THE COMMISSION ON JUDICIAL CONDUCT

IN RE: JUDGE ERNEST B. MURPHY

COMPLAINT NOS. 2006-9 & 2006-30

COMMISSION'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS FOR SANCTIONS

The Commission on Judicial Conduct ("the Commission") hereby submits the following Proposed Findings of Fact and Conclusions of Law with respect to the evidence presented at the Formal Hearing on the above complaints.

I. BACKGROUND

On January 10, 2006, the Commission initiated a complaint against Judge Ernest B. Murphy (Complaint No. 2006-9). A second complaint was filed against Judge Ernest B. Murphy by the *Boston Herald* on February 17, 2006 (Complaint No. 2006-30).

On July 10, 2007, the Commission, acting pursuant to M.G.L. c. 211C, § 5(14) and Commission Rule 7B(4), found sufficient cause to issue Formal Charges in the above complaints and filed formal charges with the Supreme Judicial Court ("the SJC"). These charges alleged that Judge Ernest B. Murphy ("Judge Murphy") violated the following Canons of the Code of Judicial Conduct:

1. CANON 1A: FAILURE TO MAINTAIN AND OBSERVE HIGH STANDARDS OF CONDUCT
2. CANON 2: FAILURE TO AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY
3. CANON 2A: FAILURE TO ACT IN A MANNER THAT PROMOTES PUBLIC CONFIDENCE IN THE INTEGRITY AND IMPARTIALITY OF THE JUDICIARY
4. CANON 2B: LENDING THE PRESTIGE OF JUDICIAL OFFICE TO ADVANCE HIS OWN PRIVATE INTERESTS
5. 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
6. 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 REASONABLY PERCEIVED TO EXPLOIT HIS JUDICIAL POSITION

A Formal Hearing on these charges took place on October 15 and 16, 2007 and evidence relating to these charges was presented.

II. PROPOSED FINDINGS OF FACT

1. Judge Ernest B. Murphy was appointed a judge in the Massachusetts Superior Court in the year, 2000. Judge Murphy served continuously in that capacity up to, and including, the date of his testimony during the Formal Hearing of this matter.[1]

2. Judge Murphy, acting in his personal capacity, filed a libel lawsuit against the *Boston Herald* in June of 2002.[2]

3. Patrick Purcell ("Mr. Purcell") was, in June of 2002, the Publisher and majority-owner of the *Boston Herald*. Mr. Purcell served continuously in that capacity up to, and including, the date of his testimony during the Formal Hearing of this matter.[3]

4. Mr. Purcell did not attend law school and is not a lawyer.[4]

5. In this libel suit, Judge Murphy was represented by Attorney Howard Cooper from the law firm, Todd & Weld.[5]

6. In their defense of this libel suit, the *Boston Herald* and Mr. Purcell were represented by Attorney M. Robert Dushman ("Attorney Dushman") of the law firm, Brown Rudnick.[6]

7. Judge Murphy had very strong feelings that he would win the libel lawsuit he had filed. Judge Murphy strongly believed he was going to win the lawsuit, and that the *Boston Herald* was "in serious trouble." Judge Murphy wanted to convey to Mr. Purcell his legal opinion that the *Boston Herald* could not prevail in its defense of the lawsuit.[7]

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[1] (Tr.33:15-19)
[2] (Tr. 35:2-11)
[3] (Tr. 172:14-18)
[4] (Tr. 181:22-24)
[5] (Tr. 37:21-24)
[6] (Tr. 38:2-5)
[7] (Tr. 50:23-24; 51:1-21) and (40:20-24; 41:1-12)

8. To that end, in October of 2003, Judge Murphy sought a private, one-on-one, settlement discussion with Mr. Purcell.[8]

9. Judge Murphy sought this meeting through his attorney, Howard Cooper.[9]

10. Attorney Howard Cooper contacted Mr. Purcell's and the *Boston Herald*'s lawyer, Attorney Dushman to arrange this meeting.[10]

11. A private meeting took place between Mr. Purcell and Judge Murphy in October of 2003. This meeting took place at Mr. Purcell's office at the *Boston Herald*.[11]

12. The time and location of this meeting were arranged by the respective counsel of Mr. Purcell and Judge Murphy.[12]

13. At no time during this October, 2003 meeting was there a discussion between Judge Murphy and Mr. Purcell regarding continuing to have ongoing direct contact about this libel suit without the knowledge of their respective attorneys. [13]

    Judge Murphy and Mr. Purcell did not exchange direct phone numbers, cellular phone numbers or email addresses.[14]

14. After argument on the summary judgment motion in the libel suit, Judge Murphy sought, through his attorney, Howard Cooper, a second private, one-on-one, settlement meeting between himself and Mr. Purcell. The timing and location of this meeting were arranged by the attorneys for Judge Murphy and Mr. Purcell. This meeting took place at Mr. Purcell's *Boston Herald* office in April of 2004.[15]

15. At this second meeting, Judge Murphy told Mr. Purcell why Judge Murphy felt the Boston Herald could not win the libel suit.[16]

16. At no time during this April, 2004 meeting was there a discussion between Judge Murphy and Mr. Purcell regarding continuing to have ongoing

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[8] (Tr. 37:10-18)
[9] (Tr. 37:18-24)
[10] Exhibit 2.
[11] (Tr. 41:13-19)
[12] (Tr. 38:6-17)
[13] (Tr. 180:19-24; 181:1)
[14] (Tr. 43:3-15)
[15] (Tr. 43:16-24; 44:1-24; 45:1-10)
[16] (Tr. 45:11-23)

direct contact about this libel suit without the knowledge of their respective attorneys.[17]

Judge Murphy and Mr. Purcell did not exchange direct phone numbers, cellular phone numbers or email addresses.[18]

17. Mr. Purcell's attorney, Attorney Dushman, never told him anything about the meetings with Judge Murphy prior to trial being "confidential settlement negotiations."[19]

Attorney Howard Cooper had no percipient knowledge of whether Attorney Dushman ever told Mr. Purcell that his direct meetings with Judge Murphy would constitute "confidential settlement discussions."[20]

Never, during either the October, 2003 meeting or the April, 2004 meeting, did Mr. Purcell and Judge Murphy discuss that they would consider their direct communications to be "confidential settlement discussions."[21]

18. With the exception of the two meetings arranged by their respective counsel, Judge Murphy and Mr. Purcell had no direct contact after the lawsuit was filed until Judge Murphy sent letters to Mr. Purcell, after the jury trial, on February 20, 2005 and March 18, 2005.

19. The libel suit Judge Murphy brought against the *Boston Herald* went to trial in January and February of 2005 and, on February 18, 2005, the jury awarded Judge Murphy $2.09 million.

20. Judge Murphy was "desperate" to settle the libel lawsuit after the jury verdict and did not want the *Boston Herald* to appeal the verdict.[22]

21. It was with that "desperate" state of mind that, "immediately"[23] after the jury returned its verdict, Judge Murphy "begged"[24] his counsel Howard Cooper to arrange a "four-way" meeting to discuss settlement of the case. At this meeting Judge Murphy, Attorney Howard Cooper, Mr. Purcell and Attorney Dushman would have been present.[25]

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[17] (Tr. 184:23-24; 185:1-6)
[18] (Tr. 43:3-15)
[19] (Tr. 221:16-22)
[20] (Tr. 161:13-24; 162:1-24; 163:1-12)
[21] (Tr. 181:2-14 and 184:13-18)
[22] (Tr. 54:4-12)
[23] (Tr. 59:16-17)
[24] (Tr. 60:8-13)
[25] (Tr. 59:13-24) and (Tr. 58:4-19) and (Tr. 55:17-24; 56:1-23)

22. Judge Murphy was told that the other side was "not interested in a four-way conference."[26] After being told the other side was not interested in a settlement discussion, Judge Murphy initiated direct contact with Mr. Purcell anyway by writing a letter to him on February 20, 2005. [27]

23. Judge Murphy sent this letter to Mr. Purcell at the main address for the *Boston Herald* after Judge Murphy, through his own efforts, determined what the address was. Mr. Purcell did not provide Judge Murphy with any address at which to contact him.[28]

24. Judge Murphy used an official Superior Court stationery envelope to send this February 20th letter, written on his own official Superior Court letterhead.

    This letterhead stationery was provided to Judge Murphy by the Trial Court. Judge Murphy was provided with Superior Court letterhead, envelopes and business cards at the same time.[29]

25. In this letter, Judge Murphy proposed the settlement meeting he had been told the other side was not interested in.

    In his letter to Mr. Purcell, Judge Murphy told Mr. Purcell that part of the price for this meeting was that Mr. Purcell had to bring a cashier's check to the meeting payable to Judge Murphy. Judge Murphy wrote, "No check, no meeting." Judge Murphy proposed a settlement of $3.26 million.

    Judge Murphy was fully aware that, at this point in time, the *Boston Herald* only owed him $2.8 million dollars (the $2.09 million jury verdict plus statutory interest as of that date).[30]

    Judge Murphy proposed the $3.26 million settlement figure because he "wanted [Mr. Purcell] to get hit in the face with $3.26 million because [Mr. Purcell] was going to say wait a second, the verdict was only 2.8"[31] and "this guy's crazy."[32]

    Judge Murphy put the $3.26 million amount in the February 20, 2005 letter to "shake [Mr. Purcell] up."[33]

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[26] (Tr. 58:4-19)
[27] (Tr. 60:17-24)
[28] (Tr. 92:3-22)
[29] (Tr. 109:9-20)
[30] (Tr. 72: 3-13 and 78:10-17)
[31] (Tr. 104:15-24; 105: 1-14)
[32] (Tr. 105:17)
[33] (Tr. 105:15-22)

26. Mr. Purcell felt that when he received this February 20th letter, "I couldn't believe I was getting this from a judge; to me, it looked like a ransom note, and that – it was very strange."[34]

27. Mr. Purcell also felt that "the reference 'Because it is, Mr. Purcell, in your distinct business interests to do so, in my considered opinion,' once again, seemed to be a bit of a threat. And it seemed to me that this was more intimidation. And the idea that I would show up and take this check without discussing it with counsel and without pursuing what legal rights I still had seemed to me I wasn't going to agree with."[35]

28. The tone of Judge Murphy's February 20th letter was intentional: "I was taking my gloves off because I wanted to settle this case, and I thought this was the only thing I had left, is to roll up my sleeves with this guy and let him have it, that might possibly precipitate a change in his position."[36]

29. Judge Murphy further acknowledged with respect to his February 20th letter, "I agree that it was strong. I agree that it was tough."

30. Mr. Purcell and the *Boston Herald* had been represented throughout the libel suit by the law firm Brown Rudnick, specifically Attorney Dushman, and Judge Murphy knew that.[37]

31. Mr. Purcell and Attorney Dushman felt that the best interests of the *Boston Herald* were served by pressing forward and appealing the jury verdict.[38]

32. After a $500,000 deductible, the insurance company for the *Boston Herald* had to bear the cost of the jury verdict and any legal fees that were incurred by the *Boston Herald*. When the *Boston Herald* decided to pursue an appeal rather than settle after the jury verdict, the *Boston Herald*'s financial liability remained limited to the same $500,000 deductible.[39]

33. Mr. Purcell did not respond in any way to Judge Murphy's February 20, 2005 letter. There was no contact of any kind between Judge Murphy and Mr. Purcell between February 20, 2005 and March 18, 2005.[40]

34. Judge Murphy sent a second letter to Mr. Purcell that was dated March 18, 2005. This letter was written on plain stationery but was enclosed in an official court stationery envelope.

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[34] (Tr. 187: 16-22)
[35] (Tr. 190: 9-18)
[36] (Tr. 84:7-24)
[37] (Tr. 75:1-10)
[38] (Tr. 217:2-9)
[39] (Tr. 238:7-24; 239:1-5)
[40] (Tr. 191:20-24; 192: 1-15)

35. Judge Murphy sent this letter to Mr. Purcell at the main address for the *Boston Herald* after Judge Murphy, through his own efforts, determined what the address was. Mr. Purcell did not provide Judge Murphy with any address at which to contact him.[41]

36. In this second letter, Judge Murphy expressed, in very strong language, his legal opinion of the *Boston Herald*'s chances of successfully appealing the jury verdict in the libel suit.

37. When he received this second letter from Judge Murphy, Mr. Purcell felt "there's the distinct appearance of a ransom note. And once again, basically saying, I have no chance and that . . . I have no chance of winning this case."[42]

38. Mr. Purcell alerted his counsel, Attorney Dushman, to these two letters from Judge Murphy. Mr. Purcell and Attorney Dushman decided not to respond in any way to the February 20th and March 18th letters from Judge Murphy.[43]

39. Judge Murphy sent these letters to Mr. Purcell after being warned about the use of official court stationery. Judge Murphy had received a letter, dated August 21, 2002, from the Executive Director of the Commission on Judicial Conduct. In this letter, Judge Murphy was advised to "consider the appropriateness of using judicial stationery for certain purposes."[44]

40. In December of 2005, Judge Murphy's attorney filed a motion "to freeze the assets of the Herald." Mr. Purcell testified that, when Judge Murphy's lawyer filed this motion, "[W]e decided that something else had to be done. The efforts on Judge Murphy's part to work out a settlement, and then these letters in combination with the movement to freeze our assets, basically made us say, 'We cannot go on with this,' and so we had to fight back."[45]

The lawyers for the Boston Herald made a decision to file Judge Murphy's February 20th and March 18th, 2005 letters as part of a court filing to "demonstrate that this was an effort on the part of Judge Murphy to get us to not pursue our rights, what our legal rights were."[46]

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[41] (Tr. 92:3-22)
[42] (Tr. 194:3-9)
[43] (Tr. 194:10-14)
[44] (Tr. 100:10-24; 101:1-18)
[45] (Tr. 195: 6-16)
[46] (Tr. 199:21-24; 200:1-4)

Because these letters were going to be filed with the court, the Editor of the *Boston Herald* was notified and provided with a copy of the court submission.[47]

Mr. Purcell understood that "this was a high-profile case" and the court filing would be in the newspaper. However, Mr. Purcell was not directly involved in how Judge Murphy's letters were covered in the *Boston Herald.*[48]

Judge Murphy's letters were filed with the court the day before the first article about them appeared in the *Boston Herald.*[49]

41. On December 21, 2005 the *Boston Herald* published an article about Judge Murphy's February 20, 2005 and March 18, 2005 letters. This article included most of the content of both letters.[50]

On December 21, 2005, the *Boston Herald* published the full text of these letters and actual copies of these letters in its online web edition.[51]

As of December 21, 2005, the paper edition of the *Boston Herald* had a circulation of about 230,000 to 240,000 readers.[52] As of December 21, 2005, the *Boston Herald*'s website had "roughly 3 million unique visitors per month."[53]

42. Attorney Dushman passed away prior to the Formal Hearing of this matter.

III. PROPOSED RULINGS OF LAW

1. WHETHER JUDGE MURPHY MEANT TO USE HIS POSITION AS A JUDGE TO INFLUENCE THE OPPOSING PARTY OR NOT, WHEN JUDGE MURPHY USED OFFICIAL JUDICIAL STATIONERY TO SEND AND WRITE LETTERS TO THE OPPOSING PARTY IN A LAWSUIT IN WHICH JUDGE MURPHY WAS PERSONALLY INVOLVED, HE VIOLATED THE CANONS OF THE MASSACHUSETTS CODE OF JUDICIAL CONDUCT. IT IS, BY EXTENSION, IRRELEVANT THAT THE RECIPIENT OF THESE LETTERS ALREADY KNEW THAT JUDGE MURPHY WAS A JUDGE.

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[47] (Tr. 200:22-24; 201:1-12)
[48] (Tr. 201:13-23)
[49] Exhibit 1, Appendix F.
[50] Exhibit 1, Appendix F.
[51] (Tr. 202:5-14)
[52] (Tr. 202:20-22)
[53] (Tr. 202:23-24; 203:1-24)

"Whatever [the judge's] motive, it is no cure for conduct that creates an appearance of impropriety."[54] A judge's explanation for his conduct "may shed light on his after-the-fact, subjective belief," but it does nothing to eliminate the appearance arising from the objective record.[55]

In the case, In the Matter of Donald M. Mosley, the Nevada Supreme Court relied heavily on a decision of the Alaska Supreme Court[56] for guidance in deciding if a judge violated Canon 2B[57] 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 fact 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.[58]

The California Commission on Judicial Conduct (CCJC) has 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,

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[54] In re Snow, 674 A.2d 573, 578 (New Hampshire 1996).
[55] In the Matter of Johnstone, 2 P.2d 1226, 1237 (Alaska 2000).
[56] 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 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."
[57] 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."
[58] In the Matter of Donald M. Mosley, 102 P.3d 555, 560 Nevada Supreme Court (May 17, 2001), quoting Inquiry Concering a Judge, 822 P.2d 1333, 1336 (Alaska 1991).

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."

2. JUDGE MURPHY'S LETTERS TO MR. PURCELL DO NOT CONSTITUTE "SETTLEMENT NEGOTIATIONS" AND 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 WHETHER JUDGE MURPHY VIOLATED ANY OF THE CANONS OF THE MASSACHUSETTS CODE OF JUDICIAL CONDUCT.

Whether a particular discussion is, in fact, a settlement discussion is a question for the trial judge.[59] The evidence in this case supports a finding that these letters were not part of any type of continuing confidential settlement discussions.

When Judge Murphy sent these letters, his only prior "settlement" communications with Mr. Purcell had taken the form of face-to-face meetings, with the knowledge and approval of counsel for both sides. Judge Murphy sent the February 20, 2005 letter to Mr. Purcell after being told that the other side was not interested in settlement talks. Judge Murphy sent the March 18, 2005 letter after receiving no response to his February 20th letter.

Judge Murphy's opening statements in these letters would be unnecessary if there, in fact, was an agreement for this kind of continuing settlement discussion. In his February 20th letter, Judge Murphy wrote, "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." In his March 18th letter, Judge Murphy wrote, "I'm going to, once again, principal to principal, as 'settlement negotiations' – off the record – just between you and me – tell you something."

Also, Judge Murphy's statement in his March 18th letter, "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 Mr. Purcell not to pursue an appeal at a cost of "$331,056 /yr for the next two or three years."

To the extent that these letters might be considered part of a settlement discussion, that fact would not provide Judge Murphy with an opportunity to escape responsibility for misconduct he committed as part of such communications.

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[59] Marchand v. Murray, 27 Mass App 611, 615 (1989).

"[P]ublic policy does not support the exclusion of an offer of compromise when that offer is seen as too coercive on a party's exercise of their constitutional rights."[60] Here, Judge Murphy's letters sought to pressure the *Boston Herald* not to pursue its Constitutional rights to Due Process through an appeal.

Moreover, it is clear that public policy would be frustrated if a judge were permitted to commit misconduct but escape responsibility for that misconduct by simply prefacing his improper statements as "settlement negotiations."

3. JUDGE MURPHY'S CONDUCT IS PROPERLY EVALUATED FROM THE PERSPECTIVE OF THE "HYPOTHETICAL REASONABLE OBJECTIVE PERSON."

"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.'"[61]

In the Alaska case, Inquiry Concerning a Judge, the Alaska Supreme Court addressed the viewpoint from which a fact-finder should consider whether a judge 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."[62]

This same "reasonable objective person" standard applies in Massachusetts. In the case, In the Matter of Frederick L. Brown, the Massachusetts Supreme Judicial Court indicated that the standard of the "objective reasonable person" should be applied when evaluating whether a judge has violated the Canons of the Code of Judicial Conduct.[63]

Judicial misconduct cases[64] have described this reasonable person as "a reasonably intelligent and informed member of the public,"[65] an objective observer,[66] and the average person encountered in society.[67] Other formulations emphasize what a

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[60] Evidentiary Standard sec. 408.1, citing Commonwealth v. Kennedy, 389 Mass. 308, 312-313 (1983).
[61] In the Matter of Donald M. Mosley, 102 P.3d at 560, quoting Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864-65 (1988).
[62] Inquiry Concering a Judge, 822 P.2d 1333, 1340 (Alaska 1991).
[63] In the Matter of Frederick L. Brown, 427 Mass. 146, 153 (1998).
[64] This paragraph, is, with minor changes, taken from "Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility," Cynthia Gray, Judicature, Volume 89, Number 1 (July-August 2005).
[65] In the Matter of Johnstone, 2P.3d 1226, 1237 n.38 (Alaska 2000).
[66] Adams v. Commission on Judicial Performance, 897 P.2d 544, 548 (California 1995).
[67] Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).

reasonable person is not: not the judge himself or herself,[68] not a well-trained lawyer,[69] not a highly sophisticated observer of public affairs,[70] and not a cynic skeptical of the government and the courts.[71] Perhaps the most evocative variation characterizes the reasonable person as "neither excessively indulgent, nor excessively jaundiced."[72] Further, the reasonable person would not be "uninformed or misinformed,"[73] and the perception of an impropriety must be based on more than vague conjectures and subtle innuendo. Realistically, however, a reasonable person could not know "every conceivably relevant fact"[74] but would know "all available information,"[75] "all the relevant circumstances that a reasonable inquiry would disclose,"[76] or the "totality of circumstances."[77]

IV. ARGUMENT

Judge Murphy testified several times during the Formal Hearing of this matter that he was "desperate" to settle the libel lawsuit and put the matter behind him. When the jury returned a verdict in Judge Murphy's favor on February 18, 2005, Judge Murphy "begged"[78] his lawyer to set up a meeting with Mr. Purcell and Attorney Dushman to discuss settlement. Judge Murphy admitted that he did not want the *Boston Herald* to pursue an appeal of the jury verdict.[79]

Judge Murphy was told that the other side was not interested in a settlement meeting. However, Judge Murphy's desperation to settle the libel suit prevented him from taking "no" for an answer. Judge Murphy proceeded to write letters to Mr. Purcell on February 20, 2005 and March 18, 2005.

Judge Murphy's decision to send these letters to the opposing side in a lawsuit in which Judge Murphy was personally involved, after being told the other side did not want to meet with him, formed the basis for the misconduct with which he is charged.

Judge Murphy, while an active Superior Court judge, sent these letters to a non-lawyer and used judicial stationery. In doing so, Judge Murphy failed to observe the "high standards of conduct" required by Canons.

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[68] In re Snow, 674 A.2d 573, 577 (New Hampshire 1996), quoting Blaisdell v. City of Rochester, 609 A.2d 388, 390 (New Hampshire 1992).
[69] Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).
[70] Id.
[71] Id.
[72] In the Matter of Larsen, 616 A.2d 529, 584 (Pennsylvania 1992).
[73] Id. at 582.
[74] Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).
[75] In the Matter of Johnstone, 2P.3d 1226, 1237 n.38 (Alaska 2000).
[76] Delaware Code of Judicial Conduct, Commentary to Canon 2A.
[77] In the Matter of Larsen, 616 A.2d 529, 584 (Pennsylvania 1992).
[78] (Tr. 60:8-13)
[79] (Tr. 85:20-24)

In these letters, Judge Murphy improperly sought to pressure Patrick Purcell, a non-lawyer, not to appeal the jury verdict in a civil lawsuit in which Judge Murphy was personally involved as the Plaintiff.

Furthermore, these letters from Judge Murphy violated Canons with which he is charged not just because his letters improperly sought to apply pressure, but also because of the manner in which Judge Murphy sought to pressure Mr. Purcell not to pursue his right to appeal the libel verdict:

1. In his February 20, 2005 letter, Judge Murphy made reference to the court proceedings being "my business" and wrote, "As you no doubt clearly recollect, ole Mike Ditka here warned you against playing 'the Team from Chicago' in this particular Super Bowl." This statement improperly suggested that Judge Murphy has a special insight into the court system, connections within it, and a special influence over it because of his position as a judge.

2. In his February 20th letter to Mr. Purcell, Judge Murphy improperly proposed a settlement amount of $3.26 million. Judge Murphy offered no alternative monetary settlement except that, if Mr. Purcell could "stand before the God of [his] understanding, and as a man of honor, as for the return of that check," Judge Murphy would "flip it back" to Mr. Purcell.

   In his February 20th letter, Judge Murphy also wrote to Mr. Purcell that it is in "[Mr. Purcell's] distinct business interest" to pay Judge Murphy $3.26 million rather than appeal the jury verdict. This statement improperly implied that there might be consequences to the *Boston Herald*'s business interest if Mr. Purcell did not comply with Judge Murphy's settlement proposal.

   Judge Murphy proposed $3.26 million as the only amount for which the case could be settled, despite the fact that Judge Murphy was fully aware that, at that point in time, the *Boston Herald* only owed him $2.8 million dollars (the $2.09 million jury verdict plus statutory interest as of that date).[80]

   Through this act, Judge Murphy failed to observe the "high standards of conduct" required of a judge. Judge Murphy proposed this settlement amount of $3.26 million despite knowing the *Boston Herald* owed him less, because he "wanted [Mr. Purcell] to get hit in the face with $3.26 million because [Mr. Purcell] was going to say wait a second, the verdict was only 2.8"[81] and "this guy's crazy."[82] Judge Murphy admitted that he

[80] (Tr. 72: 3-13 and 78:10-17)
[81] (Tr. 104:15-24; 105: 1-14)
[82] (Tr. 105:17)

put the $3.26 million amount in the February 20, 2005 letter to "shake [Mr. Purcell] up."[83]

3. In this same February 20th letter, Judge Murphy improperly proposed the settlement meeting that had just been rejected by the opposing side and included improper conditions as the "price" of this meeting.

   The price of the meeting included conditions designed to prevent Mr. Purcell, a non-lawyer, from seeking advice about Judge Murphy's proposed settlement meeting from the counsel at Brown Rudnick who had represented him throughout the libel suit.

   Mr. Purcell and the *Boston Herald* had been represented by the law firm Brown Rudnick, specifically Attorney Dushman, and Judge Murphy knew that.[84]

   Judge Murphy's letter required that Mr. Purcell not bring his lawyer from Brown Rudnick to this settlement meeting, tell his lawyer from Brown Rudnick that the meeting was going to take place or show his lawyer from Brown Rudnick the February 20, 2005 letter from Judge Murphy.

   Mr. Purcell and Attorney Dushman felt that the best interests of the *Boston Herald* were served by pressing forward and appealing the jury verdict.[85]

   The insurance company for the *Boston Herald* was Mutual of Bermuda.[86] After a $500,000 deductible, the insurance company for the *Boston Herald* had to bear the cost of the jury verdict and any legal fees that were incurred by the *Boston Herald*. When the *Boston Herald* decided to pursue an appeal rather than settle after the jury verdict, the *Boston Herald*'s financial liability remained limited to the same $500,000 deductible.[87]

   Judge Murphy understood that there was an insurance company for the *Boston Herald* that should indemnify the *Boston Herald* against the jury verdict.[88] Judge Murphy also understood that "Gerald Schaefer" was the president, CEO and a Board Member for Mutual of Bermuda.[89] Judge Murphy "was assuming that Gerald Schaefer would be the gentleman who would be coming from the insurer. And he is an attorney."[90]

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[83] (Tr. 105:15-22)
[84] (Tr. 75:1-10)
[85] (Tr. 217:2-9)
[86] (Tr. 79:4-24)
[87] (Tr. 238:7-24; 239:1-5)
[88] (Tr. 79:22-24; 80:1-7)
[89] (Tr. 79:8-16)
[90] (Tr. 79:14-16)

Under these circumstances, Judge Murphy knew or should have known that, if Mr. Purcell succumbed to his demanded "price" for a settlement meeting and showed this letter only to "the gentleman whose authorized signature will be affixed to the check in question," Mr. Purcell might not be able to seek advice from an attorney about this letter.

Judge Murphy also knew or should have known that if Mr. Purcell did seek advice, he would only be able to notify and seek advice from the president, CEO and Board Member for Mutual of Bermuda, Gerald Schaefer, whose interests differed those of the *Boston Herald* and might have favored immediate settlement over appeal of the libel verdict.

4. This February 20, 2005 letter improperly concluded with a warning to Mr. Purcell that it would be a "mistake. In fact, a BIG mistake" to show the letter to anyone other than "the gentleman whose authorized signature will be affixed to the check in question." The language of this warning, coupled with the use of punctuation and capitalization, took on a threatening tone.

   This use of wording had greater weight and was more intimidating and threatening because it was made by a sitting Superior Court judge to a non-lawyer, because it was written on Superior Court stationery, and because it was a statement made to a non-lawyer by a judge who had a personal interest in the outcome of the case the letter referenced.

   Judge Murphy admitted that the tone of this letter was intentional: "I was taking my gloves off because I wanted to settle this case, and I thought this was the only thing I had left, is to roll up my sleeves with this guy and let him have it, that might possibly precipitate a change in his position." Judge Murphy further admitted with respect to his February 20th letter, "I agree that it was strong. I agree that it was tough."[91]

5. In his March 18, 2005 letter, Judge Murphy improperly "pretty strongly expressed"[92], his legal opinion of the *Boston Herald*'s chances of successfully appealing the jury verdict in the libel suit. In this letter, Judge Murphy wrote,

   "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.

[91] (Tr. 84:15-24; 85:1-24)
[92] (Tr. 88:22-23)

> 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.

The language of this warning, coupled with the use of punctuation and capitalization, applied improper pressure because it took on a threatening tone.

This use of wording had greater weight and was more intimidating and threatening because it was made by a sitting Superior Court judge, because it was sent in an official court envelope, and because it was a statement made to a non-lawyer by a judge who had a personal interest in the outcome of the case the letter referenced.

V. VIOLATIONS OF THE CANONS

1. CANON 1

Canon 1 of the Massachusetts Code of Judicial Conduct states, "A judge shall participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

The 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...[V]iolation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law."

When Judge Murphy sent letters dated February 20, 2005 and March 18, 2005 to Mr. Purcell, Judge Murphy failed to observe the "high standards of conduct" required of judges and "diminishe[d] public confidence in the judiciary," thereby violating Canon 1.

2. CANON 2, 2A, 2B

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."

The nature of the pressure Judge Murphy sought to apply in his February 20, 2005 and March 18, 2005 letters 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.

Judge Murphy's use of official judicial stationery to express his legal opinions, and thus 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," in violation of Canon 2B.

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." Judge Murphy has conceded that his use of official Superior Court stationery was inappropriate.[93]

Judge Murphy's demand, in his February 20th letter, on Superior Court Judicial letterhead, for approximately $500,000 more than he knew the *Boston Herald* would have been required to pay him if they simply paid the jury verdict 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.

For the reasons described above, Judge Murphy's statement in his February 20th letter, "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 also violates 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.

Judge Murphy's February 20th letter had a threatening tone. Judge Murphy wrote: "Under NO circumstances should you involve Brown, Rudnick in this meeting. Or notify that firm that such a meeting is to take place." Judge Murphy then wrote, in the post-script to his February 20th letter, "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."

The wording and punctuation of these statements created a threatening tone. These statements would lead a "reasonable objective person" to believe that Judge Murphy might try to use his position as a judge to harm the *Boston Herald* or Patrick Purcell. A person could reasonably conclude that a judge's position of power and authority would permit him to harm an ordinary citizen in ways that do not have to be explicitly defined when a threat is made. These threatening statements violate Canon 2A because they create "in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired," and, on

[93] (Tr. 94:4-20)

official judicial stationery, these statements "len[t] the prestige of judicial office for the advancement of the private interests of the judge," in further violation of Canon 2B.

Judge Murphy admitted that, in his March 18, 2005 letter, he "pretty strongly expressed"[94] his opinion regarding the *Boston Herald*'s chances on appeal. This "strong" expression of opinion by a judge who had a personal interest in the case he was referencing, made to a non-lawyer, 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. 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, 560 Nevada Supreme Court (May 17, 2001), quoting Inquiry Concering a Judge, 822 P.2d 1333, 1341 (Alaska 1991) (emphasis added). This is particularly so given that this letter was sent in an official judicial envelope in violation of Canon 2B.

When Judge Murphy sent letters dated February 20, 2005 and March 18, 2005 to Mr. Purcell, Judge Murphy failed "to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "len[t] the prestige of judicial office for the advancement of the private interests of the judge" in violation of Canons 2, 2A and 2B.

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

The content of Judge Murphy's February 20, 2005 and March 18, 2005 letters improperly expressed 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. These letters also had a threatening tone and sought, through improper means, to pressure the opposing side in this case not to pursue an appeal. Finally, Judge Murphy improperly used official court stationery for these letters. As such, these letters involved Judge Murphy's "extrajudicial activities" and violated Canons 4A(1) and 4D(1).

By sending these letters, 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). 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, 560 Nevada Supreme Court (May 17, 2001), quoting Inquiry Concering a Judge, 822 P.2d 1333, 1341 (Alaska 1991) (emphasis added).

Because he used judicial stationery for these letters, Judge Murphy failed to "refrain from financial and business dealings that tend to reflect adversely on the judge's

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[94] (Tr. 88:22-23)

impartiality . . .[and] that may reasonably be perceived to exploit the judge's judicial position" in violation of Canon 4D(1).

When Judge Murphy sent letters dated February 20, 2005 and March 18, 2005 to Mr. Purcell, Judge Murphy failed "to conduct his "extrajudicial activities so that they do not . . .cast doubt on [his] capacity to act impartially as a judge" and 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 4A(1) and 4D(1).

VI. SANCTIONS AND AGGRAVATING FACTORS

1. **Instances of the improper use of judicial letterhead can be found in other jurisdictions.**

    a. *In re Gallagher* 951 P.2d 705 (Or. 1999). This judge was found to have extensively used his judicial assistant for personal and campaigning purposes, including drafting 95% of his non-official personal business letters on official judge's stationery over several years. These letters included the collection of a personal debt, disputing various bills and disputing a parking ticket. The Supreme Court of Oregon wrote that an "objective observer" would perceive the judge's use of official letterhead and the title "Circuit Court Judge" for letters disputing a parking ticket as an attempt to receive better treatment than an average citizen. The Court found that the judge's use of letterhead and often the title "Circuit Court Judge" in other correspondences "would cause an objective observer reasonably to conclude that the accused was lending the prestige of the office to advance his own private interests." The Court noted that the judge's demanding letters asserting legal propositions in close proximity to reminders of his status as a judge indicated that the judge "intends his position to lend weight or credibility to his assertions." In mitigation, the Court noted that the judge had no prior complaints. The judge was suspended without pay for six months.

    b. *In the Matter of Donald M. Mosley*, 102 P. 3d 555, Nevada Supreme Court (May 17, 2001). The Nevada Supreme Court upheld the discipline of the Nevada Commission on Judicial Discipline. The Court found that this judge had *ex parte* communication with a criminal defendant's attorney, should have recused himself in a matter involving a witness in his own personal family law proceedings, and sent two letters to his son's two principals advising them that he had been awarded custody of his son and requesting that they prohibit the child's mother access to the child at school. With regard to his use of judicial stationery, the Court applied an "objective reasonable person" standard to conclude that the judge was attempting to gain a personal advantage, despite the principals' already knowing he was a judge. The Court upheld the Commission's imposition

of the discipline: that the judge attend an ethics course, pay a $5,000 fine and receive censures for unethical conduct.

c. *In the Matter of Sharlow*, New York Commission on Judicial Conduct, March 22, 2005. A non-attorney Town Court Justice wrote a letter on judicial stationery to another judge entering a plea of guilty on behalf of his son and asking if his son's appearance was required on March 16, 2004. The Commission admonished the judge.

d. *Inquiry Concerning a Judge*, 822 P.2d 1333, Supreme Court of Alaska (Dec.6, 1991). The Alaska Supreme Court judge in this case was also an officer, director and shareholder of a company which was involved in litigation with another company. The judge wrote three letters to the attorney for the company his company was in litigation with on judicial "chambers" stationery, typed by his judicial secretary. The letters confirmed an agreement between the judge and the attorney, advised that the judge had encountered the judge who was assigned the case, and confirmed mailing of a settlement package. The judge also was found to have created an appearance of impropriety by meeting with the Governor of Alaska, a personal friend, to discuss a matter involving this litigation. The Court issued a private reprimand.

The court's reasoning in this case was detailed and helpful. The objective test the court used to evaluate the judge's conduct was "whether a judge fails 'to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afoot.' *In re Inquiry Concerning a Judge*, 788 P.2d 716 (Alaska 1990)." The court found by "clear and convincing evidence that the stationery was an attempt to influence opposing counsel and other viewers of the letters or that it had this effect." They wrote, "We find the stationery as used likely to cause members of the thinking public to believe that **[the judge] 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.**" (emphasis added) They also wrote that the judge "easily could have avoided risking a negative effect on the confidence of the public in the administration of justice. Petitioner could have used [his company's] own stationery or plain stationery. Either would have avoided creating an appearance of impropriety."

The decision set out a "four pronged test" for determining an appropriate sanction, modeled on the American Bar Associations test for determining sanctions against lawyers. They noted that "public admonishments generally are administered only in cases involving blatant violations of the Code of Judicial Canons, according to cases from other jurisdictions," which they listed. They found the judge's mental state to be negligent,

rather than purposeful and knowing. The court "weighed most heavily among the aggravating factors [the judge's] substantial experience in the practice of law," taking "particular note" of the three letters on judicial stationery. They found that **the judge "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** [emphasis added]."

e. *In the Matter Concerning Judge Joseph E. Di Loreto,* California Commission on Judicial Performance, June 13, 2006. This judge sent a letter on "chambers" judicial stationery, which identified the judge as a judge and which had "(personal)" typed at the top. The judge wrote to the City of Downey regarding a dispute he had regarding alleged Municipal Code violations, requesting an extension of time to remove his personal property and "implicitly, the forbearance of legal actions." Previously, in 2001, this judge was disciplined (the judge was issued an "advisory letter") for using the same judicial stationery in a personal dispute involving ownership of a racing car with a friend. The Commission found that the judge's use of the parenthetical "Personal" was not relevant. They found, "**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** [emphasis added]." The Commission issued a "public admonishment."

2. Judge Murphy aggravated his violations of the Canons by sending the February 20th and March 18, 2005 letters to the Publisher of the *Boston Herald.*

Judge Murphy "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."[95] The Commentary to Rule 2A of the Massachusetts Code of Judicial Conduct warns, "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."

Massachusetts case law has held that judges have an obligation to "take reasonable precautions," both on and off the bench, "to avoid having a negative effect on the confidence of the thinking public." In Inquiry Concerning a Judge, 788 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

[95] In re Inquiry Concerning a Judge, 822 P.2d 1333, 1345 (Alaska 1991).

thinking public in the administration of justice."[96] In the Massachusetts case, In the Matter of Morrissey, 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" was sufficient to support a finding of misconduct.[97]

Judge Murphy's letters were not part of any type of continuing confidential settlement discussions. When Judge Murphy sent letters to Mr. Purcell, his only prior "settlement" communications with Mr. Purcell had taken the form of face-to-face meetings, with the knowledge and approval of counsel for both sides. Moreover, Judge Murphy sent the February 20, 2005 letter to Mr. Purcell after being told that the other side was not interested in settlement talks. Judge Murphy sent the March 18, 2005 letter after receiving no response to his February 20th letter.

Judge Murphy's statement in his March 18th letter, "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 Mr. Purcell not to pursue an appeal at a cost of "$331,056 /yr for the next two or three years."

Judge Murphy's decision to send the letters at issue in this case to the publisher of a major newspaper, with a daily circulation of 230,000 to 240,000 readers,[98] 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.'"[99]

3. **Judge Murphy's violations of the Canons are also aggravated because he had been previously advised by the Executive Director of the Commission on Judicial Conduct, in August of 2002, to "consider the appropriateness of using judicial stationery for certain purposes."[100]**

VII. RECOMMENDATION

The Commission respectfully submits that there is clear and convincing evidence that Judge Murphy violated the Canons of the Code of Judicial Conduct with which he has been charged.

Based on the evidence presented to the Hearing Officer, including evidence relating to factors which aggravate Judge Murphy's misconduct, the Commission

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[96] Inquiry Concerning a Judge, 788 P.2d 716, 723 (1990), quoting In the Matter of Bonin, 375 Mass. 680 (1978).
[97] In the Matter of Morrissey, 366 Mass. 11, 16 (1974).
[98] (Tr. 202:20-22)
[99] Inquiry Concerning a Judge, 788 P.2d 716, 723 (1990), quoting In the Matter of Bonin, 375 Mass. 680 (1978).
[100] (Tr. 100:10-24; 101:1-2)

respectfully submits that the appropriate sanction for Judge Murphy's violations of the Canons with which he has been charged is as follows:

1. Public censure pursuant to M.G.L. c. 211C, sec. 8(4)(e).

2. Suspension without pay for one year pursuant to M.G.L. c. 211C, secs. 8(4)(d) and 8(4)(h).

3. Assessment of costs incurred by the Commission during the Formal Hearing of this matter pursuant to M.G.L. c. 211C, sec. 8(4)(g).

VIII. CONCLUSION

For the foregoing reasons, the Commission requests the Hearing Officer adopt its proposed Findings of Facts and Rulings of Law and its proposed sanctions for Judge Murphy's misconduct.

Respectfully Submitted
For the Commission on Judicial Conduct

by: _____
Howard V. Neff, III
Staff Attorney

Dated: October 30, 2007

and [326 Or. 270] to obtain public statements of support for the judge's candidacy."

Former Canon 2 A provided:

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

The second cause of complaint charged that the accused had used official letterhead, his judicial assistant's work time, and other public resources for personal and campaign-related business. The Commission charged that the foregoing conduct willfully violated former Canon 2 A and current JR 1-101(A) and (C) and JR 2-107. JR 1-101(A) provides:

"A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system."

JR 1-101(C) provides:

"A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge."

JR 2-107 provides in part that "[a] judge shall be faithful to the law."

The third cause of complaint charged that the accused had used his official position or office to influence or obtain an advantage in the manner in which he corresponded with the San Diego City Treasurer about a parking ticket that he had received, with golf course representatives, with airline representatives, with a magazine, and with various other persons and entities. The Commission charged that the foregoing conduct willfully violated former Canon 2 A, JR 1-101(A), JR 1-101(C), JR 2-107, former Canon 2 B and JR 1-101(F). Former Canon 2 B provided in part:

"A judge should not lend the prestige of the office to advance the private interests of others, nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

[326 Or. 271] JR 1-101(F) provides in part:

"A judge shall not use the position to advance the private interests of the judge or any person, nor shall a judge convey or permit anyone to convey the impression that anyone has a special influence with the judge[.]"

The Commission also charged that all three forms of alleged misconduct violated ORS 244.040(1)(a), which provides:

"No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than [listed exceptions that do not apply in this case] ."

FINDINGS OF FACT

The underlying facts that we find in this section of the opinion are not disputed. 2

A. General Background.

The accused became a lawyer in 1968 and was in private practice until January 1981, when he was appointed as a judge of the District Court for Multnomah County. In May 1982, he ran unopposed to retain that position and was elected.

In the May 1984 primary, the accused ran against four other candidates for a vacant Circuit Court position. He won election to that seat in the November 1984 general election and, accordingly, began service as a judge of the Circuit Court in January 1985. The accused ran unopposed for re-election in 1990 and 1996.

B. First Cause of Complaint.

In the 1984 election, the accused's campaign incurred a substantial debt. In order to decrease that debt, the accused held his first golf tournament fundraiser in 1984. [326 Or. 272] A golf tournament fundraiser, called "Hizzoner's

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Classic" or "Hizzoner's Annual Classic," was held annually from 1984 to 1995. The 1984 campaign debt was retired in 1989 or 1990.

The present charges concerning personal solicitation of campaign contributions stem from the 1995 golf tournament fundraiser. The accused sent a personal letter, dated August 18, 1995, to about 700 people who were on the mailing list for his golf tournament fundraiser. 3 That letter bore the accused's courthouse address. After describing the results of the 1994 golf tournament fundraiser, the accused's letter concluded:

"The 12th Annual is set for Friday, September 22, 1995, with tee times beginning at 12:15 at Eastmoreland. The Committee's letter is enclosed.

"Once again, thanks for your many years of friendship and support. Early next year, I will be running again for a new term. One major special-interest group has threatened to challenge my re-election, so your continued support is especially welcome and appreciated.

"All the very best,

"[signature]

"HIZZONER"

(Boldface, underlining, and capitalization in original.)

At the bottom left of the signature page, the initials of the accused and of his judicial assistant appear, along with the notation "[e]nclosure."

The enclosure that accompanied the accused's letter in the same envelope, and that was included at his direction, was a one-page document dated August 18, 1995, from the Re-elect Judge Gallagher Committee. That document announced "Hizzoner's 12th Annual Classic" and stated in part:

"CONTRIBUTION: $100.00, which may be a dollar-for-dollar tax credit on your joint Oregon State tax return,[4] so it may actually cost you nothing! Such a deal!

[326 Or. 273] " * * * Make your check payable to: Re-elect Judge Gallagher Committee." (Boldface, underlining, and capitalization in original.)

On a tear-off portion at the bottom there were spaces to respond with name, address, and handicap, followed by a space stating: "___ Sorry, I can't make it this year, but here's a donation for the campaign fund." Also enclosed was a return envelope addressed to "Hizzoner's Classic." That envelope bore the accused's home address.

C. Second Cause of Complaint.

Judicial assistants are state employees who perform secretarial and other support services related to judges' official functions. The job description of a judicial assistant does not include the performance of personal or campaign services for judges. The accused knew that his judicial assistant was a state employee.

Linda Austin-Croft became the accused's judicial assistant in 1985. From 1988 through 1996, the accused had her type about 300 pages of personal documents on public equipment and during working hours. Austin-Croft generally typed those personal documents during the regular course of the work day, whenever they were presented to her. Although the official duties of Austin-Croft and the accused did not suffer as a result of this activity, Austin-Croft's typing of personal documents did not aid the accused in the efficient performance of his duties as a judge. Examples of the personal

documents that Austin-Croft typed include the following:

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[326 Or. 274] * A letter to the Consul General of France to secure a visa for the accused's daughter.

* A letter to the Commissary at McChord Air Force Base about cash register errors in relation to purchases made by the accused.

* Minutes of a neighborhood meeting.

* A letter to the president of Nordstrom about the price of a suit that the accused had bought.

* A letter to the president of Portland General Electric about service at the accused's residence.

* A letter to the president of United Airlines about securing bereavement rates for himself and his wife.

* A pleading in the accused's own divorce case.

* A letter about the Gallagher family coat of arms.

* A letter to the director of customer service at a computer publication, threatening to report practices to the Oregon Attorney General's office.

* A letter to Golf World magazine, threatening to report its business practices to the Oregon Attorney General's office.

* Letters to the San Diego City Treasurer about a parking ticket that the accused had received.

* Letters to his lawyer, his ex-wife, and others about issues in the accused's divorce case.

* Letters about his financial interests in Ireland.

* Letters to his lawyer and to a trustee in bankruptcy concerning the collection of a personal debt owed to the accused.

* Numerous letters to his siblings and others about his father's estate.

* Letters to acquaintances about his St. Patrick's Day party.

* Jokes and limericks.

[326 Or. 275] * Letters to the Portland Golf Club disputing charges on his bill.

Most of the personal documents at issue were prepared and mailed on the accused's official stationery and were signed above the typewritten official title of Circuit Court Judge.

In addition to preparing personal documents for the accused, Austin-Croft occasionally assisted the accused during work time with other personal tasks. She obtained airline fares and schedules for him and booked a flight unrelated to his work. On occasion she picked up his dry cleaning and made haircut appointments for him.

Austin-Croft also performed campaign-related services for the accused, at his direction, during work time. With respect to the 1995 golf tournament fundraiser, Austin-Croft typed the accused's August 18, 1995, letter during working hours and on public equipment at the courthouse. She had typed similar letters in previous years.

Beginning in 1985, Austin-Croft helped with the annual golf tournament fundraisers in many other ways as well. While at work in the courthouse, she answered detailed telephone inquiries about the golf tournament fundraiser, both on the day of the tournament and on other days. The accused did not instruct her to refer such calls to the campaign committee.

On tournament days, which occurred during the regular work week, Austin-Croft prepared the lists of pairings and tee times. She took the prizes to the tournament site, where she performed administrative functions, such as collecting money. She also rode around the course in a golf cart with the video photographer who recorded the tournament. In a 1991 letter to participants in the fundraiser, the accused praised his judicial assistant for those tasks, thanking her by name as the person "who answers all your phone questions, oversees the distribution of towels, scorecards, etc., and gets us to the 1st tee on time." Austin-Croft performed those functions at the accused's request, and during what otherwise would have been her working time.

From 1985 to 1993, Austin-Croft designated golf tournament fundraiser days as regular work days on her [326 Or. 276] time sheets, even though she attended to court business for only a brief period on such days. In 1994 and 1995, on her own initiative, she changed the designation to either vacation or compensatory

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time. The accused approved and signed his judicial assistant's time records every month.

D. Third Cause of Complaint.

Beginning in about 1986, the accused used official letterhead for many letters relating to the advancement of his personal interests. In most instances, the title "Circuit Court Judge" appeared immediately beneath his signature. The accused testified that "probably 95 percent" of his "nonofficial" personal business letters went out on his judge's stationery. Some examples follow.

In 1986, the accused wrote on official letterhead to a trustee in bankruptcy (who is a lawyer) concerning the collection of a personal debt owed to the accused. The accused previously had obtained a judgment against an individual who later filed for bankruptcy. The letter stated:

"Further to our recent telephone conversation regarding [debtor's name], enclosed herewith is a copy of the transcript of [debtor's] judgment-debtor examination of September 9, 1986. It is at this proceeding where he admits for the first time that the amount of the commission he actually earned immediately before the date he filed bankruptcy was $60,000.00, rather than the $30,000.00 he was forced to acknowledge at the first meeting of creditors.

"I respectfully request that, as trustee, you deny [creditor's] 'claim' in her son's bankruptcy estate. It is utterly spurious, as is just about everything these two phony baloneys do. If you have any doubt at all regarding these frauds, take a brief look at the transcript. If the activities described therein ain't fraud, what is?

"Thanks for your consideration.

"Very truly yours,

"[signed] Steve

"Stephen L. Gallagher, Jr.

"Circuit Court Judge"

[326 Or. 277] In 1988 and 1989, the accused wrote a series of three letters to the Portland Golf Club, all on court letterhead and using the title "Circuit Court Judge" immediately beneath the signature. The first letter stated that the accused intentionally had deferred payment of his bill. The letter then complained of various alleged errors of the bookkeeping office and the dining room. The accused enclosed partial payment and stated that no further payment would be made "[u]ntil a satisfactory explanation" of charges was received. A postscript said:

"Your form dunning letter, copy enclosed, was received by me on December 19, 1988, calling for a response one full day and part of another after receipt. By any measure, such

inadequate notice is both unreasonable and insulting."

A second letter detailed the complaints of the accused and asserted that certain charges should be deducted from his bill. The accused submitted "the aforementioned balance as payment in full" of his outstanding bill as of the end of the previous month. The second letter concluded in part:

"Kindly either reverse the amount or make a credit entry on my next statement. I do not expect to have any unpaid balance as of that date.

"I am sure you can tell that I am not particularly pleased with the way this matter was handled."

A third letter "insist[ed]" on a reply and reiterated that the accused "had been erroneously billed and should be credited with the sums" discussed earlier.

In 1989, the accused wrote to the supplier of a copy machine that he had bought at an auction, again on Circuit Court letterhead and again using the title "Circuit Court Judge" beneath the signature. The letter stated that the supplier had described the copier "as making copies in black or a selected second color." The accused stated that he had given the copier to his lawyer and that she had told him that her requests for an instruction manual, a warranty, and information about a service contract had gone unheeded.

"Further, the machine I requested that you deliver to her directly does not print in a selected second color, although [326 Or. 278] the representation that it would was significant in my decision to continue my bidding to the point of success.

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"What am I to conclude from this treatment? Do you intend not to furnish the described machine? Do you intend to leave us without a manual describing the operation of the machine? Are you not interested in pursuing a service contract?

"Please respond to my questions, in order that I may advise her on how to proceed."

In 1989, the accused wrote to an insurance company regarding payment of household and automobile insurance. Among other things, the letter asked "that you waive any so-called late charges until we get this matter resolved." The one-page letter, prepared on Circuit Court letterhead, also used the title "Circuit Court Judge" beneath the accused's signature.

In 1991, the accused wrote to a computer publication, again on official letterhead and again using the designation "Circuit Court Judge" just beneath the signature line. The letter opened by stating that the accused was writing "to communicate my extreme displeasure with your company's tactics." After detailing what had occurred, the letter said in part:

"Your promotion was grossly misleading and deceptive. What was advertised to be a one volume edition * * * in reality turned out to be, a series of volumes (how many, or what they cover I haven't a clue) which come periodically at your convenience.

" * * * * *

"You will receive the third of the three volumes upon delivery by the Postal Service. You will receive the other two only after I have received from you good funds to cover the postage required of $2.94. I will not accept any further of your publications.

"My intent is to report your shabby practices to the Oregon State Attorney General's Office. Perhaps criminal sanctions are in order. We don't like it much out here being duped by this kind of deception."

[326 Or. 279] In 1992, the accused wrote to a physician who had examined his eyes and had

recommended a change in the accused's prescription lenses. The letter said in part:

"Upon receipt of your statement for the lenses, I submitted it to Blue Cross, which denied my claim because but 23 months (rather than 24 months) had elapsed since the last time my glasses were made. * * * "

"I am enclosing my check in the sum of $214.00, representing the billing of $324.00 less the $110.00 Blue Cross coverage. Notwithstanding your assurance that I would be billed 'your price', I have determined that the charges incurred are 20--25% higher than comparable amounts charged elsewhere. Nevertheless, I will remit the balance of the full amount when you send me a corrected statement which can be processed through Blue Cross in order that I receive the coverage contemplated by the policy."

That letter, too, was on Circuit Court letterhead and bore the title "Circuit Court Judge" beneath the signature.

In 1993, the accused wrote on Circuit Court letterhead to a representative of Golf World magazine. That letter read in part:

"The facts are these: in response to your offer during last Christmas season, I ordered a FREE subscription for my brother [name], and renewed my own: Total cost: $17.47. In other words, two subscriptions for the price of one. I paid $17.47, and the last correspondence from me to [another employee of the magazine] contained a copy of my check, front and back. For the first time, I receive a letter from you.

"Either you are going to honor your own promotional commitments or you are not. If you do not, I will cease to become a Golf World subscriber and report this entire matter to the Office of The Oregon Attorney General, Consumer Affairs Division.

"Very truly yours,

"Stephen L. Gallagher, Jr.

"Circuit Court Judge"

(Emphasis in original.)

[326 Or. 280] The accused wrote a series of letters to the San Diego City Treasurer in 1995, protesting a notice of parking violation that the

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accused had received in December 1994. In this series of letters, the accused made clear that he was a judge.

The first such letter, which went out on Circuit Court letterhead, stated in part that the accused and his wife "were flabbergasted to have received a Parking Violation Notice." The accused's letter stated that they "had no prior notice whatsoever" of the parking restriction in question and that they had complied with a street sign. The letter ended with the sentence, "Thank you for your considerations." Immediately beneath that sentence, the accused's name and the title of "Circuit Court Judge" appeared.

The second such letter complained that the accused had received a "form response" to his first letter and that officials in San Diego had conducted "no investigation of the conditions at the location where I received the Parking Violation Notice." The letter then continued:

"Why is it that:

"(1) You did not respond to me, when you had a letter containing my complete name and [courthouse] address and when you were informed in that letter that I was the driver of the alleged offending vehicle??? It was your own Notice that asked for this information, and it was supplied to you.

"(2) No investigation of the scene of the alleged violation was made by anyone, although you represent by your computer-generated 'denial' of my 'dismissal request' that such an investigation has been conducted???

"I hereby insist that you honor my request for an administrative hearing on all aspects of your shabby treatment of citizens who visit San Diego. With reluctance, I enclose the exorbitant sum of $40.00. I further request that you set my hearing in late May 1995 on a Friday or a Monday, so that I can come back to San Diego over a long weekend. I also request that the photographs I included in my letter of January 23, 1995 be made available to me at the hearing." (Emphasis in original.)

[326 Or. 281] The accused sent copies of that letter to, among others, the Mayor of San Diego and the Presiding Judge of the San Diego Superior Court.

A third letter 5 contained factual information respecting the validity of the parking violation, an affidavit from the accused's wife, and this text in part:

"I am unable to attend the referenced hearing in person, as I am presiding over a death penalty case [identified by name and court docket number], and several key witnesses are scheduled to testify on Monday, July 17, 1995."

On Circuit Court letterhead, also in 1995, the accused wrote to an Oregon travel agent to complain about a car rental agency that he had used during personal travel in San Diego. The accused noted that he had been pleased by his initial experience with that agency and had "authorized you to use my pleasant experience to support your recommendation [to use that agency]."

"Three months later, I write to revoke my previous endorsement. What [the agency] charged me on October 31, 1994 has practically doubled in price. I paid $86.99 to rent a 1994 Nissan Sentra for one week. Today, I was quoted $169.99 for the same car!! As it turns out, the only thing 'special' about [the agency] is the outrageous way they manipulate their pricing.

"I will not use [the agency] again and direct you not to use my name as a reference." (Emphasis in original.)

The accused signed that letter above the title "Circuit Court Judge" and sent a copy to the car rental agency.

DISCUSSION OF CHARGED VIOLATIONS

In discussing the charged violations, we will limit our consideration to alleged violations of the Canons and Judicial Rules. Whether any of the accused's conduct also violated ORS 244.040(1)(a) would have no

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bearing on the conclusions that we reach below or on the sanction that we deem [326 Or. 282] appropriate. Therefore, we find it unnecessary to consider the possible application of that statute further.

A. Personal Solicitation of Campaign Contributions.

With respect to his 1995 letter about the golf tournament fundraiser, the accused advances a series of arguments as to why he should not be found guilty of violating former Canon 7 B(7) and former Canon 2 A. Some of those arguments assert that the canons did not in fact prohibit his conduct. In the alternative, the accused argues that an application of the canons to his conduct would be unconstitutional.

We need not decide those questions. Whether the accused is guilty of the violations charged in the first cause of complaint would not alter the sanction that we deem appropriate. That being so, we need not decide whether the accused violated former Canon 7 B(7) or former Canon 2 A as charged in the first cause of complaint.

B. Personal and Campaign Use of State Resources.

In the second cause of complaint, the Commission charged that the accused had violated (among other things) former Canon 2 A, which required that a judge "act at all times

in a manner that promotes public confidence in the integrity and impartiality of the judiciary"; and JR 1-101(A), which currently contains substantially the same requirement. The accused acknowledges the underlying facts: that--at his direction--his judicial assistant performed purely personal and campaign tasks on work time, while being paid by the state, using state property (such as letterhead) and typing equipment (such as computers) in the process. Those facts constitute a violation of the charged rules. Court staff, court supplies, and court typing equipment are to be used for court business, not for personal and campaign purposes.

The accused argues for a "de minimis" or "incidental use" exception to the foregoing principle. An example given by the accused is having a judicial assistant make a personal telephone call to cancel a lunch appointment so that a judge may continue a trial into the lunch hour.

We assume that a "de minimis" or "incidental use" exception is proper. Normal human experience teaches that [326 Or. 283] judges, like other workers, cannot separate personal life from work life completely. In this regard, the accused's example illustrates the point nicely.

But the accused's acts, as demonstrated in the record, can in no way be characterized as falling within such an exception. Over a period of years, it was the usual custom and practice of the accused to make personal use of a state employee and of state supplies and typing equipment for personal and campaign purposes. Those uses were substantial. Austin-Croft spent almost full working days, for instance, administering the annual golf tournament fundraiser, and for many years designated even the golfing days as regular work time on her time sheets, which the accused approved and signed as her supervisor. Additionally, the quantity of the accused's personal documents, prepared by a state employee on work time and using official stationery, was voluminous.

We conclude that the accused's extensive use of his judicial assistant's time, and of state property and equipment, for personal and campaign purposes violated former Canon 2 A. Taxpayers have a right to expect that the employees and the materials for which they pay will be used for public purposes. Obtaining substantial personal and political benefits directly from the use of those public employees and materials runs afoul of the requirement to "act * * * in a manner that promotes public confidence in the integrity * * * of the judiciary." For the same reason, the accused's conduct violated JR 1-101(A), which contains substantially the same requirement.

C. Use of Office to Advance Private Interests.

The third cause of complaint alleged that the accused had violated, among other things, former Canon 2 A, which provided that a judge "should act at all times in a

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manner that promotes public confidence in the integrity and impartiality of the judiciary"; JR 1-101(A), which currently contains substantially the same provision; JR 1-101(C), which provides that "[a] judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge"; former Canon 2 B, which prohibited a judge from lending the prestige of the [326 Or. 284] office to advance the private interests of others and from conveying the impression that others are in a special position to influence the judge; and JR 1-101(F), which prohibits a judge from lending the prestige of the office to advance the private interests of the judge or of another and from conveying the impression that anyone has a special influence with the judge. The Commission concluded that the accused was not guilty of the matters charged in the third cause of complaint. Neither party asked this court to come to a different conclusion, and neither party briefed the issue substantively.

Nonetheless, it is this court's task to consider the whole case de novo. Pursuant to ORS 1.430(1), this court "shall review the record of the proceedings under ORS 1.420 [relating to the Commission's procedures respecting charges of misconduct] on the law and facts." (Emphasis added.) We are mindful that in some past cases this court--although recognizing its authority to consider all matters charged--has chosen to limit review to only those causes of complaint against a judge that resulted in a conclusion by the Commission that the judge had violated a provision of the Code. See, e.g., Schenck, 318 Or. at 404 n. 3, 870 P.2d 185 (reviewing only those causes of complaint for which the Commission had found a willful violation of a canon). On the other hand, in lawyer discipline cases, the court has exercised its authority to consider all charged conduct. See, e.g., In re Biggs, 318 Or. 281, 864 P.2d 1310 (1994) (finding additional violations of the charged disciplinary rules and increasing the accused's discipline from a two-year suspension to disbarment).

In this case, we exercise our authority to consider all charged conduct, for three reasons. First, the conduct charged in the third cause of complaint is repeated and serious, and the nature of the charge does not duplicate the kind of misconduct complained of in the other causes of complaint. Second, we note (as discussed more fully below) that the Commission found that the accused had committed some of the charged acts; it went on to conclude only that the conduct was not willful. Third, the Commission's conclusion concerning willfulness is facially dubious. We turn to a consideration of the merits of the third cause of complaint.

[326 Or. 285] The Commission found that the accused's use of official letterhead and the title "Circuit Court Judge" in connection with correspondence relating to his parking ticket in San Diego "would cause an objective observer to conclude he was attempting to receive better treatment than the average citizen protesting a parking ticket would receive." We agree with and adopt those findings.

In addition, we find that the use of official letterhead--and in most instances further references to the accused's office (such as the typing of his title beneath his signature)--in the examples quoted in the Findings of Fact above would cause an objective observer reasonably to conclude that the accused was lending the prestige of the office to advance his own private interests. In some cases advancement of the private interests of others was involved, at least in part: his lawyer (with regard to the matter of the copier); his brother (with regard to the magazine subscription); and his wife (with regard to the matters involving the accused's own financial interests).

In this connection, we note that the official commentary to Canon 2 B of the American Bar Association's Model Code of Judicial Conduct (1998) (ABA Code) states in part:

"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." Commentary

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to Canon 2 B of the ABA Code (emphasis added).

The relevant portion of Canon 2 B of the ABA Code is almost identical to former Canon 2 B of the Oregon Code of Judicial Conduct and is similar to the pertinent provision of JR 1-101(F). Although this court is not bound by the ABA's commentary, we approve of the quoted interpretation.

Notwithstanding its factual findings, the Commission concluded that the accused did not act willfully, 6 but only [326 Or. 286] negligently. We disagree with that conclusion on "willfulness" for several reasons.

First, the accused's testimony demonstrated that he knew what the ABA's commentary has made clear: that court stationery is for court-related business. Indeed, he had purchased and used separate personal stationery for non-court purposes, but his supply "ran out."

Second, the accused repeatedly used the letterhead and title of his office in correspondence designed to obtain personal advantages, including financial advantages, for himself and those close to him. That frequency suggests that the practice was far from inadvertent.

Third, the official letterhead of the Circuit Court is colorful and conspicuous, and in most instances the accused placed his title just beneath his signature. Those elements suggest that the accused knew both that he was using stationery that featured his judicial identity and that the fact of his position was likely to play a prominent role in the recipient's response to each such letter.

Fourth, many of the letters were demanding, and many of them asserted legal propositions in close proximity to reminders of the accused's status as a judge. Examples include his letters to the bankruptcy trustee, the Portland Golf Club, the computer publication, and Golf World magazine. 326 Or. at 276-281, 951 P.2d at 710-712. Those factors suggest that the accused intended his position to lend weight or credibility to his assertions.

Accordingly, we conclude that the foregoing conduct was willful and that it violated former Canon 2 B and JR 1-101(F).

We also conclude that this conduct violated former Canon 2 A and JR 1-101(A). The use of one's judicial office as a pressure tactic to gain personal advantages for oneself and one's relatives and friends undermines public confidence in the judiciary and in its integrity and impartiality.

[326 Or. 287] Finally, we conclude that this conduct violated JR 1-101(C). An inappropriate attempt to gain such personal advantages "reflects adversely on the judge's character, competence, temperament or fitness to serve as a judge."

PROCEDURAL CHALLENGES AND AFFIRMATIVE DEFENSES

The accused raises several challenges to the Commission's procedures. Additionally, he presented several affirmative defenses. We have considered each issue and all arguments made in support thereof. We are not persuaded by any of those arguments, but an extended discussion of our reasons would not benefit bench or bar. 7

SANCTION

We begin our consideration of an appropriate sanction by reiterating the aims of judicial discipline:

"Judges are disciplined primarily to preserve public confidence in the integrity and impartiality of the judiciary. Thus, disciplining judges serves to educate and inform the judiciary and the public that certain types of conduct are improper and will not be tolerated. Discipline of a judge also serves to deter the disciplined judge as

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well as other judges from repeating the type of conduct sanctioned." Schenck, 318 Or. at 438, 870 P.2d 185.

The accused portrays this proceeding as being primarily an overreaction to his asking a judicial assistant to perform a handful of trivial, sporadic, and incidental personal tasks. That perspective misses the main point. Most seriously, the accused systematically used state-paid services, property, and equipment to further his campaign fundraising and his private interests, and he systematically used his position as a judge to try to obtain financial advantages for himself and those close to him.

In setting the sanction in this case, we consider several factors to be significant. Many of those factors point to the need for a substantial sanction: The misconduct covered [326 Or. 288] in the second and third causes of complaint was frequent and formed a persistent and pervasive pattern of behavior. The misconduct covered in the third cause of complaint illustrated that the accused exploited his position to satisfy personal desires. The effect of the misconduct covered in the second cause of complaint was to the indirect economic detriment of the public. The accused was an experienced judge at the time of the charged conduct and therefore was well familiar with the high standards of behavior that the privilege of judicial service demands. The accused's conduct adversely affects the public's perception of the integrity and dignity of the judiciary.

Another factor, however, weighs against a more severe sanction. There have been no prior complaints about the accused.

The Commission asks that we consider as an aggravating factor the accused's "tactics designed to obstruct and delay" the Commission's processes. We need not decide whether such tactics could be an aggravating factor, because we do not agree with the Commission's characterization of the accused's actions. Although his defense was vigorous, it was not improper.

Taking into account the reasons for imposing judicial discipline, the nature of the accused's misconduct, and all the other factors described above, we conclude that the appropriate sanction in this case is a six-month suspension during which the accused shall not receive the salary of his public office. 8

The accused is suspended from office without salary for a period of six months, commencing on the effective date of this decision.

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* Carson, C.J., and Fadeley, J., did not participate in the consideration or decision of this case.

1 By order of the Oregon Supreme Court, the former canons of the Oregon Code of Judicial Conduct were superseded by the judicial rules in the new Code, effective January 1, 1996. Order No. 95-095 (Nov. 22, 1995).

2 The reader may note, in our recitation of the facts, conduct that could be characterized as violating provisions of the Code other than those cited in the text above. For purposes of this case, however, we will confine our analysis to those violations charged by the Commission.

3 More than 30 recipients lived outside Oregon, including two in a foreign country, and many more recipients did not live in Multnomah County. Typically the tournament itself drew between 48 and 62 players.

4 ORS 316.102 provides in part:

"(1) A credit against taxes shall be allowed for voluntary contributions in money made in the taxable year:

" * * * * *

"(b) * * * [T]o or for the use of a person who must be a candidate for nomination or election to a federal, state or local elective office in any biennial primary election, presidential preference primary election, general election or special election in this state. * * *

" * * * * *

"(2) The credit allowed by subsection (1) of this section shall be the lesser of:

"(a) * * * [T]he total contribution, not to exceed $100 on a joint return; or

"(b) The tax liability of the taxpayer."

5 Between the dates of the accused's second and third letters regarding the San Diego parking ticket, Austin-Croft also wrote a letter requesting

a postponement of a hearing in that matter. Her letter identified herself as a judicial assistant for the accused, a judge.

6 As noted above, in this context a "willful" act is an act done with the conscious objective of causing the result or acting in the manner contrary to the applicable rule. Schenck, 318 Or. at 405, 870 P.2d 185. It is not necessary that the judge know that the conduct in question violates an ethical rule, so long as the judge is aware of circumstances that make the rule applicable. Ibid.

7 Because of the result that we reach in this case, we need not and do not discuss the accused's counterclaim for attorney fees in the event that he were to prevail.

8 Cases that we have found from other jurisdictions are not sufficiently analogous to provide guidance as to the appropriate sanction in this case.

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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

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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

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

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

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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 Orentt; 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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> 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 Figliuzzi'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

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

2. On or about February 10, 2004, respondent's son, Jordan P. Sharlow, then age 16, was charged in the Massena Village Court with Trespass, in violation of Section 140.05 of the Penal Law. The case was transferred to the Brasher Town Court after the Massena village justices disqualified themselves from the case, and Brasher Town Court Justice Jeremiah D. Mahoney scheduled the arraignment for March 16, 2004.

3. Prior to March 16, 2004, respondent wrote a letter to Judge Mahoney on Massena Town Court stationery, *inter alia* purporting to enter a plea of not guilty on behalf of his son and asking whether Judge Mahoney still required his son's appearance on March 16, 2004.

4. As a result of receiving respondent's letter, Judge Mahoney adjourned the matter and disqualified himself from Jordan Sharlow's case, causing the case to be transferred to another judge. Respondent subsequently hired an attorney to represent his son and, on the consent of the district attorney's office, the charge against respondent's son was ultimately adjourned in contemplation of dismissal.

5. Respondent regrets his conduct. He recognizes that it was improper to use his court stationery to intercede with another judge on his son's behalf.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(B) and 100.2(C) of the Rules Governing Judicial Conduct and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

By writing a letter on judicial stationery to the judge presiding in his son's case, respondent violated well-established ethical standards barring a judge from lending the prestige of judicial office to advance the private interests of the judge or others. Section 100.2(C) of the Rules Governing Judicial Conduct; *Matter of Edwards v. State Comm. on Judicial Conduct*, 67 NY2d 153 (1986). *See also, Matter of Nesbitt*, 2003 Annual Report 152 (Comm. on Judicial Conduct) (judge sent a letter on judicial stationery challenging an administrative determination concerning the judge's son); *Matter of Pennington*, 2004 Annual Report 139 (Comm. on Judicial Conduct) (judge met with the district attorney to discuss his son's case).

In the letter, respondent acted as his son's advocate, noting that he had requested but not received a copy of the accusatory instrument, entering a not guilty plea on his son's behalf, and asking the presiding judge to advise him if his son had to appear on the date scheduled for arraignment. Section 170.10(1) of the Criminal Procedure Law requires a defendant's personal appearance in court for arraignment, and a plea of not guilty cannot be entered by mail.

Notwithstanding the absence of an explicit request for favorable treatment, such a communication conveys an implicit request for special consideration, which constitutes favoritism. *Matter of Edwards, supra*. Such conduct "is wrong, and always has been wrong" (*Matter of Byrne*, 47 NY2d [b] [Ct. on the Judiciary 1979]). Indeed, after receiving respondent's letter, the presiding judge felt constrained to disqualify himself from the case.

Although respondent's desire to assist his son is understandable, his "'paternal instincts' do not justify a departure from the standards expected of the judiciary" (*Matter of Edwards, supra*, 67 NY2d at 155).

By reason of the foregoing, the Commission determines that the appropriate disposition is

admonition.

Mr. Goldman, Mr. Emery, Mr. Felder, Ms. Hernandez, Judge Peters, Mr. Pope and Judge Ruderman concur.

Judge Ciardullo and Mr. Coffey dissent and vote to reject the Agreed Statement on the basis that the disposition is too harsh and that the appropriate disposition is a letter of caution.

Ms. DiPirro and Judge Luciano were not present.

Dated: March 22, 2005

DISSENTING OPINION BY JUDGE CIARDULLO, IN WHICH MR. COFFEY JOINS

I cannot join in the majority opinion, because I believe that the penalty is too harsh for the misconduct. Because this case involves a single instance, and for the reasons set forth below, I would issue the respondent a private letter of caution.

Respondent, a judge in the Massena Town Court and a parent of a 16 year old son, wrote a letter on his court stationery to the judge in the Massena Village Court. The letter states:

> Dear Judge Mahoney,
>
> Judge sorry to have to come [sic] you with this case pending against my son Jordan P. Sharlow case #04030004.9 PL 140.05 Trespass. At this time after conversation of this incident and lack of accusatory instrument and supporting statements I requested from the Massena Village Police Department my son pleads NOT GUILTY to the charge. If you still want my son to appear 3/16/2004 advise. Otherwise set for trial. I have heard nothing from the District attorneys office. Again sorry this has been sent to your Court.
>
> Respectfully Yours,
> Hon. Gerald P. Sharlow
> Massena Town Justice

It was wrong for respondent to send this letter on court stationery, a fact that he admits. Using his title and judicial office in this manner plainly violated ethical rules and lent the prestige of his office to advance private interests (Section 100.2[C]).

Even if respondent had not used his court stationery or judicial title to communicate with the arraigning court, the circumstances here warrant a cautionary statement. The record shows that respondent retired from the Massena Police Department after 25 years, and the Village court was situated within the Town of Massena. Both Village justices recused themselves from hearing the case. Because respondent was apparently well known, it is likely that any communication from the respondent to the Village court would create the appearance that he was invoking the prestige of his judicial office.

I am not prepared to state, however, that a judge who is a parent of a minor child may never appear or communicate with a court that is presiding over charges involving that child. A judge

does not lose his or her rights and responsibilities as a parent simply because he or she holds judicial office. There are many situations where a minor legally lacks capacity to act and the parent must act for the child (for example, under Public Health Law §2504, a minor under the age of 18 legally cannot consent to medical treatment). Therefore, I do not condemn judges who appear in court, communicate with a prosecutor, or otherwise assist a child in trouble. In my view, an ethical problem arises only where the judge is known to be a judge and this knowledge is likely to result in favoritism. Those circumstances were present in this case. Respondent ultimately took the appropriate action to cure the impropriety by retaining an attorney to represent his son.

I disagree with the majority, however, that this case warrants a public sanction. I do not read respondent's letter as requesting any special consideration. Rather, the letter simply asks the court whether defendant must appear, and requests the court to enter a not guilty plea and set the matter down for trial. The statements in the letter are quite unremarkable and are common communications in justice court matters. For that reason, I view this case differently than other situations where judges have blatantly requested favorable treatment using court stationery. *See, Matter of Freeman,* 1992 Annual Report 44 (town justice was admonished for writing to another judge on court stationery in support of a customer of his private business, seeking to have customer's gun permit reinstated); *Matter of Martin,* 2002 Annual Report 121 (Supreme Court justice was admonished for writing two *ex parte* letters on judicial stationery in support of defendants awaiting sentencing); *Matter of Nesbitt,* 2003 Annual Report 152 (judge was admonished for sending a letter on judicial stationery to a school official challenging expulsion of his son from a college program, and requesting reinstatement of the son "pending hearing and determination of this matter by competent authority").

Therefore, I respectfully dissent.

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

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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.

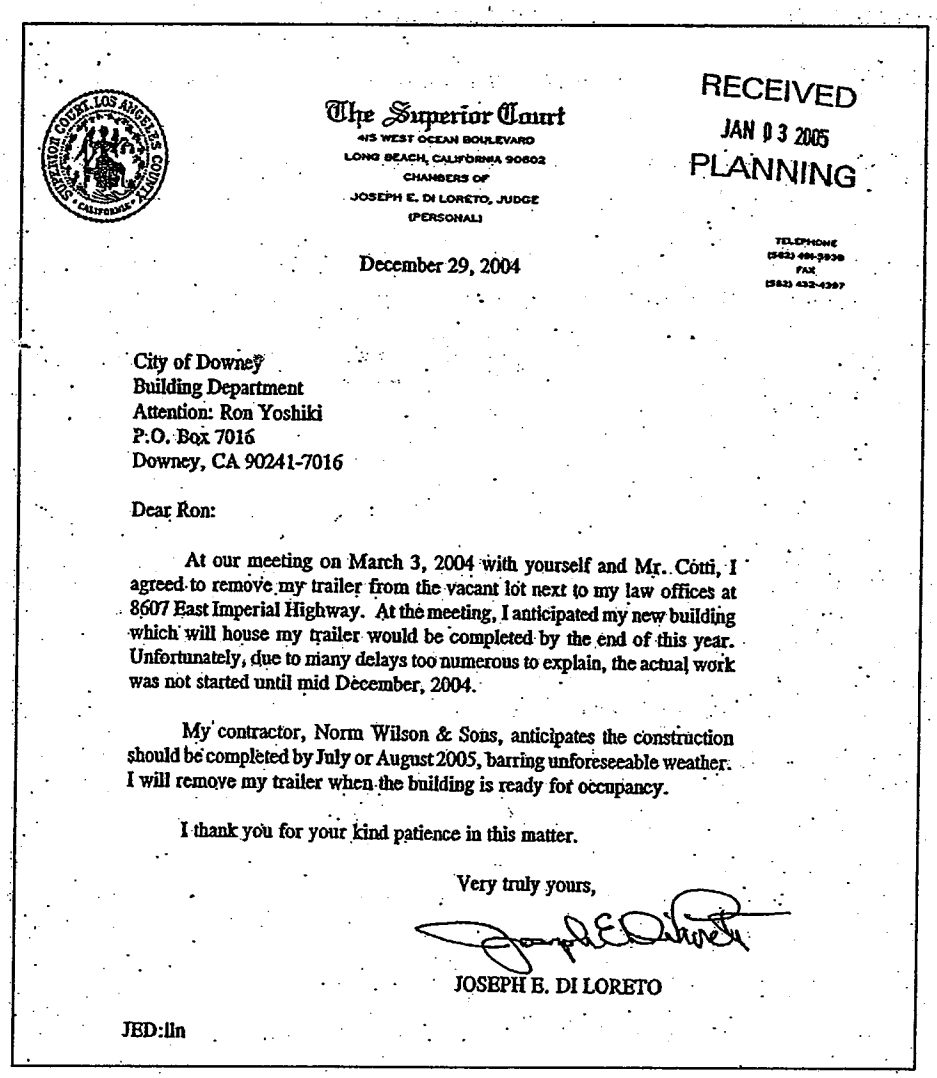
6 The majority's conclusion on the use of chambers stationery cannot rest on a violation of some rule against using the stationery for the simple reason that there is no rule.

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."



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
(562) 491-5939
FAX
(562) 432-4297

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

companies called the SAM group, standing for Shell, ARCO and Mobil. Part of SAM's off-shore development project involved designing helicopters to explore the Gulf of Alaska. After three years, Appellant practiced law on his own, primarily in aviation. He then became couns to Wien, a scheduled passenger and cargo carrier at that time, negotiating and granting small bush carriers' reduced rate agreement and other contracts. He left Wien in 1982, after about three years of employment, and started to work for KWA. He negotiated with KWA's board of directors to receive travel benefits immediately upon employment.

Part of Appellant's duties included contracting reduced fare agreemen with other airlines. A typical reduced fare agreement gives an airline authority to issue a ticket on another airline at a price less than the published fares. Some airlines declined to enter such an agreement w KWA, while others agreed. [FN2]

FN2. KWA entered into reduced fare agreements, without an accompanying interline agreement, with the following airlines: Alaska, Aloha, Hawaiian, Pacific Western, Republic, Southwest Pacific Island, United and Wien.

An interline agreement, or baggage and ticket agreement, allows airlines to ticket passengers and transfer baggage on one another's routes. KWA was not interested in interlining, being a small airline onl providing service from three western Alaska communities to the bush. Furthermore, KWA lacked the computer reservation capability and personnel required to interline.

On July 8, 1982, Appellant contacted Pacific Southwest Airlines about the possibility of entering into a reduced fare agreement, but was notified that PSA was unwilling to extend travel benefits to unschedule airlines. On April 1, 1983, he inquired again. In response, Mary Anne Galetto, PSA's vice-president of Pricing and Economic Planning, verifie that KWA was now a scheduled airline, and offered to enter a reduced fare agreement if KWA would also enter into an interline agreement. Her letter stated:

Our current policy restricts employee travel benefits to employees of airlines with which we interline revenue passengers.

She sent both a reduced fare contract form and an interline contract form to Appellant.

The PSA reduced fare agreement gave each airline authority to self-ticket, or issue reduced fare tickets on its own ticket stock, on a space available basis, to its employees rather than have them obtain the tickets each time from the carrying airline. Blank ticket stock and a validating stamp are used to create such a ticket.

The reduced fare agreement contained the following termination claus

This Agreement ... shall continue in force and effect until termination either party, such termination to be effective upon 60 days prior writt notice by either party to the other party, to the office designated in th contract....

This termination clause makes no mention of the effect of filing for bankruptcy.

By contrast, the interline agreement contained the following terminati clause:

A. Any party hereto may withdraw from the agreement by giving thirt days advance notice of such withdrawal to the other party hereto.
B. However, if the other party has become insolvent, suspended payments or failed to meet its contractual obligations, or has become involved, voluntarily or involuntarily, in proceedings declaring or to declare it bankrupt such notice of withdrawal may become effective o the date of written notice to the other party.
C. A party hereto that ceases to operate scheduled service for 30 day or more for any reason other than a strike shall be deemed to have withdrawn from this agreement, effective 10 days after written notice such cessation is given to the other party.
Appellant signed both agreements on behalf of KWA and designated Merrill Field, KWA's Anchorage corporate headquarters (also Gifford's business address), as its business address. In testimony Appellant sai he agreed to the interline agreement with PSA because it was harmle if useless:
Q Okay. If you didn't want these interline agreements, ... why did yo even sign them--or why were they signed by Mr. Fowler, if you know?
A They didn't hurt us; they didn't cost us anything; they might be applicable in the future with future expansion plans. If the other party desired it, that was fine with us.
While Appellant was employed by KWA, KWA attempted to sell itself. Apparently concerned about the possible effect of such a sale on reduced fare privileges, the Board of Directors of KWA voted to exten reduced travel benefits indefinitely to certain executives, including Appellant, notwithstanding any change in management. [FN3]

> FN3. The minutes of the meeting were reduced to one page in writing and signed by the board. They read in pertinent part:
>
> Resolved, that ... and [Appellant] and their eligible dependents, shall be entitled to receive airline travel benefits from the travel industry, they shall be considered corporate officers with regard such benefits, and the Company shall assist them in obtaining such benefits. The Company shall not take any action to cause such benefits to be lessened or diminished from their presently existing levels nor will the Company deny them the opportunity participate in those benefits.

The airline was never actually sold during Appellant's tenure. Howeve Rocky Mountain Helicopters, Inc. took over management of KWA and renamed it "Air Forty-Nine, Inc." without exercising its option to purchase the company.
Appellant became ill and retired from KWA in May 1983. In August 1983, Gifford initiated "Chapter 7" federal bankruptcy liquidation proceedings and a trustee was appointed. Deborah Pickworth, KWA's secretary/treasurer during its operation, stayed on as KWA's comptroller. KWA was finally sold in 1984, but remained a corporatior until November 1985.
Sometime after Appellant left KWA in May 1983, Pickworth gave Appellant blank ticket stock and a validating stamp. As a practical matter this allowed Appellant to continue to issue himself reduced far tickets. Reduced fare billings were to be sent to Pickworth's post offic box, instead of the corporate address mentioned in the agreement.

Appellant was to pay Ms. Pickworth personally for the tickets. Appellai made no effort to determine if the carrying airlines objected, apparent feeling no obligation to do so. [FN4]

FN4. Appellant testified in cross-examination:

A We had ... conversations that we had these benefits.... We kn we had these rights; we knew we'd pay for our tickets. As some plot or motive against some airline companies, no.

. . . . .

Q ... Was there ever any inquiry directed to any of the carriers who were going to be involved in carrying you or the Pickworths on a reduced fare basis as to whether this arrangement was all right with them?
A I don't recall any.
Q Don't you think it would have been appropriate to do that, given th cessation of operations of Kodiak Western Airlines and the bankruptcy of Gifford?
A ... if you're saying that would I wish I'd have done that now? You b Arden. I don't like being here. And maybe if somebody had said, "Hell no ... you can't do that." ... I'd have probably analyzed it. I'd have looked at it carefully.... This is the most--this is the most I think I've ever stood up in my life for something that I think was right. And if it had been brought to my attention then, I would have looked at it--jus like when Bernd Guetschow brought it to my attention. I still think Bernd Guetschow is wrong. I still think you're wrong. I--I still think I' got those rights.

On January 1, 1984, the *Official Airline Guide* informed PSA that KWA had ceased operations. Ms. Galleto did not send KWA a written notice termination of the reduced fare agreement because "[t]here was no place to communicate any longer with the corporation; it was no long in business.... There was no need to write letters saying it was suspended." To Ms. Galleto it was a "given."
In June 1985, after having been a sitting judge for approximately six months, Appellant validated blank ticket stock and took a reduced-far flight from Reno, Nevada to San Francisco, California, on PSA. The ticket contained the identification "Employee Charge" and Appellant's employee ID number. [FN5] In this instance, PSA sent Appellant's bill for $20.60 to the Merrill Field business address, instead of to Pickworth's post office box, thereby alerting the bankruptcy trustee. T trustee's attorney, Bernd Guetschow, demanded the immediate return of the ticket stock and validating stamp from Appellant. Appellant offered to pay the $20.60 bill, but Guetschow refused to allow Appella to do so. Appellant then paid PSA directly.

FN5. Appellant testified that employee numbers were used even after retirement.

Ms. Galetto testified that in her opinion the reduced fare agreement w ineffective without the interline agreement (which terminated upon th

initiation of KWA's bankruptcy proceedings):
... You cannot have a reduced fare agreement that allows self-ticketin without an agreement to allow you to do the ticketing.... [T]he ticketi and baggage agreement was null and void. Consequently, no one witl Kodiak Alaska Airlines was authorized to write tickets on PSA Airlines any longer. You have to have the ticketing and baggage agreement tc issue a ticket on us. Without it, you cannot do so.

. . . . .

[T]here's a fundamental reason ... for a carrier to extend an employee reduced fare agreement to another company. That's--a fluff [sic] thin That's not a necessity to operating.
Q Okay.
A Whereas a ticketing and baggage agreement is a necessity.
Ms. Galetto further testified that PSA corporate policy prevented integrating an interline agreement and a reduced fare agreement into one document. She said that the purpose of having two separate agreements was that PSA did not always extend reduced fare privileg when an interline agreement had been executed.
Ms. Galetto asserted it was unnecessary for PSA to include the same termination provision in both agreements.
[I]t's unnecessary for two reasons, specifically. One, if a company ceases operation, then they are no longer going to be doing ticketing another carrier. And the ... reduced fare agreement requires that you can ticket ... since the ticketing and baggage agreement ceases when service ceases, you can't ticket. Secondly ... in the very beginning, it talks about, "[e]ach party shall grant to employees of such airline." Well, if the airline isn't operating, you certainly can't be an employee it.
Ms. Galetto went on to explain that unauthorized use of the tickets wa harmful to PSA in two respects. First, Appellant would otherwise have paid full price for the ticket. Second, Appellant's possession of the tick stock and stamp placed PSA at risk of unauthorized use. [FN6]

FN6. According to the testimony of Ms. Galleto:

[A]n unauthorized person was walking around with a ... validatic plate and ticket stock that could be worth millions and millions o dollars within this industry.

David Jensen, Vice-President of Administration for Reeve Aleutian Airways (Reeve), testified that blank ticket stock and validation stamp were kept either in possession of the ticket agents or locked up. He al testified that he doubted that KWA reduced-fare tickets would have been accepted by those with knowledge of KWA's status at the time. Appellant, by contrast, sought to show that he in fact had the continu right to issue himself reduced-fare tickets. Both Mr. Jensen and Appellant testified, contrary to Ms. Galetto, that the reduced fare and interline agreements are physically separate and complete contracts c their own, and not necessarily interdependent. [FN7] Additionally, the parties stipulated to accept Appellant's offer of proof of the expected testimony of attorney Henry Camerot, former counsel for Alaska Airlines:

FN7. According to the testimony of Appellant:

Q Do you have to look at the ticket and baggaging agreement to understand what this says?

A No. This is complete in itself.

Q ... And you agreed with his characterization, that the reduced fare agreement was a stand-alone document. Do you recall that?

A That's right.

According to the videotaped deposition of Jensen:

Q ... Is the baggage and ticketing agreement a separate docume and a separate, distinct agreement from the reduced fare agreement?

A Generally.

Q Does one depend upon the other?

A Normally, you don't have pass privilege agreements unless yo have an interline relationship in the other areas.

Q Is one actually dependent upon it though?

A Not necessarily.

Alaska Airlines entered into ticket and baggage agreements with othe airlines, and Alaska Airlines entered into reduced fare agreements wit other airlines, similar if not identical to the one that you have seen he in two exhibits. It would be his testimony that these are separate documents--that they stand by themselves; that each one is integrate that you can interpret and apply and enforce the provisions of the reduced fare agreement by itself without reference to the ticket and baggage agreement. And he would testify that the reason for it is the provisions are clear, unambiguous.

He would testify that an airline can cease and does cease flying scheduled operations and still retain employees and has done that a number of ... times in the past. Things just don't end by way of obligations to employees because the airline ceases flying operations.

However, Appellant knew the bankruptcy trustee had control of KWA's assets at the time he self-ticketed approximately two years after the filing of the "Chapter 7" proceedings. He did not check whether the agreements were still in effect, although he realized that such agreements could be terminated easily, regardless of bankruptcy. Appellant also conceded it would have been reasonable to check whether or not the agreements were still in effect before utilizing the benefits thereof:

Q Well, wouldn't it be reasonable, as a lawyer, ... to think that given t non-operational status and the Chapter 11 and Chapter 7 proceedings

that intimately involved KWA also that there might have been some change in the agreement that they had executed back in 1983, by tha time, two years later[?]
A Yes, it's reasonable.
Q But if it's reasonable to think that, then why wouldn't it be reasonat for you to be ... concerned ... when you're still self-ticketing in June o 85?
A I guess I just don't speculate on hypothetical problems, and you're worried about them....
The Commission found that the record did not demonstrate by clear a convincing evidence any actual impropriety by Appellant. The Commission determined that Appellant's claim to a right to indefinite travel benefits through self-ticketing was tenuous at best, but sufficie to defeat a finding of actual impropriety. Nevertheless, the Commissic found Appellant failed to avoid conduct that created an appearance of impropriety. It further concluded that Appellant's conduct was prejudicial to the administration of justice and brought the judicial offi into disrepute, in violation of AS 22.30.011(a)(3)(C) and (D). Additionally, it determined that Appellant violated Canons 1 and 2A of the Code of Judicial Conduct. The Commission determined the appropriate sanction to be public reprimand pursuant to AS 22.30.011 (d)(3). After our holding that the Commission has no authority to determine sanctions, but only to recommend them, and remanding fo recommendation as to sanction, *Judge I*, 762 P.2d at 1296, the Commission recommended public censure.

II. DISCUSSION

[1] The Supreme Court of Alaska is the body entrusted with the ultimate decision in matters of judicial qualifications. *Id.* at 1296; *In r Hanson*, 532 P.2d 303, 307 (Alaska 1975).
[2] In determining the appropriate sanction in a judicial conduct case, this court will independently evaluate the evidence of record. *Id.* at 3([FN8]

FN8. Suggestions to the contrary in *In re Robson*, 500 P.2d 657 (Alaska 1972) are disapproved.

The Commission found that Appellant violated AS 22.30.011(a)(3)(C) and (D), which state:
(a) The commission shall on its own motion or on receipt of a written complaint inquire into an allegation that a judge
(3) ... committed an act or acts that constitute

. . . . .;

(C) conduct prejudicial to the administration of justice;
(D) conduct that brings the judicial office into disrepute.
The Commission further found that Appellant violated Canons 1 and 2 of the Code of Judicial Conduct:
Canon 1. A Judge Should Uphold the Integrity and Independence of tl Judiciary.
An independent and honorable judiciary is indispensable to justice in c 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 furthe that objective.

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 conduc himself at all times in a manner that promotes public confidence in th integrity and impartiality of the judiciary.
[3][4] Alaska statutory law and the Code of Judicial Conduct hold judges to the highest standard of personal and official conduct. This standard is greater than that expected of lawyers and other persons i society. *E.g., In re Inquiry Relating to* Rome, 218 Kan. 198, 542 P.2d 676, 682 (1975); *Complaint Concerning* Winton, 350 N.W.2d 337, 34((Minn.1984). A judge's unethical or seemingly unethical behavior outside the courtroom detracts from the efficient administration of justice and the integrity of the judicial office, as it diminishes respect the judiciary in the eyes of the public. *E.g., In the* Matter of Haddad, 627 P.2d 221, 223 (Ariz.1981); *Rome,* 542 P.2d at 683; *Winton,* 350 N.W.2d at 340. Because the purpose of judicial discipline is to protect the public rather than punish the individual judge, the proceeding is neither civil nor criminal but *sui generis.* Haddad, 627 P.2d at 223; *McComb v. Comm'n on Judicial Performance,* 138 Cal.Rptr. 459, 564 P.2d 1, 5 (1977); *Rome,* 542 P.2d at 683.
Members of the judiciary should be acutely aware that any action they take, whether on or off the bench, must be measured against exactin standards of scrutiny to the end that public perception of the integrity the judiciary will be preserved.... That is not to say, of course, that Judges must cloister themselves from the day-to-day problems of fam and friends. But it does necessitate that Judges must assiduously avoi those contacts which might create even the appearance of impropriet *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 (N.Y.1980).
[5] We agree with the Commission that the record does not sufficientl establish any actual impropriety by Appellant. [FN9] There is an uncertain question concerning whether Appellant's privilege to self- ticket had terminated; there is not "clear and convincing" evidence th it had. *See* Hanson, 532 P.2d at 310. However, we also agree with its finding that Appellant created an appearance of impropriety, violating Canons 1 and 2A of the Code of Judicial Conduct and hence AS 22.30.011(a)(3)(E) (prohibiting violations of the Code of Judicial Conduct).

> FN9. Therefore, Appellant did not violate AS 22.30.011(a)(3)(C). When misconduct is extra-judicial, as here, it is prejudicial to the administration of justice only if it is "wilful misconduct out of office, i.e. unjudicial conduct committed in bad faith...." *E.g., Spruance v. Comm'n on Judicial Qualifications,* 13 Cal.3d 778, 1: Cal.Rptr. 841, 853, 532 P.2d 1209, 1221 (1975).

[6][7] The duty to avoid creating an appearance of impropriety is one taking "reasonable precautions" to avoid having "a negative effect on the confidence of the thinking public in the administration of justice." *the* Matter of Bonin, 375 Mass. 680, 378 N.E.2d 669, 682-83 (1978). Otherwise stated, did Appellant fail to use reasonable care to prevent objectively reasonable persons from believing an impropriety was afo(The self-validation of reduced fare tickets through a defunct airline, where Appellant 1) knew that the agreement permitting such self-

validation could be terminated on short notice, if it had not been already; 2) did not check on the validity of the agreements despite knowing that a bankruptcy trustee had been in control of KWA for almost two years; and 3) admits that a reasonable lawyer would have consulted with the trustee before self-ticketing, creates a sufficient appearance of impropriety to constitute a violation of Canon 2. [FN10]

FN10. A violation of Canon 2, as it brings the judiciary into disrepute, also violates AS 22.30.011(a)(3)(D).

III. SANCTION

[8] In *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 51-52 (Alaska 1986), we adopted the American Bar Association's Standards for Imposing Lawyer Sanctions as guidelines for sanctioning lawyer misconduct. *See* ABA Standards for Imposing Lawyer Sanctions (1986 *reprinted in* ABA/BNA *Lawyer's Manual on Professional Conduct*, 01:801-01:856 (1986) (hereinafter ABA Standards). We reasoned tha the ABA Standards provide a "theoretical framework within which to organize and analyze the relevant factors to be considered in disciplin sanction cases." *Buckalew*, 731 P.2d at 52. A framework is needed to "ensure a level of consistency necessary for fairness to the public and the legal system...." *Id.* As we believe such consistency is equally important in matters of judicial misconduct, we will analogize to these standards insofar as possible when sanctioning judges. [FN11] We not in so doing that the American Bar Association has adopted Standards Relating to Judicial Discipline and Disability Retirement. *See* ABA Standards Relating to Judicial Discipline and Disability Retirement (1978), *reprinted in* National Center for Professional Responsibility for the Joint Committee on Professional Discipline, American Bar Association, *Professional Discipline for Lawyers and Judges* (1979). However, these standards are largely hortatory and prescribe specific sanctions only for a few serious violations not at issue here (commissi of a felony or misdemeanor). *Id.*

FN11. The ABA Standards are limited in analogical scope becaus judges are held to a higher level of scrutiny than are ordinary lawyers. *E.g.*, *Winton*, 350 N.W.2d at 340 (Minn.1984). This is n to say, however, that they are valueless.

The ABA Standards utilize a four pronged test to determine the level c sanction:
(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
(3) What was the extent of the actual or potential injury caused by th lawyer's misconduct? (Was there a serious or potentially serious injur

(4) Are there any aggravating or mitigating circumstances?
Buckalew, 731 P.2d at 52, *quoting* ABA Standards, Theoretical Framework, ABA/BNA at 01:805-06.
The first step in applying the ABA Standards is to examine the first

three prongs of the test. Next, we examine the ABA Standards to find the recommended sanction for this type of misconduct. Finally, we ascertain whether any aggravating or mitigating circumstances apply which warrant increasing or decreasing the otherwise appropriate sanction. *Id.*

1. *The three pronged test.*

The first prong deals with the ethical duty violated. The ABA Standard do not directly address the problem of creating an appearance of impropriety. Rather, the ABA Standards seek to implement a system f the consistent punishment of Disciplinary Rule violations. The Disciplinary Rules, however, do not mandate the punishment of a lawyer who creates only an appearance of impropriety of the type at issue here. While Ethical Consideration 9-6 contains cautionary language that a lawyer should "strive to avoid not only professional impropriety but also the appearance of impropriety," DR 9-101 prohib only certain specific types of apparent improprieties not apposite here *See* DR 9-101(A) (accepting private employment on a matter "upon tl merits of which he has acted in a judicial capacity"); DR 9-101(B) (accepting private employment in a matter in which he had substantia responsibility while a public employee); DR 9-101(C) (implying the ability to improperly influence decision-makers). This is one area in which the Code of Judicial Conduct demands more of judges than the Disciplinary Rules do of lawyers.

The second prong requires examination of the offender's mental state Our review of the record reveals only a negligent state of mind, not a knowing or purposeful one. The ABA Standards define negligence as "when a lawyer fails to be aware of a substantial risk that circumstanc 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." ABA Standards, Definitions, ABA/BNA at 1:807. Appellant's error lies in his negligent failure to appreciate a substantial risk that h self-issuance of reduced fare tickets might appear improper under the circumstances.

The third prong requires examination of the actual or potential harm occasioned by the violation. As far as actual harm, there was relativel little. The trustee of KWA incurred a debt of $20.60, which Appellant intended to pay, and did pay. Assuming that the agreement was in fa inoperative, which is not clearly demonstrated by the evidence, then PSA also suffered the loss of the difference between a $20.60 reducec fare and a full fare of $82.40, or $61.80. If it was not inoperative, no harm was suffered. Additionally, the ticket was a "stand-by" ticket. Tl potential harm in this case, according to Ms. Galleto, was somewhat greater, assuming the further step of the validation plate falling into t wrong hands. The ABA Standards define potential harm as "the harm that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." ABA Standards, Definitions, ABA/BNA at 1:807. We cannot, on this record, say that th consequences feared by Ms. Galleto would "probably" have resulted from Appellant's possession of a validating stamp and blank stock, giv the lack of evidence of any nefarious purpose on Appellant's part. Additionally, the validating stamp, which was part of the record, is no masterpiece of complexity and could be rather easily duplicated. Thus we feel that the degree of actual or potential injury caused was nearly negligible.

2. *Recommended Sanction.*
[9][10] As discussed *supra,* no part of the ABA Standards specifically addresses the problem of creating the appearance of impropriety, yet useful pattern appears throughout. Where the violation, whatever its nature, involves only negligent conduct which occasions little injury, tl recommended sanction is admonition, or private reprimand. *See* ABA Standard 2.6, ABA/BNA at 01:813 ("Admonition, also known as privat reprimand, is a form of non-public discipline which declares the condu of the lawyer improper ..."); ABA Standard 4.24, ABA/BNA at 01:820; ABA Standard 4.34, ABA/BNA at 01:824; ABA Standard 4.44, ABA/BN at 01:826; ABA Standard 4.54, ABA/BNA at 01:827; ABA Standard 4.64, ABA/BNA at 01:828; ABA Standard 5.24, ABA/BNA at 01:832; ABA Standard 6.14, ABA/BNA at 01:834; ABA Standard 6.24, ABA/BN at 01:836; ABA Standard 6.34, ABA/BNA at 01:837; ABA Standard 7. ABA/BNA at 01:839. Since this pattern is consistent throughout the Al Standards irrespective of the nature of the offense, [FN12] it is fair to apply it to unaddressed judicial violations involving, as here, the same mental state and degree of injury. Thus, a private reprimand is the baseline sanction for this conduct. [FN13]

FN12. The ABA Standards do urge against admonition for the negligent violation of a standing discipline order, a situation not issue here. *See* ABA Standard 8.4, ABA/BNA at 01:841.

FN13. Because creation of an appearance of impropriety, where actual impropriety is demonstrated, is essentially negligent, the baseline sanction will generally be either private reprimand or public censure under the ABA Standards, depending on the amount of harm caused and subject to increase or decrease dependent upon the presence of aggravating or mitigating factor

3. *Aggravating and Mitigating Factors.*
[11] The ABA Standards provide for the consideration of aggravating and mitigating factors in deciding whether to depart from the baseline sanction. Mitigating factors include:
(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 attitud 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.
ABA Standard 9.32, ABA/BNA at 01:842.
Aggravating factors include:
(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 intentionall 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.
ABA Standard 9.22, ABA/BNA at 01:841-42.
Just as there is "no 'magic formula' to determine which or how many mitigating circumstances justify the reduction of an otherwise appropriate sanction," *Buckalew*, 731 P.2d at 54, so too is there no formula dictating how many aggravating factors justify increasing a sanction, or how aggravating and mitigating factors are to be balance "Each case presents different circumstances which must be weighed against the nature and gravity of the ... misconduct." *Id.*
In this case, several mitigating factors, (a), (b), (e), (f), (g) and (*i*), are present. The record before us contains no evidence that Appellant has ever received a disciplinary sanction, public or private, as an attorney or judge, and we are aware of none. We do not believe the record reflects a "dishonest or selfish motive," but rather negligence. Appellant's attitude toward the proceedings appears to have been cooperative. Although Appellant has practiced law for many years, he had been on the bench for a relatively short period of time, and thus perhaps was less familiar with the Code of Judicial Conduct than migh otherwise be the case. Appellant acknowledged his lapse of care durin his cross-examination, and expressed remorse.
On the other hand, we find no aggravating circumstances present. Balancing these factors, we conclude that it would not be appropriate depart from the baseline sanction of private reprimand. "Our paramou concern, here as always, must be the protection of the public, the courts, and the legal profession." *Buckalew*, 731 P.2d at 56. This paramount concern would be ill served in this case by failing to expre in some way our disapproval of Appellant's neglect.

IV. CONCLUSION

For the reasons stated above, the Commission's recommended sanctic of public censure is rejected. This court will administer the private reprimand in closed proceedings.

RABINOWITZ and MOORE, JJ., not participating.
Alaska,1990.
In re Inquiry Concerning a Judge
788 P.2d 716
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