from AHFC. The case was assigned to Superior Court Judge Peter Michalski. CMC counterclaimed for breach of contract, claiming the money withheld was for expenses incurred in its management of mobile homes covered by foreclosed AHFC mortgages. CMC sought reimbursement for the management expenses.

AHFC requested that CMC participate in a settlement conference. Petitioner was asked to be one of three members of a settlement panel. The proposed settlement, if one were reached, would be put to the Boards of Directors of AHFC and CMC. Petitioner agreed to be on the settlement panel.

On November 6, 1987, petitioner met with Charles Evans, counsel for AHFC. Petitioner and Evans agreed on the format and procedures for presenting evidence to the settlement panel. They also agreed to file a stipulation with Judge Michalski to delay rulings on certain motions then pending in the case. Later that afternoon, petitioner met Judge Michalski by chance in the courthouse parking lot and verbally related the stipulation to him. Judge Michalski requested that petitioner put their discussion into writing and send it to Evans.

On November 9 and 10, 1987, petitioner sent three letters to Evans. These letters were sent on petitioner's judicial "chambers" stationery and were typed by his secretary at the supreme court. The first letter, dated November 9, confirmed the agreement between petitioner and Evans regarding the procedures to be followed by the three-member settlement panel

for hearing evidence. The second letter, also dated November 9, informed Evans that petitioner had encountered Judge Michalski in the courthouse parking lot. The third letter, dated November 10, confirmed petitioner's mailing of a settlement package to Evans.

On November 14, 1987, the settlement panel negotiated a settlement. The proposed settlement recommended that AHFC pay CMC $573,000 in exchange for CMC's release of claims against AHFC. The settlement subsequently was approved by CMC's Board of Directors. It was disapproved, however, by AHFC's executive director, Ron Lehr, and its attorney, Evans. Nonetheless, AHFC was required to present the proposed settlement at a public hearing to decide whether to accept the settlement. The hearing was scheduled for December 10, 1987.

Petitioner learned prior to the public hearing that Lehr intended to use his influence with the Governor to delay or cancel the public hearing. Petitioner called the Governor's office on December 7, 1987, to counterbalance Lehr's anticipated action. Petitioner was a long time acquaintance and friend of the Governor. Petitioner asked the Governor to meet with him on a personal matter.

A meeting was scheduled and took place the following evening at Anchorage International Airport. Petitioner met with Governor Cowper and Charity Kadow, director of the Anchorage Governor's office. At the meeting, petitioner expressed his view

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that the public hearing should go ahead as scheduled. The Governor took no action as a result of the meeting. 1

The public hearing was conducted as scheduled on December 10, 1987. AHFC went into executive session in the middle of the public hearing and then postponed the public hearing. The board of AHFC met again on December 21, 1987, at which time the settlement was approved. Reports of petitioner's involvement in the case subsequently became public.

The Judicial Conduct Commission filed a formal complaint against petitioner, after an initial investigation, pursuant to AS 22.30.011(a) and Rule 9C(4) of the Commission rules. The Commission found probable cause to believe that petitioner had engaged in misconduct requiring discipline. The complaint alleged that petitioner had violated Canons 1, 2, 3, and 4 of the Code of Judicial Conduct as well as subsections (3)(C), (3)(D), and (3)(E) of AS 22.30.011(a).

Petitioner filed his answer on September 28, 1989, denying the allegations. The Commission appointed William Bankston as special counsel to present the formal charges, pursuant to Commission Rules 2C and 10A.

Bankston made an oral motion to dismiss the charges against petitioner on November 22, 1989, before the Commission Chairman. The Chairman denied the motion without prejudice, asking that it be re-presented to the full Commission at the formal disciplinary hearing scheduled for November 27, 1989.

Petitioner joined in special counsel's motion to dismiss before the full Commission. Petitioner and special counsel also stipulated to a set of facts for the Commission to consider on the motion. The Commission heard oral argument on the motion to dismiss and denied it.

Petitioner filed a motion for reconsideration with the Commission. The motion was based on the fact that he and special counsel had stipulated to dismiss the charges. The motion for reconsideration also was denied by the Commission.

The Commission adjudicated the complaint on December 7, 1989, finding that petitioner's use of court stationery, his manner of arranging a meeting with the Governor, and his actual meeting with the Governor created an appearance of impropriety in violation of Canons 1 and 2 of the Alaska Code of Judicial

Conduct and AS 22.30.011(a)(3)(D) and (E). The Commission dismissed several other charges, finding that the other acts alleged did not result in a violation of any of the Judicial Canons or statutes. The Commission recommended to this court discipline in the form of a public admonishment. 2

The Commission thereafter filed its determination and record pursuant to Commission Rule 12. On January 7, 1990, petitioner filed his petition to reject the recommendation of the Commission.

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II. PRELIMINARY DISCUSSION

A. THE ALASKA CODE OF JUDICIAL CONDUCT

The applicable judicial canons from the Code of Judicial Conduct are Canons 1, 2, 4 and 5.

Canon 1 states:

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2 states:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Canon 4 states:

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Canon 5 states in pertinent part:

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

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B. THE STANDARD OF REVIEW

This court has the final authority in proceedings related to judicial conduct in Alaska. Alaska Const. art. IV, §§ 1, 10; In re Inquiry Concerning a Judge, 762 P.2d 1292 (Alaska 1988) (hereinafter Judge I); In re Hanson, 532 P.2d 303 (Alaska 1975). In exercising this power, the court is required to conduct an independent evaluation of the evidence. In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990) (hereinafter Judge II). Independent review is required to ensure that "procedural due process has been accorded the judicial officer proceeded against and that the requisite findings of fact have been made and are supported by substantial evidence." Judge I, 762 P.2d at 1294.

Before we conduct a de novo review of the Commission's determination that petitioner created an appearance of impropriety in violation of the Code of Judicial Conduct, we first address a procedural issue raised by petitioner in regard to the Motion to Dismiss.

C. THE COMMISSION DID NOT ERR IN DENYING SPECIAL COUNSEL'S MOTION TO DISMISS.

The motion to dismiss was based on special counsel's view that petitioner had not violated any of the judicial canons. This motion was denied by the Commission, even though petitioner joined in the motion.

Petitioner contends that the Commission erred in denying the motion to dismiss. Petitioner argues that the motion to dismiss should have been treated as an Alaska Civil Rule 41(e) dismissal that the Commission was obliged to accept. He contends that the Commission's discretion in regard to the stipulated motion is analogous to that of a trial court faced with a stipulated dismissal.

The Commission disagrees and responds by noting that the rules of civil and criminal procedure do not apply in their entirety to judicial conduct proceedings. The Commission argues that these proceedings are neither civil nor criminal but are special proceedings. The Commission further argues that the role of special counsel is merely to collect and present evidence and does not include the authority to dismiss charges. The Commission argues that only it is authorized to dismiss cases after a finding of probable cause. The Commission contends it fulfilled its duty by conducting an independent review of the motion to dismiss. The Commission disagreed with special counsel's findings after reviewing them upon consideration of the motion, and therefore denied the motion to dismiss.

We agree with the Commission's position regarding its discretion to deny the motion to dismiss. The Commission appropriately heard oral argument on the motion to dismiss and reviewed the record independently before

denying the motion. Under Alaska law, the Commission is the only entity authorized to make judicial conduct recommendations to the supreme court or to decide not to make any recommendation. AS 22.30.011(d). A contrary finding would undermine the purpose and integrity of the Commission by permitting a sole individual to make an ultimate decision regarding judicial discipline.

III. INDEPENDENT REVIEW ON THE MERITS

A. PETITIONER'S CONDUCT CREATED AN APPEARANCE OF IMPROPRIETY IN VIOLATION OF JUDICIAL CANON 2.

The Commission determined that petitioner's conduct violated Canon 2 by creating an appearance of impropriety in three instances: petitioner's use of chambers stationery, petitioner's phone call to the Governor's office requesting a meeting with the Governor, and petitioner's meeting with the Governor. 3 The Commission declined to find that any of the conduct was actually improper, although the basis for that determination is not fully explained.

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Petitioner challenges all three of the Commission's determinations of appearance of impropriety. Moreover, petitioner argues that the Commission applied the wrong test in evaluating his conduct.

1. The Appropriate Test

Both petitioner and the Commission have argued extensively over the test to be used to evaluate petitioner's conduct. They both argue that the test should be objective, but they propose different objective tests. The Alaska Supreme Court decided Judge II since the date the parties completed their briefing. Judge II is controlling as to the appropriate test. The test is whether a judge fails "to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot." 788 P.2d at 723. The Judge II court stated that "[t]he duty to avoid creating an appearance of impropriety is one of taking 'reasonable precautions' to avoid having a 'negative effect on the confidence of the thinking public in the administration of justice.' " Id. (quoting In the Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669, 682-83 (1978)).

We reject both parties' arguments about how petitioner's conduct should be judged, and also reject the test actually used by the Commission. Instead, we employ the Judge II test. We decide whether petitioner failed to use reasonable care to prevent a reasonably objective individual from believing that an impropriety was afoot. This hypothetical objectively reasonable person forms his or her belief upon learning that petitioner had used chambers stationery in private litigation in writing letters to opposing counsel, had called the Governor to meet with him personally regarding a private business matter, and had met with the Governor on this private matter, with the matter ending in a settlement apparently favorable to petitioner's private business interest. 4

The objectively reasonable person is not a well trained lawyer or a highly sophisticated observer of public affairs. Neither is this person a cynic skeptical of the government and the courts. Moreover, an objectively reasonable person is not necessarily one who is informed of every conceivably relevant fact. He or she is the average person encountered in society.

We now proceed to evaluate each instance of petitioner's disputed conduct through the eyes of this objectively reasonable person.

2. Petitioner's Use of Chambers Stationery Created an Appearance of Impropriety.

We agree with the Commission that petitioner's use of chambers stationery for the three private letters created an appearance of impropriety. We find by clear and convincing evidence 5 that a reasonably objective person would believe that the stationery was an attempt

to influence opposing counsel and other viewers of the letters or that it had this effect.

Petitioner defends his use of the stationery by claiming he used chambers stationery, not official stationery, and by pointing out that the court system lacks any written policy restricting the use of chambers stationery. These arguments are weak. An objectively reasonable person would not know the difference between the two types of stationery or whether any policy existed.6

6 Moreover, individual judges have an obligation to follow ethical constraints concerning the use of judicial stationery, notwithstanding any court system policy or lack of policy.

Petitioner next claims that the intended recipients of the letters were not influenced in fact by the chambers stationery. We find this fact irrelevant to the opinions of the thinking public who might see the letters in the public records. We find the stationery as used likely to cause members of the thinking public to believe that petitioner was unable to distinguish his judicial activities from his personal ones. This failure to maintain separate interests could lead a reasonable person to believe that petitioner's judicial decision-making ability similarly might be flawed.

Petitioner easily could have avoided risking a negative effect on the confidence of the public in the administration of justice. Petitioner could have used CMC's own stationery or plain stationery. Either would have avoided creating an appearance of impropriety.

3. The Wording of Petitioner's Request to Meet with the Governor Did Not Create an Appearance of Impropriety.

We reject the Commission's finding that petitioner's manner of arranging a meeting with the Governor violated the judicial canons. We do not agree that petitioner violated Canon 2 by the way he worded his phone call to the Governor's office.

The Commission found that petitioner violated the Canon by identifying himself as a justice when calling the Governor's office and by failing to clearly identify as personal the nature of his requested meeting with the Governor. Petitioner agrees that he identified himself as a justice when calling, but claims he specifically stated that he wanted "to speak with the Governor on a personal matter." Before the Commission, the parties stipulated to a set of facts supporting petitioner's assertion on this latter point, even though the Commission now argues that petitioner's statement that "he wanted to personally meet with the Governor" failed to specify that the meeting itself would be on a personal matter.

We do not find that a reasonably objective person would believe that an impropriety was afoot from petitioner's identification of himself as a "justice" when calling the Governor in the same conversation in which petitioner stated he was calling on a personal matter. The thinking public would know that many persons of title such as doctors and judges identify themselves or are identified by others, by their title, by habit. There is no evidence that petitioner intentionally used his title to get quick attention or failed to follow the use of his title with a statement that he was calling on a personal matter. We therefore find that the identification of petitioner by his title in the circumstances did not create the appearance of impropriety.

We have reviewed the stipulation entered into by petitioner and the commission as to petitioner stating he wanted to speak with the Governor on a personal matter. We find that the stipulation in petitioner's favor is supported by the record. We therefore accept the stipulation and find petitioner requested to meet on a personal matter creating no impropriety or appearance thereof.

4. Petitioner's Meeting with the Governor Created the Appearance of Impropriety.

We agree with the Commission that petitioner's meeting with the Governor created the appearance of impropriety. Petitioner challenges this determination, arguing that the Commission's decision means any private business meeting between a judge and the Governor violates the judicial canons. He contends such a result is at odds with Canon 5, which permits a judge

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to conduct business activities. Petitioner also argues there was no appearance of impropriety in the meeting because he never asked the Governor directly to do him any favors, but merely reported Lehr's anticipated actions to the Governor.

We use the Judge II test in rejecting petitioner's arguments. The reasonably objective person would conclude that impropriety was afoot because petitioner had substantial private business interests that were involved in litigation against the state, petitioner was a justice of the state supreme court, and petitioner met personally with the Governor to discuss this litigation in an attempt to persuade the Governor to intervene in a manner favorable to petitioner's interests. We make this finding after careful review of the text and context of Canons 1, 2, 4 and 5.

Our analysis must start and end with the relevant canons. Canon 1 sets out the importance of an independent and honorable judiciary. This canon requires judges to participate in establishing and maintaining high standards of conduct to preserve the integrity and independence of the judiciary. Canon 1 also requires the other canons to be read and construed in such a manner as to further this objective.

Canon 2 echoes this emphasis on the integrity of the judiciary by requiring judges to avoid impropriety and the appearance of impropriety at all times. Canon 4 permits judges involved in quasi-judicial activities to consult with members of the executive or legislative branches "but only on matters concerning the administration of justice."

Finally, Canon 5 requires a judge to regulate his or her extra-judicial activities to minimize the risk of conflict with his or her judicial duties. Section C focuses on financial activities. Subsection C(1) clearly requires a judge to refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties or exploit his judicial position. Subsection C(2) limits a judge to holding and managing investments only if they do not conflict with the requirements of subsection (1). 7

It is evident in reading all of these canons together and in focusing on the specific language the drafters employed that petitioner should have conducted his business activities only if they would not create the appearance of impropriety. Here, the creation of the appearance of impropriety is obvious. The reasonably objective person would be justified in believing that an impropriety was afoot upon learning of a personal meeting between a justice of the state supreme court and the Governor involving the justice's private business matters that were then in litigation with the state, notwithstanding the fact that the Governor took no action after the meeting.

There were reasonable steps that petitioner could have taken to avoid creating the appearance of impropriety. Petitioner could have foregone any meeting with the Governor. Petitioner could have asked someone from CMC to seek a meeting with and to actually meet with the Governor to argue CMC's position, although not on petitioner's behalf. Either action would have avoided petitioner's direct involvement on this issue and would have avoided the appearance of impropriety.

Petitioner's conduct created precisely the appearance of impropriety that the canons guard against. The reasonably objective person could easily conclude that petitioner was using the

prestige of his office to encourage the Governor to intercede on his behalf. Petitioner stood to gain personally from the proposed settlement, from all appearances. This apparent self-interest distinguishes this case from one with no appearance of impropriety. The thinking public easily could conclude that the justice might someday return the favor to the Governor. Precisely this sort of conduct jeopardizes and erodes public confidence in the integrity and impartiality of the judiciary,

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and is prohibited by the judicial canons.

The judicial canons reflect the drafters' intent to limit judges' activities in a fashion that is not required of other citizens, even other citizens of public note. A judge may participate in extra-judicial activities only if these activities do not compromise the integrity of the judicial system. A judge carries restrictions on his or her personal life that are not imposed on members of the general public, on other public officials, on members of bar associations, or on anyone else. A New York court appropriately stated that "[m]embers of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved." Lonschein v. State Comm'n on Judicial Conduct, 50 N.Y.2d 569, 430 N.Y.S.2d 571, 572, 408 N.E.2d 901, 902 (1980).

We therefore accept the Commission's determination with respect to petitioner's meeting with the Governor that the meeting created the appearance of impropriety. 8

B. PETITIONER'S CONDUCT WARRANTS A PRIVATE REPRIMAND.

We next review the sanction recommended by the Commission. The Commission requested this court to publicly admonish petitioner. Alaska Statute 22.30.011 does not expressly authorize public admonishment as a sanction, however. 9 Moreover, a public admonishment appears inconsistent with the Commission's expressed view that "the least severe sanction is appropriate" because there was only the appearance of impropriety. The Commission gave two reasons for opting for a public admonition. The Commission felt there was a need to emphasize to the public and other judges that a judge has an obligation to avoid the appearance of impropriety. The Commission also found that petitioner should be publicly cleared of any accusation of actual impropriety due to publicity about his role in the settlement. Petitioner opposes any public admonition based on such reasons and requests a private admonition if an admonition is to be administered.

The appropriate rules for judicial sanctions may be drawn from the test for determining appropriate sanctions against lawyers developed by the American Bar Association, even though judges are held to a higher standard of conduct than lawyers. Judge II, 788 P.2d at 723 & n. 11; Disciplinary Matter Involving Buckalew, 731 P.2d 48, 51-52 (Alaska 1986). This court has used the ABA Standards before to organize and analyze the relevant factors to be considered in both judicial and lawyer discipline sanction cases.

The ABA framework for determining appropriate sanctions is a four pronged test:

1. What ethical duty did the lawyer (judge) violate?

2. What was the lawyer's (judge's) mental state?

3. What was the extent of the actual or potential injury caused by the lawyer's (judge's) misconduct?

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4. Are there any aggravating or mitigating circumstances?

Judge II, 788 P.2d at 724; Buckalew, 731 P.2d at 52 (quoting ABA Standards, Theoretical Framework, reprinted in ABA/BNA Lawyers' Manual on Professional Conduct, 01:805-01:806 (1986)).

The disciplining body first examines prongs 1 through 3 to determine the baseline sanction. Subsequently, the disciplining body determines whether any aggravating or mitigating circumstances justify a departure from the baseline sanction.

The duty violated here was the duty of the judicial officer to avoid creating an appearance of impropriety. This duty is only indirectly addressed in the ABA Standards because the appearance of impropriety is forbidden to lawyers in only limited ways whereas it very broadly applies to judges. "This is one area in which the Code of Judicial Conduct demands more of judges than the Disciplinary Rules do of lawyers." Judge II, 788 P.2d at 724. We therefore must decide for ourselves the seriousness of the violation. We do so in conjunction with addressing the third prong of the test, the amount of harm caused.

We thus turn to a determination of petitioner's mental state. Specifically, we must decide whether petitioner's mental state was negligent, or purposeful and knowing. Id. Negligence is a failure "to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." Id. (quoting ABA Standards, Definitions, ABA/BNA 1:807). Here the record fails to clearly and convincingly prove a knowing or purposeful state of mind. It does reflect a negligent one, however. Petitioner failed to be aware of a substantial risk that his actions could result in a reasonably objective person believing that an impropriety was afoot.

Next we address the actual or potential harm caused by the violation. Judge II performed a lengthy analysis of these two types of harm. We give the Judge II analysis great deference. In Judge II, the court found no actual harm even though the judge had made an unreasonable attempt to issue himself a reduced fare airplane ticket through a defunct airline. The court found no actual or significant harm because the potential difference in ticket price was only $20.60. The court recognized, however, that other harm was foreseeable from the judge's continued possession of a validating plate and blank stock. Id. at 724-25. Accepting the analysis of Judge II, we do not find any actual harm here because the Governor did not do petitioner any favors after the meeting. We clearly find that potential harm could result from the undermining of the public's confidence in the judiciary, however. We find therefore that the violation is moderately serious even though no actual harm resulted.

Accordingly, we find using the first three parts of the test above that the appropriate baseline sanction here is a private reprimand. Our conclusion is supported by the ABA sanction philosophy that has been commented on by this court before. Id. at 726. This sanction philosophy suggests that "[w]here the violation, whatever its nature, involves only negligent conduct which occasions little injury, the recommended sanction is admonition, or private reprimand." Id. at 725. We follow the Judge II application of the baseline sanction of private reprimand for a violation involving the same mental state and degree of injury.

We note that public admonishments generally are administered only in cases involving blatant violations of the Code of Judicial Canons, according to cases from other jurisdictions. See Gubler v. Commission on Judicial Performance, 37 Cal.3d 27, 207 Cal.Rptr. 171, 688 P.2d 551 (1984) (wrongful attorney fee collecting practices against criminal defendants, doubling attorney fees imposed on defendant represented by public defender, authorizing release of confiscated guns for sale by defendants); In re Hayes, 541 So.2d 105 (Fla.1989) (judge's discussions with journalist of progress of murder trial on multiple occasions

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knowing journalist would use material); In re Ford, 404 Mass. 347, 535 N.E.2d 225 (1989) (judge serving as CEO of non-profit corporation while serving as a judge); In re Kiley, 74 N.Y.2d 364, 547 N.Y.S.2d 623, 546 N.E.2d 916 (1989) (lending and appearing to lend the prestige of office to advance private interests of criminal defendants); In re Derrick, 301 S.C. 367, 392 S.E.2d 180 (1990) (conviction of crime of moral turpitude based on breach of trust with fraudulent intent); In re Pearson, 299 S.C. 499, 386 S.E.2d 249 (1989) (referring to another person as a "nigger lover"). Petitioner's conduct does not rise to the level of severity of the conduct in these other cases. The ABA Standards are designed to promote consistency in discipline. ABA Standards for Imposing Lawyer Sanctions, ABA/BNA 01:801-01:804. We find that the reasoning of Judge II applies well to the case before the court, and therefore we conclude that a private reprimand is the appropriate baseline sanction.

Finally we consider whether this private reprimand should be subject to increase or decrease depending upon the presence of aggravating or mitigating factors. Judge II, 788 P.2d at 725. We use the aggravating and mitigating factors set out by the ABA Standards. 10

We find five mitigating factors in this case. There is an absence of prior disciplinary proceedings, petitioner has cooperated with the disciplinary process although he does not admit wrongdoing, petitioner has asserted he subsequently divested himself of his business interest before the press reported the matter and in fact took a loss in so doing, the petitioner has an excellent reputation, and there was a delay in the initiation of disciplinary proceedings. We find two aggravating factors. There was selfish motive on petitioner's part at the time, and he has had substantial experience in the practice of law.

We find there should be no departure from the baseline sanction, after balancing the applicable mitigating and aggravating factors and upon review of the sanctions imposed by other courts. We have weighed most heavily among the aggravating factors petitioner's substantial experience in the practice of law. We take particular note with respect to the three letters sent to Evans. Petitioner should have realized that these materials could come to the attention of the public and therefore harm the judiciary, even if he meant no harm by them. This aggravating factor is offset by the mitigating factors of timely effort to rectify consequences, the lack of actual harm from the conduct and petitioner's continued excellent reputation. Additionally, there was nearly a two-year delay between the conduct in question and the bringing of charges by the Commission, with petitioner's conduct remaining above

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reproach throughout. A private reprimand best serves the paramount concern of "protection of the public, the courts, and the legal profession." Buckalew, 731 P.2d at 56.

IV. CONCLUSION

We accept in part and reject in part the recommendation of the Judicial Conduct Commission that petitioner be found in violation of several judicial canons. We reject the recommendation of the Judicial Conduct Commission for a public admonishment. The reprimand will be private.

HODGES, SCHULZ and TUNLEY, JJ., concur in part and dissent in part.

HODGES, Judge, concurring and dissenting.

I concur with the majority on the following issues:

1. The standard of review to be applied is independent review;

2. The Commission did not err in denying special counsel's motion to dismiss;

3. The test articulated in In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990) (Judge II), is the test to be applied; 1

4. The use of chambers stationery created the appearance of impropriety; and

5. A private reprimand is the appropriate sanction.

I dissent from the majority on the following issues:

1. Their reversal of the Commission's finding that calling the Governor's office was the appearance of impropriety; and

2. Their finding that meeting with the Governor was only an appearance of impropriety.

APPENDIX

NOTE: OPINION CONTAINS TABLE OR OTHER DATA THAT IS NOT VIEWABLE

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The Commission determined that calling the Governor's office to arrange a meeting, identifying himself as a justice but not clearly indicating it was on a purely private matter created the appearance of impropriety. I agree that this creates an appearance of impropriety. An objectively reasonable person would conclude that petitioner was using his position as a supreme court justice--that is, his judicial position--to arrange a meeting with the Governor on a purely private business matter.

In the factual context of the call to the Governor's office, I find that a reasonably objective person would believe that an impropriety was afoot. The majority views the call to the Governor's office in isolation. Under the facts of this case, that view is unrealistic--the call must be viewed in light of all the surrounding circumstances. When this is done, a reasonably objective person would believe that petitioner was attempting to use his judicial position for private gain--using his judicial position to influence the Governor regarding the settlement.

In isolation, the mere call to the Governor's office is not improper, but when viewed in context--which you must do--it is!

The Commission determined that petitioner's meeting with the Governor did not constitute an actual impropriety, but only the appearance of impropriety. It is not entirely clear how the Commission reached this conclusion. It appears that the Commission based its determination on the relationship of Canons 2, 4 and 5.

Petitioner challenges the determination that the meeting created even the appearance of impropriety. He contends that the Commission's decision means any private business meeting between a judicial officer and the Governor violates the judicial canons. He argues that this result is at odds with Canon 5, which permits a judge to engage in business activities. He further contends that since the Governor took no action--was not influenced by the meeting--there was no apparent or actual impropriety. Apparently petitioner feels that you can attempt to improperly influence someone, but if they are not influenced, there is no improper conduct. This argument is patently without merit.

Canon 5 permits judicial officers to engage in private business matters. It does not grant carte blanche to permit engaging in private business and violate the Canons. Extreme care must be exercised by judges in their private business affairs.

Upon independent evaluation of the evidence, I find that the meeting with the Governor was actually improper. Therefore, I disagree with the Commission's finding that the meeting with the Governor was only an

appearance of impropriety. In making this determination, the judge's conduct must be analyzed in relation to the Judicial Canons. Canon 1 emphasizes the

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need for an independent and honorable judiciary; judges must maintain high standards of conduct to preserve the integrity and independence of the courts. The other judicial canons must be construed to further this objective.

That judges should avoid impropriety and the appearance of impropriety is re-emphasized in Canon 2. Canon 3 dictates that a judge's judicial duties take precedence over all of his other activities. Canon 4 permits, subject to the proper performance of his duties, engaging in activities to improve the "Law, Legal System and the Administration of Justice." Canon 5 requires that a judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties. Specifically, Canon 5 provides:

C(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

Subsection C(2) provides that a judge may manage investments, but only if it does not conflict with subsection C(1). Thus it is clear that a judge must refrain from financial or business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties or exploit his judicial position. If there is any conflict or potential conflict the judge must refrain from acting in furtherance of his business activity.

In evaluating petitioner's conduct in light of the Canons, I find that petitioner's meeting with the Governor on a private business matter in litigation against a state public finance corporation was an actual impropriety. Petitioner is a member of the state's highest court. He arranged a meeting with the Governor, the highest member of the executive branch, to attempt to have the Governor intercede for him on a purely private financial matter. This is precisely the kind of activity that the Judicial Canons prohibit. An objectively reasonable person would conclude that petitioner was using his judicial position for his own direct financial interests.

Petitioner apparently had a large personal financial stake in the proposed settlement. 2 An objectively reasonable person would conclude that petitioner would use his judicial position to further his own financial interests. This casts doubt on petitioner's judicial integrity.

It is this apparent large financial self-interest that distinguishes the facts of this case from other judicial conduct cases where the court has found only an appearance of impropriety.

In re Hanson, 532 P.2d 303 (Alaska 1975), is an example. In the Hanson case, the sole resident judge of Kenai had dinner in a public restaurant with the Mayor, who was an "old friend," for the purpose of encouraging the public to support the Mayor's troubled grocery business. The Commission concluded that the judge's conduct constituted use of his judicial office "to promote private business interests, in violation of Canon 25 of the Canons of Judicial Ethics ... and ... conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of AS 22.30.070(c)(2)." 532 P.2d at 309. We held that the Commission was in error in concluding that there was a violation of Canon 25 or AS 22.30.070(c)(2). In so holding we stated:

The instant case presents a single isolated occasion of a judge having dinner with a family friend, who has not been indicted. This is a far cry from the type of improper conduct which Canon 25 was designed to prohibit. Judged by objective standards, any signal emanating from

this public repast was rather weak and ambiguous and one that we cannot characterize as involving improper persuasion or coercion, or the appearance thereof, employed to promote the grocery business of Mayor Steinbeck.

Id. at 311.

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The present case is readily distinguished from the Hanson case. A justice of the highest court of the state met with the Governor, the state's highest executive officer, to persuade him to intercede on petitioner's behalf in a matter involving litigation between petitioner's company and a state public finance corporation. If the proposed settlement went forward, petitioner apparently stood to gain financially from the settlement. An objectively reasonable person could easily believe that any involvement by the Governor favorable to petitioner would result in a quid pro quo--that the justice would someday return the favor to the Governor. It is precisely this type of conduct that jeopardizes and erodes public confidence in the integrity and impartiality of the judiciary. This is clearly prohibited by the Code of Judicial Conduct.

The Code of Judicial Conduct limits judges' extra-judicial activities more so than the ordinary citizen or other public figures. A judge may participate in extra-judicial activities only if they do not compromise the integrity of the judicial system. In some situations it may be acceptable for a private person to act, but not a judge. There may be some instances where the judge has to decline to participate.

Petitioner had a range of choices in his involvement with CMC. Although a director and shareholder it was not necessary for him to become actively involved in the settlement negotiations. If he did, as he did here, he had to act cautiously to make sure that what occurred here did not happen. Clearly he should not have used court stationery--there was a reasonable alternative--blank or CMC stationery; he should not have called or met with the Governor--there was a reasonable alternative--he could have ignored the possibility that the public hearing might be delayed or canceled, or he could have requested another member or employee of CMC to meet with the Governor. A better approach would have been to decline participation in the settlement panel, since a reasonable alternative would have been to have another member of CMC participate. A judge may have business dealings but must do so cautiously; passive rather than active participation is the watch word. Here petitioner became actively involved, casting a shadow on his ability to be impartial in his judicial duties.

A judge's responsibility and obligation to maintain the public's confidence in the judicial system is clearly set out in the Code of Judicial Conduct. These restrictions apply to both judicial and non-judicial activities. The Code places restrictions on a judge's personal life that are not imposed on members of the general public, public figures, or members of the bar. As pointed out in Lonschein v. State Comm'n on Judicial Conduct, 50 N.Y.2d 569, 430 N.Y.S.2d 571, 572, 408 N.E.2d 901, 902 (1980):

Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exacting standards of scrutiny to the end that public perception of the integrity of the judiciary will be preserved. There must also be a recognition that any actions undertaken in the public sphere reflect, whether designedly or not, upon the prestige of the judiciary. Thus, any communication from a Judge to an outside agency on behalf of another, may be perceived as one backed by the power and prestige of judicial office.... Judges must assiduously avoid those contacts which might create even the appearance of impropriety.

(Citation omitted).

I find that the Commission erred in concluding that petitioner's conduct created only the appearance of impropriety. I find that the meeting between petitioner, a justice of the state's highest court and the Governor, the

highest executive officer in the state, on personal business of the justice relating to a financial dispute with a state agency constitutes actual impropriety.

SCHULZ, Judge, concurring in part and dissenting in part.

The Alaska Commission on Judicial Conduct (the Commission) found the petitioner violated Canon 2 of the Code of Judicial

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Conduct. 1 That finding compelled the further finding that petitioner's conduct violated Canon 1 2 and AS 22.30.011(a)(3)(D) and (E). 3

Based on an incomplete recitation of "facts" and an erroneous application of the objectively reasonable person test enunciated by this court in In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990) (Judge II), a majority of this court today affirms the Commission's findings in two respects.

I dissent.

In Judge II, this court said:

> The duty to avoid creating an appearance of impropriety is one of taking "reasonable precautions" to avoid having "a negative effect on the confidence of the thinking public, in the administration of justice." Otherwise stated, did appellant fail to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot?

788 P.2d at 723 (quoting In the Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669, 682-83 (1978)) (emphasis added).

That is the test which the court applies today. Unfortunately, the court has become very selective in determining what it is that the "thinking public" or "objectively reasonable persons" think about. For instance, the court either totally ignores, or gives far too little weight, to the fact that while petitioner used court stationery in a private matter, the stationery was provided for whatever purpose the justice wanted to use it. 4 As the court points out, the petitioner used the chambers stationery to memorialize agreements between him and opposing counsel in litigation in which he was directly involved, and in which he was participating at the opposing parties' request. Why it is that "objectively reasonable persons" have to ignore those facts is beyond my ken. 5

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While I agree with the premise that an objectively reasonable person is not necessarily fully informed, (Maj.Op. at 1340-1341), it does seem that the objectively reasonable person should be aware of at least some of the surrounding circumstances and at least a little of the content of the letters before jumping to the conclusion, as the majority does, that an impropriety may be afoot. 6 The court also concludes that petitioner's meeting with the Governor created the appearance of an impropriety because "petitioner had substantial private business interests that were involved in litigation against the state, petitioner was a justice of the state supreme court, and petitioner met personally with the Governor to discuss this litigation in an attempt to persuade the Governor to intervene in a manner favorable to petitioner's interests." (Maj.Op. at 1342).

First, the court is simply wrong when it says that petitioner met with the Governor to discuss the petitioner's business interests. That conclusion is not supported by the record in the case. Neither the nature of petitioner's business interests nor the terms of the settlement agreement were ever mentioned in the meeting with the Governor. Petitioner met with the Governor because the petitioner had information that Evans, who represented AHFC in the litigation, and the Executive Director of AHFC were trying to torpedo a settlement process that CMC had entered into in good faith. Petitioner never asked the Governor to change anybody's

mind or to attempt to influence the AHFC board to accept or reject the settlement. Second, the court's conclusion that the litigation concluded with a favorable settlement for petitioner is not supported by the record. According to the record, the settlement proposal was reached after the use of a well recognized "mini-trial" procedure and was ultimately approved by both parties. The record contains no information and the Commission made no findings on whether or not the settlement was favorable to CMC, to petitioner, or to AHFC. The record in this case would not support a finding on that point in any event.

Third, the court cavalierly suggests that petitioner could have avoided the appearance of impropriety by foregoing the meeting with the Governor entirely. (Maj.Op. at 1342). The court cites no authority for the proposition that the petitioner should roll over and play dead simply because he happens to be a justice, when confronted with at least delay, and quite probably deliberate obstruction, by executive branch officials. Until today, there was no authority for that proposition.

Next, the court suggests that petitioner could have done indirectly what he should not do directly by having someone on the CMC staff arrange a meeting and actually meet with the Governor. (Maj.Op. at 1342-1343). To suggest that such a manipulative course of action would avoid the appearance of impropriety only recognizes that it would be more difficult for the objectively reasonable person to find out about it. More troublesome, however, is the question of what test we apply in the case of a sole proprietorship without executive type staff. 7 The court also considers it significant that the litigation concluded with a favorable settlement for petitioner. (Maj.Op. at 1343). What this has to do with the meeting with the Governor is not divulged by the majority probably because there is no evidence that the terms of the settlement were discussed at the meeting. In fact, the record discloses that the terms of the settlement and who it was favorable or unfavorable to were never discussed at the meeting.

Finally, since the court has correctly concluded that there was nothing wrong in asking for the meeting in the first place, it seems a strange leap in logic to conclude that the meeting itself somehow created an appearance of impropriety.

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I have absolutely no quarrel with the proposition that judges, because of the nature of their office, must maintain the highest standards of conduct in both their judicial and extra-judicial affairs, and, further, it must appear that judges maintain those standards. Until today, I had thought that Judge II provided a reasonably objective standard by which to measure that conduct in appearance of impropriety cases. Unfortunately, for the public and the bench, I am apparently wrong.

I agree with the majority that the Commission did not err in denying special counsel's motion to dismiss. Otherwise, I dissent.

TUNLEY, Judge, concurring in part and dissenting in part.

I concur with the dissent of Judge Schulz, respectfully adding a few further comments.

Petitioner was requested by all parties to sit on the settlement panel. While serving thereon he used his judicial chambers court stationery to memorialize agreements and meetings. These writings were only distributed among the other members of the settlement panel. There was at that time no court rule or policy against justices using their chambers stationery for such purposes nor is there presently. Any objectively reasonable person who was reasonably informed could only conclude no impropriety was afoot when reviewing the files containing these letters as that person would understand the background of these letters and such was only private chambers stationery.

Concerning the meeting with the Governor, petitioner was only making sure the agreement agreed upon by the settlement panel would see the light of day at a public hearing. It was not for a private purpose. Any objectively reasonable person who was reasonably informed could only conclude no impropriety was afoot. Petitioner, as a member of the settlement panel, met with the Governor so as to prevent Lehr from using his influence with the Governor to delay or cancel the public hearing taking place whereat the Board of AHFC would decide whether to accept the settlement agreement approved by the panel. No discussion was had concerning the settlement agreement itself. Ms. Kadow, Director of the Governor's Anchorage office, attended the meeting so it cannot be labeled a private meeting.

Certainly the test of In re Inquiry Concerning a Judge, 788 P.2d 716 (Alaska 1990) (Judge II), must include the requirement that objectively reasonable persons be reasonably informed. In my opinion, the majority fails to acknowledge that the reasonable person must also be reasonably informed of the surrounding circumstances. The test of Judge II certainly is not a "hindsight" test. I believe the majority employ a test of "hindsight" in determining the appearance of impropriety in this case while professing they do not. Based upon such "hindsight," the majority today condemn business activity of a most respected member of the highest court of this state, a state that allows members of the judiciary to "engage in other remunerative activity including the operation of a business." Judicial Canon 5C(2). Also, petitioner was asked by all involved to partake therein. Further, based on information now before this court, petitioner divested himself of his interest in the business long before this matter was publicly reported, petitioner losing a considerable amount of money in such divestment. Pursuant to the test of Judge II, the complaints against petitioner just do not establish an appearance of impropriety, and the majority opinion is just completely wrong.

As I pen my thoughts herein, a wave of deep concern for the judiciary of this state washes across my spirit. Judges must live in the real world, and I don't believe they should be expected to sever all ties with it upon taking the bench. They would thus isolate themselves from the rest of society. Involvement in the outside world is necessary to enrich judicial temperament and to enhance a judge's ability to make difficult decisions. 1 I am fearful the majority's decision

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will further isolate our judiciary from the real world. My brethren and I, both at bench and bar, must have faith that today's interpretation of what is an appearance of impropriety when washed with the sands of time, will not last long. 2

I concur with the majority in concluding that the petitioner's request to meet with the Governor did not create the appearance of impropriety. Lastly, I concur with the majority in concluding that the Commission did not err in denying special counsel's motion to dismiss.

I am authorized to say that Judge Schulz joins in the above comments.

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* Sitting by assignment made pursuant to article IV, section 16 of the Alaska Constitution and Appellate Rule 406(f).

1 No written record exists of what transpired at the meeting.

2 At the time AS 22.30.011(d) provided:

(d) The Commission may, after a hearing held under (b) of this section,

(1) exonerate the judge of the charges;

(2) informally and privately admonish the judge or recommend counseling;

(3) reprimand the judge publicly or privately;

(4) refer the matter to the supreme court with a recommendation that the judge be suspended, removed, or retired from the office or publicly or privately censured by the supreme court.

In In re Inquiry Concerning a Judge, 762 P.2d 1292 (Alaska 1988) (hereinafter Judge I), the Alaska Supreme Court ruled that subsection (3) of this statute was in conflict with article IV, section 10 of the Alaska Constitution. The court found the Commission was without power to impose sanctions itself and could only recommend sanctions to the supreme court.

Here, the Commission was aware of Judge I when it made its determination. The Commission recommended a public admonition without citing either AS 22.30.011(d)(2) or (d)(3). The Commission noted that public admonitions exist in many states. Determination at 12.

We reject the Commission's recommendation for the reasons expressed in this opinion. We elect to impose a private reprimand under former AS 22.30.011(d)(3). This discipline is the same discipline chosen in Judge I.

3 The Commission found that petitioner's parking lot encounter with Judge Michalski did not violate any of the judicial canons because "it was apparent at the time of the contact that no further legal proceedings were contemplated." We accept this finding by the Commission.

4 This description of the basis of the objectively reasonable person's belief is not changed by petitioner's assertions on rehearing. Petitioner asserts on rehearing that the objectively reasonable person should find no appearance of impropriety because petitioner ultimately received no actual cash return due to the fact that later he divested himself of his interest in CMC subsequent to the settlement being paid. We find this later conduct irrelevant to the opinions of the thinking public at the time of the original acts. Later attempts to undo the harm may be considered in mitigation but they are not properly a part of the determination of whether an actual impropriety or the appearance of impropriety occurred. (We have considered petitioner's assertions about divesting himself of his interest, even though these assertions are outside the stipulated facts.)

5 The "clear and convincing" standard is required by In re Hanson, 532 P.2d 303, 308 (Alaska 1975).

6 The appendix contains sample "official" stationery and "chambers" stationery. In conformity with the rules of confidentiality that govern these proceedings, the petitioner's name, which appears on the "chambers" stationery, has been deleted from the copy appearing in the appendix.

7 The formal complaint of the Commission does not charge petitioner with a violation of Canon 5.

8 We have considered whether petitioner's conduct amounted to an actual impropriety, in violation of Canon 4, because he consulted with an executive official other than regarding the administration of justice. We find that Canon 4, by its title, applies only to quasi-judicial activities. The proscription in Canon 4 is not applicable because petitioner was not involved in quasi-judicial activities.

We note that Canon 4C of the ABA's new proposed Model Code of Judicial Conduct (1990), addressed in Judge Tunley's dissent, provides:

Governmental, Civic, or Charitable Activities

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

We conclude from the title of this section that it also would not apply to petitioner's activities because they were not "governmental," "civic," or "charitable." Moreover, we note that even

were the above code adopted for Alaska, a judge could only do what is permitted by that section if the judge could do so without creating an appearance of impropriety.

9 See footnote 2.

10 The mitigating factors set out by the ABA are:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical or mental disability or impairment;

(i) delay in disciplinary proceedings;

(j) interim rehabilitation;

(k) imposition of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses.

Judge II, 788 P.2d at 725 (quoting ABA Standard 9.32, reprinted in ABA/BNA Lawyers' Manual on Professional Conduct 01:842 (1986)).

The aggravating factors set out by the ABA are:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution.

Id. (quoting ABA Standard 9.22, ABA/BNA 01:841-42).

1 The majority discusses the test in the context of an objectively reasonable person and goes on to define in some detail what that "person" is. I do not feel that it is necessary to define "an objectively reasonable person" other than it is "an objectively reasonable person." Further, in the majority's opinion (at 1340, 1340 n. 4, 1341), they use the "thinking public" in applying the test. I disagree with the majority's use of the "thinking public." The majority either equates the "thinking public" with the "objectively reasonable public" or changes the test in its application.

2 Although not included in the record before the Commission evidence has been received that shortly after the settlement was reached Petitioner divested himself of any interest in CMC, did not receive any monies as a result of the settlement, and transferred his stock to the corporation at a financial loss.

1 Canon 2:

A Judge Should Avoid Impropriety and the Appearance of Impropriety in all His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a

manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interest of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

2 Canon 1:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

3 AS 22.30.011(a)(3)(D) and (E):

(a) The Commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge

....

(3) within a period of not more than six years before the start of the current term, committed an act or acts that constitute

....

(D) conduct that brings the judicial office into disrepute; or

(E) conduct in violation of the code of judicial conduct;

4 I express no opinion as to whether or not that is a good or a bad rule. If the rule is bad, however, the rule should be changed before we sanction someone for violating what I can only characterize as a highly subjective expectation for judicial conduct.

5 It is interesting that the thinking public or objectively (emphasis added) reasonable persons of Judge II have become so selective. For instance, the record in this case makes it clear that petitioner took part in the settlement process in 1987 because he was asked by the other parties. They knew who he was, and apparently were not terrified by his position. Further, petitioner tendered all of his stock in the corporation at no cost to the corporation on December 29, 1987, well before this matter became a subject of public discussion. In short, whether the settlement was favorable or unfavorable to CMC or petitioner is irrelevant because petitioner took no part of the settlement in any event. The record is also clear that the merits of the settlement were never discussed between the Governor and petitioner at their meeting. The majority never addresses a central issue in this case and that issue is simply why all of the facts are not relevant and if all of the facts are not relevant, what is the test for determining what is relevant and what is not. So much for the objective test.

6 The majority's conclusion on the use of chambers stationery cannot rest on a violation of some rule against using the stationery for the simple reason that there is no rule.

7 This, of course, assumes that CMC had "staff" that could arrange a meeting with the Governor and discuss the AHFC board meeting. The record seems quite silent on what sort of "staff" options petitioner actually had.

1 Acknowledgement for my statements on the role of the judiciary is given to the authors of Judicial Conduct and Ethics, J. Shaman, S. Lubet & J. Alfini, at 2 (1990).

2 I refer also to the final proposed 1990 Model Code of Judicial Conduct of the American Bar Association (ABA) which was recommended by the Standing Committee on Ethics and Professional Responsibility of the ABA for consideration by the House of Delegates of the ABA in 1990. I can find nowhere in this Model Code of Judicial Conduct any transgression thereof in the conduct of petitioner condemned

by the majority today. In fact, Proposed Canon 4C(1) clarifies that a judge may consult with an executive official "in a matter involving the judge or the judge's interests."