# APPENDIX I

The Commonwealth of Massachusetts
COMMISSION ON JUDICIAL CONDUCT
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February 25, 2020

Mr. Francis V. Kenneally, Clerk
Clerk of the Supreme Judicial Court for the Commonwealth
John Adams Courthouse, Suite 1400
One Pemberton Square
Boston, MA 02108-1724

**CONFIDENTIAL**

RE: Commission Complaint Number 2019-27

Dear Clerk Kenneally:

Enclosed for filing, please find the Commission on Judicial Conduct's "Memorandum of Law in Support of Motion to Impound Name of Complaining Witness and Opposition to Judge's Cross Motion to Impound."

Please impound this filing and its associated documents, until further order of the Court, pursuant to Supreme Judicial Court Rule 1:15.

Thank you very much for your assistance in this matter.

Sincerely,

Howard V. Neff, III
Executive Director

Enclosure

cc: Mr. Michael P. Angelini, Esq. (with enclosure)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

COMMISSION ON JUDICIAL CONDUCT
COMMISSION COMPLAINT NUMBER 2019-27

IN THE MATTER OF A JUDGE

IMPOUNDED

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO IMPOUND NAME OF COMPLAINING WITNESS AND OPPOSITION TO JUDGE'S CROSS MOTION TO IMPOUND**

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## I. INTRODUCTION

By a motion filed with the Court on February 19, 2020, the Commission on Judicial Conduct ("the Commission") moved, pursuant to Supreme Judicial Court Rule 1:15, that this Court impound so much of the Formal Charges in the above-captioned matter and the judge's response thereto, if any, as names the complaining witness, Ms. Emily Deines ("Ms. Deines").

On February 24, 2020, the subject judge, Judge Paul M. Sushchyk ("Judge Sushchyk"), through his counsel, Mr. Michael P. Angelini, Esq., filed a "Response to Motion to Impound [Name of Complaining Witness] and Cross Motion to Impounded" (sic) with the Court.

## II. ARGUMENT

In its motion to impound the name of the complaining witness, the Commission argues that equity favors protecting the complaining witness and her family from media attention and potential threats.

Although there is no apparent case law in Massachusetts regarding protecting the identity of a complaining witness in a sexual harassment complaint in the context of judicial discipline proceedings, certain other jurisdictions have afforded the identity of such witnesses' protection. In re Iddings, 897 N.W.2d 169 (Michigan 2017) (the Michigan Supreme Court redacted the name of the subject of the alleged sexual harassment (the judge's secretary), referring to her as Ms. *****, to protect her privacy) [1]; In re Deming, 736 P.2d 639 (Washington 1987) (describing a "myriad of improper and offensive comments and sexual innuendos" by a judge to women, but only identifying the women subject to the behavior by their workplace titles) [2].

In the Matter of Seaman, the Supreme Court of New Jersey generally characterized sexual harassment as "personally offensive, highly invasive, psychologically hurtful, and often deeply embarrassing to the victim" and in its decision, referred to the complaining witness by her initials and maintained her anonymity, even though the New Jersey Advisory Committee on Judicial Conduct had followed "conventional practice" and used her full name in its pleadings. In the Matter of Seaman, 133 N.J. 67, 75 (1993) [3]. In its decision, the New Jersey Court ruled, as follows: "The ACJC followed conventional practice and used complainant's full name in its presentment. In the future, we direct that judicial-disciplinary cases involving abuse of the judicial office through sexual harassment, or other activities that humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim. The purpose behind that practice is to protect the victim's privacy and encourage reporting of such offenses." Id.

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[1] A copy of this decision is attached as Appendix A.

[2] A copy of this decision is attached as Appendix B.

Texas has also adopted a practice of protecting the identity of certain complaining witnesses in sexual harassment complaints in the context of judicial discipline proceedings. For example, citing the New Jersey Seaman case, in In re Barr, a Review Tribunal of the Texas Supreme Court referred to female attorneys to whom a judge made sexual comments and gestures by their initials despite the fact that their names had already become public. In re Barr, 13 S.W.3d 525 (Texas Special Review Tribunal 1998)[4]. The Texas Supreme Court Tribunal ruled, as follows: "The Texas Judicial Conduct Commission followed conventional practice and used the full names of each of the complainants in its notice of formal proceedings, and ultimately in its petition for removal. In the future, we urge that disciplinary cases involving abuse of the judicial office through sexual harassment, or other activities that serve to humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim. The purpose behind that practice is to protect the victim's privacy and encourage reporting of such offenses." Id. at 535, *contra* In re Casey, Opinion (Texas Special Court of Review May 9, 2017) (identifying by full name the chief clerk with whom judge had improper sexual relationship)[5].

In his response to the Commission's motion to impound the name of the complaining witness, Judge Sushchyk's counsel first seeks to argue the merits of the Formal Charges and evidence against his client.

Based upon its investigation of this matter, the Commission expects to be able to establish by clear and convincing evidence that Ms. Deines, despite the enormous power

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[3] A copy of this decision is attached as Appendix C.

[4] A copy of this decision is attached as Appendix D.

disparity between her and Judge Sushchyk and despite serious concerns regarding the repercussions of reporting Judge Sushchyk's conduct toward her, made a deliberate and courageous decision, approximately one week later, to make an official report to Chief Justice of the Probate and Family Court John Casey that, on April 25, 2019, Judge Sushchyk touched her buttock inappropriately, without justification, and without her consent, while she attended a Probate and Family Court Judicial Conference at the Ocean Edge Resort in Brewster, Massachusetts.

During the investigations of this matter, Ms. Deines has been repeatedly interviewed and has been deposed. She has continued to consistently report that Judge Sushchyk inappropriately touched her buttock on April 25, 2019. After a review of the evidence, including Ms. Deines' statements and deposition testimony, and two personal appearances by Judge Sushchyk before the Commission in connection with this complaint, the Commission has, for the first time in over ten years, found "by a preponderance of the credible evidence that there is sufficient cause to believe that there has been misconduct of a nature requiring a formal disciplinary proceeding" and has voted to issue Formal Charges. R.C.J.C. Rule 7B(4).

Ms. Deines' report to Chief Justice Casey prompted him to conduct an investigation into this matter, and in Chief Justice Casey's May 28, 2019 report to the Supreme Judicial Court (attached as Exhibit A), Chief Justice Casey not only described Ms. Deines' report of improper touching by Judge Sushchyk, but also included an April 29, 2019 written statement from Ms. Deines that again reported Ms. Deines' belief that Judge Sushchyk had touched her buttock improperly on April 25, 2019. By contrast, Chief Justice Casey's investigative report included a

[5] A copy of this decision is attached as Appendix E.

description of a May 10, 2019 interview with Judge Sushchyk, during which Judge Sushchyk vehemently denied he had improperly touched Ms. Deines on April 25, 2019. However, Judge Sushchyk then provided Chief Justice Casey with an arguably contradictory May 20, 2019 written statement in which he wrote: "I recall that as I began to pass by Ms. Deines [on April 25, 2019], to steady myself, I placed my hand in the direction of her chair and came into momentary contact with a portion of her lower body."

Moreover, the Commission respectfully submits that M.G.L. c. 211C and the Rules of the Commission provide the judge with ample due process and opportunity to defend himself against the Formal Charges issued by the Commission in this matter and this is not the proper procedural stage to evaluate nuanced factual issues regarding whether Judge Sushchyk may have placed his hand partially or fully under Ms. Deines' buttock before allegedly improperly touching her or whether he chose to partially or completely remove the flask of whiskey from his coat pocket to display it to parties attending the judicial conference.

In his response, counsel for the judge also asks the Court to impound "these entire proceedings or, in the alternative" impound both the name of the judge and the complainant from the Formal Charges and the judge's response to the Formal Charges.

While, as cited above, other jurisdictions have recognized that sexual harassment is "personally offensive, highly invasive, psychologically hurtful, and often deeply embarrassing to the victim" and have, accordingly, maintained the confidentiality of the complaining witness' identity, the Commission respectfully submits that the subject judge in this matter is entitled to no such special consideration. Indeed, Comment 2 to Rule 1.2 of the Code advises judges that

they "should expect to be the subject of public scrutiny that might be burdensome if applied to other citizens…"

Regarding the judge's request to impound "these entire proceedings," M.G.L. c. 211C and the Rules of the Commission provide a judge with ample notice that proceedings on Formal Charges take place through a public hearing procedure and that proceedings following the filing of Formal Charges may only remain confidential if the Commission, the complainant(s), and the judge concur. M.G.L. c. 211C, sec. 6(4). No such agreement has been reached in the present matter.

## III. CONCLUSION

For the foregoing reasons, the Commission requests that its motion to impound name of complaining witness be GRANTED and the judge's "Cross Motion to Impounded" (sic) be DENIED.

Respectfully Submitted,
For the Commission on Judicial Conduct,

by: 

Howard V. Neff, III
BBO # 640904
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
(617) 725-8050

Dated: February 25, 2020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

COMMISSION ON JUDICIAL CONDUCT
COMMISSION COMPLAINT NUMBER 2019-27

IN THE MATTER OF A JUDGE

IMPOUNDED

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**AFFIDAVIT OF HOWARD V. NEFF, III**

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I, Howard V. Neff, III, Counsel for the Commission on Judicial Conduct in Commission Complaint Number 2019-27, submit this Affidavit in support of the Commission's "Memorandum of Law in Support of Motion to Impound Name of Complaining Witness and Opposition to Judge's Cross Motion to Impound" and do hereby state the following:

1. I am presently employed as the Executive Director of the Commission on Judicial Conduct and have served in that capacity since September of 2012.
2. The assertions in the Commission's "Memorandum of Law in Support of Motion to Impound Name of Complaining Witness and Opposition to Judge's Cross Motion to Impound" regarding the investigation of Ms. Deines' allegations against Judge Sushchyk and the anticipated evidence should this matter proceed to formal public hearing are true to the best of my knowledge and belief.

Signed under pains and penalties of perjury this 25th day of February, 2020.

Howard V. Neff, III
BBO # 640904
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
(617) 725-8050

Dated: February 25, 2020

CERTIFICATE OF SERVICE

I, Howard V. Neff, III, attorney for the Commission on Judicial Conduct, hereby certify that I have this day served a copy of the foregoing document upon the party of record in this proceeding, as follows:

**By USPS Priority Mail**:

Mr. Michael P. Angelini, Esq.
Bowditch & Dewey, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615

Howard V. Neff, III, Esq.
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108
(617) 725-8050
BBO # 64904

Dated: February 25, 2020

# EXHIBIT 1

**CONFIDENTIAL**

Investigation Summary prepared by Chief Justice John D. Casey, Probate and Family Court Department, The Trial Court of the Commonwealth of Massachusetts on May 28, 2019.

**INTRODUCTION**

The Probate and Family Court conducts two judicial conferences each calendar year. Attendance is mandatory for all judges unless excused by the Chief Justice. Currently, there is a two day program in the Spring and a one day program in the Fall. The two day program includes one overnight accommodation which is paid from the Department budget allowance.

The Spring Conference was held this year at the Ocean Edge Resort & Golf Club located at 2907 Main Street, Brewster, MA on April 25 and 26, 2019.

Day one of the conference ended shortly after 3:00pm when all judges gathered in their robes for a group photograph. The evening dinner included in the cost of the conference was scheduled for 7:00pm at the resort. Our judges were encouraged to attend but not required. Attendees could purchase beer, wine and other alcoholic and non-alcoholic drinks at their own expense.

Emily Deines is a Field Coordinator for the Administrative Office of the Probate and Family Court. Ms. Deines assists in planning, organizing and overseeing the Conference along with a staff member from the Judicial Institute. Her attendance is required for duration of the conference. The Chief Justice of the Department extended an invitation to the administrative staff attorneys to attend the conference. There

were four administrative staff attorneys who attended the Conference and dinner.

**ALLEGATION**

Emily Deines is assigned to the western divisions. Her office is located in our Hampden Division. One of her duties is to support the Education Committee and to be the on-site coordinator at the conferences. She, in fact, was the coordinator present at the Spring Conference.

On Thursday, May 2, 2019, Ms. Deines contacted me and asked to speak with me about an incident that occurred the evening of April 25, 2019. She reported that at approximately 9:00pm on April 25, 2019 that Associate Justice Paul M. Sushchyk had grabbed her posterior, below the waist and above the thigh while they were both in the Bayzos Pub at the Ocean Edge Resort. She stated that she did not know how to react and waited a short time and left the Pub. She was sitting with three of the administrative staff attorneys at a high top table, one of whom was Evelyn Patsos. Ms. Deines reported that she looked to Attorney Patsos for any indication that she may have seen the incident. There was no such indication at that time and Ms. Deines then left and returned to her room.

Ms. Deines reports that she spoke with her husband about the incident and also with Attorney Patsos, who indicated that she did not observe the incident. Ms. Deines expressed some reservation about reporting the incident as she was concerned this allegation could have a negative impact on her career.

I told Ms. Deines that this was a very serious matter that could not be ignored given that the Trial Court has a zero tolerance policy as reflected in our sexual and gender harassment policy. I advised Ms.

Deines that I would discuss the matter with Trial Court Chief Justice Carey and advise Ms. Deines what steps would be taken concerning this allegation. I also asked her if she would please prepare a written statement which she agreed to do. A copy of her statement is attached and hereby referred to as "Exhibit 1".

I spoke with Chief Justice Carey and Probate and Family Court Deputy Court Administrator Linda M. Medonis. I decided that I would begin my investigation by speaking privately with Judge Sushchyk. I scheduled a meeting with Judge Sushchyk and met with him on May 10 in his lobby.

I handed the written statement of Ms. Deines to the Judge and asked him to read the statement. He appeared to read the statement, folded it, placed it on his desk and stated that he "couldn't have done this" that he "could not recall this incident" and that "if anything like that had happened he would be able to recall it".

Judge Sushchyk stated that he had one drink at the bar at the resort. He then went on to explain that he had a serious health condition which required surgery five years prior and that it was embarrassing but one of the side effects of the surgery was that he had no sexual drive.

The Judge stated numerous times that "I would never do anything like that" and that "I am not that kind of person, I would never intentionally hurt anyone, but especially a woman". The judge also stated numerous times that he would apologize to Ms. Deines in-person or in-writing, if she preferred.

I advised the Judge that I would be sharing the results of my investigation with Ms. Deines, Chief Justice Carey and Supreme Judicial Court Chief Justice Gants. I suggested he consider preparing a written statement regarding the incident. A copy of his statement is attached and hereby referred to as "Exhibit 2".

I offered to provide Ms. Deines with a copy of the statement but she requested instead that I summarize the statement for her, which I did.

I also met with Attorney Evelyn Patsos of the Administrative Office. She had been made aware of the incident directly by Ms. Deines. She confirmed that she, Ms. Deines, Administrative Staff Attorneys Christine Yurgulen and Jocelynne Welsh were sitting at a high top table of the Bayzos Pub at approximately 9:00pm on April 25, 2019.

She stated that shortly before that time Judge Sushchyk approached the table and stood between her and Ms. Deines. Attorney Patsos and Judge Sushchyk knew each other because of their past dealings when she worked as a Family Court Facilitator at the Worcester County Registry of Probate and he was a practicing attorney doing business with the Registry.

Attorney Patsos affirmed that Ms. Deines had asked her if she observed any physical contact initiated by the Judge against Ms. Deines. She said that she had not noticed any such contact but did recall Ms. Deines leaving the Pub shortly after 9:00pm.

On Tuesday, May 14, I met with Ms. Deines in-person and updated her as to the status of the investigation. I explained that I would be preparing a written report which would be provided to Chief Justices Gants and Carey and that ultimately, Chief Justice Gants would decide what if any action should be taken. She repeated that she wanted closure and that if the Judge acknowledged the incident, apologized and she had reason to believe it would not happen again that is the only relief she wanted. I explained that the decision would be up to Chief Justice Gants and that it was possible that my report and the written statements would be forwarded to the Commission on Judicial Conduct. Ms. Deines stated that she would respect whatever decision was made and that she would cooperate with any further investigation.

I also informed Judge Sushchyk of the same procedures and he became emotional and again said he did not intentionally touch Ms. Deines and that if he had, it was a complete accident, and that he would apologize to Ms. Deines. He stated that he would never drink alcohol at any future judicial conferences and that he would treat Ms. Deines with the utmost respect in any future dealing they might have.

**CONCLUSION**

It appears that a combination of factors including alcohol consumption and the layout of the Pub resulted in there being non-consensual physical contact between Ms. Deines and Judge Sushchyk on the evening of April 25, 2019, which was initiated by the Judge.

Exhibit 1

Emily Deines, typed 4/29/19 at 3 PM

At or around 9 PM on Thursday April 25, 2019, someone grabbed my left buttock while I was seated on a stool at the Bayzos Pub at the Ocean Edge Resort during the Probate and Family Court's Spring Judicial Conference. I believe the person who grabbed me was Paul Sushchyk because he had recently come over to the table where I was seated and was the only person directly behind me at the time of the grab. The following other individuals were either seated at the table with me or were in the direct vicinity:

Evelyn Patsos

Jocelynne Welsh

Christine Yurgelun

The grab lasted a few seconds and felt like it was made using a full hand. I did not address this with Judge Sushchyk, or anyone else at the table, at the time. I did try to make eye contact with Evelyn Patsos before leaving a few minutes later.

Exhibit 2

Statement

I, Paul M. Sushchyk, make the following statement of events of the evening of April 25, 2019, to my best belief and knowledge.

After the conclusion of the evening dinner event at the 2019 Probate and Family Judicial Conference, I, along with a number of other colleagues, went to the Bayzos Pub.

The Bayzos Pub is in the basement of main building at the Ocean Edge. The Pub has a long bar against the back wall, which seats approximately 10-12 persons. Opposite the bar are two square brick pillars, which form arches supporting the roof.

On the evening of April 25, 2019, there was a high round table, with four stools, in front of one of the brick pillars. There were other tables immediately to the left, rear and right side. The seats at the bar were full and patrons were sitting at the other tables.

I saw Atty. Patsos sitting on a stool at the round table in front of the brick pillar. She was there with four other women at the table. I had become acquainted with Atty. Patsos when she worked at the Worcester Registry of Probate Office. I came over to the table where she was sitting and joined the table.

I recall that Ms. Patsos was to my left. Opposite me were Ms. C. Yurgelun, Ms. J. Welsh and Ms. Deines. I recall that Ms. Deines occupied the seat at the table adjacent to the brick pillar.

I inquired and ordered drinks for two of the persons present and then one (Jameson whisky and water) for myself. I had one alcoholic drink (whisky and water) during the evening, at the hospitality suite gathering prior to the evening meal.

Over a period of time, I consumed a portion of the whisky and water and then excused myself from the table to use the men's room. I walked around the backside of the brick pillar, and threaded my way to the men's room, between the tables and seated patrons.

Having completed my use of the facilities, I began my return to our table, again threading my way between the patrons and the tables. I was somewhat unsteady on my feet, feeling the effects of past hip replacement surgery, the long day (I had driven to Brewster that morning from Sterling), the evening meal and the alcohol consumed. I recall that as I began to pass by Ms. Deines, to steady myself, I placed my hand in the direction of her chair and came into momentary contact with a portion of her lower body. I then returned to my seat at the table, rejoining Ms. Patsos, Ms. Yurgelun, Ms. Welsh and Ms. Deines.

Signed this 20th day of May, 2019. /S/

Paul M. Sushchyk

# APPENDIX A

**500 Mich. 1026**
**897 N.W.2d 169 (Mem)**

**IN RE: Gregg P. IDDINGS, Judge Lenawee County Probate Court**

**Before the Judicial Tenure Commission**

**SC: 154936**

**Supreme Court of Michigan.**

**July 6, 2017**

[897 N.W.2d 170]

**Order**

On December 12, 2016, the Judicial Tenure Commission issued a Decision and Recommendation to which the respondent, Honorable Gregg P. Iddings, Lenawee County Probate Court Judge, consented. It was accompanied by a settlement agreement, in which the respondent waived his rights, stipulated to findings of fact and conclusions of law, and consented to a sanction of a public censure and a 60–day suspension without pay. On February 3, 2017, this Court entered an order remanding the matter to the Commission for further explication, retaining jurisdiction. The Commission filed a supplemental report under seal on February 28, 2017. The respondent filed a motion to expand the record on May 12, 2017. On June 5, 2017, this Court entered an order under seal granting the motion to expand the record, and rejecting the order of discipline recommended by the Commission as being insufficient, given the facts stated in the stipulation and supplemental report. The order provided that the Court would impose a six-month suspension without pay on July 5, 2017, unless, pursuant to MCR 9.225, the respondent withdrew his consent to discipline by July 3, 2017. The respondent has not withdrawn his consent.

In resolving this matter, we are mindful of the standards set forth in *In re Brown* , 461 Mich. 1291, 1292–1293 (2000) :

> Everything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery; [and]
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion [is] more serious than

> breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. Ms. [* * * * *][1] was Respondent's judicial secretary from July 2010 to November 2015.
>
> 2. Between 2012 and 2015, Respondent engaged in a series of acts that constituted sexual harassment of Ms. [* * * * *].
>
> 3. Respondent's conduct included,
>
> a. Sending after-hour[s] text messages to Ms. [* * * * *], in which he discussed his marital problems and his personal feelings.
>
> b. Making an offer to purchase expensive items for Ms. [* * * * *] as Christmas gifts and inviting her to

[897 N.W.2d 171]

> Rhianna/Eminem and other high-priced concerts.
>
> c. Suggesting that Ms. [* * * * *] accompany him to exotic locations for court-related conferences where they could share a hotel room.
>
> d. Showing Ms. [* * * * *] a sexually suggestive YouTube video of a high-priced lingerie website, Agent Provacateur.
>
> e. Making comments which he admits Ms. [* * * * *] could have reasonably interpreted as an invitation to have an affair with him.
>
> f. In a letter of recommendation, while referring to Ms. [* * * * *]'s professionalism and dependability, writing "besides, she is sexy as hell." Respondent deleted the language at the request of Ms. [* * * * *].
>
> g. Writing "Seduce [* * * * *]" on the court computerized calendar and then directing Ms. [* * * * *] to look at that particular date on the calendar. Respondent deleted the language at the request of Ms. [* * * * *].
>
> h. Telling Ms. [* * * * *] that the outfits she wore to work were "too sexy."
>
> i. Telling Ms. [* * * * *] that she "owed him" for allowing her to leave work early to attend her son's after-school activities.
>
> j. Reaching over her to edit documents which would have put him in physical contact with Ms. [* * * * *].
>
> k. Staring down the front of Ms. [* * * * *]'s blouse.
>
> l. While discussing his [t]riathlon training, sitting on Ms. [* * * * *]'s desk and laying on it while she was sitting at her desk.
>
> 4. Shortly after she was hired, Ms. [* * * * *] made it clear to

Respondent that she had "no sexual attraction towards him."

5. On several occasions, Ms. [* * * * *] told Respondent that his wife would not appreciate his comments and actions.

6. On several occasions, Respondent told Ms. [* * * * *] that he was "sorry and should stop" making some of the comments.

7. Ms. [* * * * *] was very upset when she learned about a rumor at the courthouse that she was having an affair with Respondent and requested that he "shut it down."

8. His court officer told Respondent to "watch" how he spoke to Ms. [* * * * *].

9. Respondent admitted that he had received a written copy of the county's policy prohibiting harassment shortly after taking the bench.

10. Respondent admitted that he is well aware of, and familiar with, both Michigan and [f]ederal sexual harassment laws.

11. On March 18, 2016, Ms. [* * * *] filed an EEO [Equal Employment Opportunity] complaint against Respondent in which she alleged that Respondent's harassment caused "an enormous amount of stress, anxiety, discomfort, nervousness, mental breakdowns, mood swings and disruptive sleep."

12. Lenawee County hired Priscilla Archangel, Ph.D., President, Archangel and Associates, LLC[,] to conduct an investigation of the EEO complaint. Ms. Archangel filed a report of the investigation dated May 2, 2016.

13. The summary findings of the report included that Respondent's behavior toward Ms. [* * * * *],

does constitute "harassment" in the context of "Sexual harassment includes:

[897 N.W.2d 172]

> ... unwanted sexual advances ... visual conduct that includes ... a display of sexually suggestive objects or pictures, ... verbal conduct such as making or using derogatory comments based on sex or sexual comments, ... verbal sexual advances or propositions; ... suggestive/obscene letters, ..." as listed in the Lenawee County Statement Prohibiting Harassment. Specifically, he admits showing [* * * * *] a video by Agent Provacateur depicting scantily clad women in lingerie; writing "Besides, she's sexy as hell" in a reference letter; writing "seduce [* * * * *]" on his electronic calendar and showing it to her; and telling her "you owe me one" when she took vacation time to attend events for her son.

14. The report also stated that it was the "belief of the Investigator that [Respondent's behavior] constituted, at a

> minimum, an offensive, and more probably a hostile working environment."
>
> 15. On June 20, 2016, Ms. [* * * * *] signed a "Resignation Agreement and Release of All Claims" between herself and Lenawee County, Lenawee County Probate Court, and Respondent which provided that Ms. [* * * * *] [would] receive monetary compensation to release all claims related to Respondent['s] conduct.
>
> 16. Respondent self-reported the EEO complaint to the Judicial Tenure Commission. On May 5, 2016, the Judicial Tenure Commission received RFI 2016–22112 from Respondent. Respondent attached his prepared statement and Ms. [* * * * *]'s EEO complaint.
>
> 17. Respondent is extremely remorseful over these matters, he has cooperated throughout the investigation, and he is desirous of resolving these grievances.

The standards set forth in *Brown* are also being applied to the Judicial Tenure Commission's legal conclusions, to which the respondent stipulated and which we adopt as our own. The Commission concludes, and we agree, that the respondent's conduct constitutes:

> (a) Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205 ;
>
> (b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205 ;
>
> (c) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1 ;
>
> (d) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of the Code of Judicial Conduct, Canon 2A;
>
> (e) Conduct involving impropriety and the appearance of impropriety, in violation of the Code of Judicial Conduct, Canon 2A;
>
> (f) Failure to respect and observe the law and to conduct himself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;
>
> (g) Conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, in violation of MCR 9.104(2) ;
>
> (h) Lack of personal responsibility for his own behavior and for the proper conduct and administration of the court in which he presides, contrary to MCR 9.205(A) ; and

[897 N.W.2d 173]

> (i) Conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court, contrary to MCR 9.104(4).

Applying these criteria to the present case, while mindful of the agreement between the Commission and the respondent, we have concluded that the recommended public censure and 60–day suspension without pay is insufficient in light of the stipulated facts and supplemental report. Certain of the *Brown* standards are particularly relevant here: a pattern or practice of misconduct is more serious than an isolated instance of misconduct, misconduct prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety, misconduct implicating the actual administration of justice is more serious than conduct that does not, and deliberate misconduct is more serious than spontaneous misconduct. Here, the respondent, as found by the Commission, engaged in a course of conduct constituting sexual harassment from 2012 to 2015. Although his misconduct occurred while off the bench, it was serious and related to his administrative duties as a judge. The respondent's misconduct created an offensive and hostile work environment that directly affected the job performance of his judicial secretary in her dealings with the public and the court's business and affected the administration of justice. His actions implicated the appearance of impropriety and had a negative impact on the actual administration of justice. Further, his conduct was deliberate.

For the reasons set forth in this order, we ORDER that the Honorable Gregg P. Iddings be publicly censured and suspended without pay from the performance of his judicial duties for a period of six months, effective July 5, 2017. This order further stands as our public censure.

In addition, we observe that the recommendation of the Commission is premised in part on the respondent's acceptance of three additional provisions, which have been agreed upon by the Commission and the respondent. These are not encompassed within our order, because they are not judicial discipline as described in Const. 1963, art. 6, § 30 (2). The respondent has provided proof of fulfilling one of the provisions. In accordance with the rules governing judicial discipline, the Commission may recommend further discipline if the respondent fails to comply with the remaining terms:

> (1) the respondent shall continue counseling with his current therapist for one year at his own expense.
>
> (2) the respondent will provide proof of his completion of the counseling to the Commission.

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Notes:

[1] The victim's name is redacted to protect her privacy.

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# APPENDIX B

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**108 Wn.2d 82**
**736 P.2d 639**
**In re the Matter of Honorable Mark S. DEMING, Judge, Pierce County District Court No. 1, Tacoma, Washington.**
**No. J.D. 3.**
**Supreme Court of Washington, En Banc.**
**May 7, 1987.**
**As Amended Oct. 5, 1987.**

Note: Opinion Amended by 744 P.2d 340.

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[736 P.2d 641] Riddell, Williams, Bullitt & Walkinshaw by David Hoff, Seattle, for Com'n on Judicial Conduct.

Reed & Wright, Frank C. Wright (Douglas L. Applegate, of counsel), Laguna Beach, Cal., for the Judge.

John A. Strait, Tacoma, on behalf of the Bar Ass'n amicus curiae.

CALLOW, Justice.

This case involves judicial disciplinary proceedings against District Court Judge Mark S. Deming. In this case, for the first time, the Judicial Qualifications Commission (Commission), held a public hearing regarding allegations of misconduct made against a judge. Since this appeal was argued to this court Judge Deming has resigned. We answer the issues raised because of their substantial public importance. Our de novo review indicates that Judge Deming's conduct did not comport to the standards of conduct imposed on judges in this state. As the final authority which can discipline judges, we find that Judge Deming's

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conduct violated the Code of Judicial Conduct and warranted removal from office.

PROCEDURAL FACTS

On July 3, 1985, the Commission served Judge Deming with a statement of allegations regarding: (a) his personal relationship with a Probation Department employee; (b) alleged sexual harassment of female employees; (c) threats to the Director of the Probation Department; and (d) aberrant and unstable courtroom behavior. In response, Judge Deming submitted information which he asserts placed the allegations in context by explaining that the charges were caused by political disputes in the Pierce County District Court system.

On October 21, 1985, the Commission served Judge Deming with a formal complaint which alleged numerous instances of conduct violating the Code of Judicial Conduct, and notice of a fact-finding hearing to be held in December at the University of Washington School of Law. On or about October 27, Judge Deming obtained legal counsel. On October 29, by letter, his counsel objected to the holding of a public hearing and requested an opportunity to appear and present oral argument. Counsel for the Commission advocated a public hearing, arguing by letter, that because of the media's substantial coverage of the matter a confidential hearing would not protect Judge Deming, and would harm the public's faith in the judicial system. On November 6, without hearing oral argument, the Commission ordered a public hearing. The Commission then made public the complaint. Judge Deming did not seek relief from this order.

Prehearing discovery and disclosure of witness lists followed. Depositions began on November 18, 1985, and continued until the evening of December 12, the first day of the hearing. Despite the shortness of time, neither counsel asked for a continuance. On December 9, a motion in limine made by counsel for the Commission was granted,

excluding testimony about witnesses' sexual histories and certain

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statements not made in Judge Deming's presence.

The public fact-finding hearing took place between December 12 and 18, 1985. On January 10, 1986, the Commission filed a unanimous recommendation that Judge Deming be removed from office pursuant to Const. art. 4, § 31 (amend 71). On February 11, the Commission certified the matter to this court.

On February 25, 1986, the initial counsel for Judge Deming withdrew. Thereafter, Judge Deming, acting pro se, moved for reconsideration and to allow additional evidence. The above motions and a request for oral argument on post-hearing motions were denied by the Commission. On March 8, Judge Deming retained present counsel. On May 28, this court heard oral argument presented by Judge Deming and the Commission.

I
STANDARD OF REVIEW

The Washington Constitution requires this court to conduct a hearing to [736 P.2d 642] review the Commission's proceedings and findings. Const. art. 4, § 31 (amend. 71) provides:

The supreme court may not discipline or retire a judge or justice until the judicial qualifications commission recommends after notice and hearing that action be taken and the supreme court conducts a hearing, after notice, to review commission proceedings and findings against a judge or justice.

A de novo review from which we make our own determination of the law and of the facts is required. In re Buchanan, 100 Wash.2d 396, 400, 669 P.2d 1248 (1983). Matter of Cieminski, 270 N.W.2d 321, 326 (N.D.1978) said:

[T]he duty, authority, burden and responsibility of determining and making the actual judgment, together with the imposition of whatever penalty may be appropriate or necessary, rests with the Supreme Court. With this responsibility and power comes the concomitant obligation to conduct an independent inquiry into the evidence to determine whether or not the evidence merits the imposition of any penalty as recommended by the [Commission] or otherwise.

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Accordingly our review, as established by case law, is de novo on the record. In the Matter of Heuermann [90 S.D. 312], 240 N.W.2d 603 (S.D.1976); In re Hanson, 532 P.2d 303, 308 (Alaska 1975); Geiler v. Commission on Judicial Qualifications, 10 Cal.3d 270 , 110 Cal.Rptr. 201, 515 P.2d 1 (1973); and In re Diener, 268 Md. 659, 304 A.2d 587 (1973).

(Italics ours.) "[T]he term 'recommend' manifests an intent to leave the court unfettered in its adjudication. This court's constitutional responsibility cannot be abandoned by the delegation of the fact-finding power to an administrative agency or the masters." In re Nowell, 293 N.C. 235, 246, 237 S.E.2d 246 (1977).

If necessary, supplemental materials may be accepted if they will aid this court. DRJ § 7. An "independent evaluation of the evidence" allows maximum flexibility for supplementing the record. DRJ § 7, comment. In re Kneifl, 217 Neb. 472, 477, 351 N.W.2d 693, 696-97 (1984), stated:

From the power to permit the introduction of additional evidence, we conclude that our review is to be de novo.

When no new evidence is received, our review must be de novo on the record. See Matter of Cieminski, 270 N.W.2d 321 (N.D.1978). Our duty, then is to determine upon our own independent inquiry, as to the charges of alleged misconduct referred to us, whether the evidence clearly and convincingly proves that respondent acted in such a manner as to prejudice the administration of justice and bring the judicial office into disrepute. See In re Conduct of Roth, 293 Or. 179, 645 P.2d 1064 (1982); Matter of Heuermann, 90 S.D. 312, 240 N.W.2d 603 (1976).

Review by this court is not confined only to the record, therefore, our review is to be de novo. Regarding what a "de novo" hearing embraces, in 2 Am.Jur.2d § 698, p. 597 (1962), we find:

A trial or hearing "de novo" means trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered.... Even though designated an "appeal," a review in which the court is not confined to a mere reexamination of the case as heard before the administrative agency but hears

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the case de novo on the record before the agency and such further evidence as either party may see fit to produce is to be regarded as an original proceeding. iThus, on a trial or hearing de novo it has been held immaterial what errors or irregularities or invasion of constitutional rights took place in the initial proceedings.

(Italics ours. Footnotes omitted.) See also Aiudi v. Baillargeon, 121 R.I. 454, 399 A.2d 1240 (1979); Herzberg v. State ex. rel. Humphrey, 20 Ariz.App. 428, 513 P.2d 966 (1973); State v. Pollock, 251 Ala. 603, 38 So.2d 870, 7 A.L.R.2d 757 (1948); Fowler v. Young, 77 Ohio App. 20, 32 Ohio Ops. 298, 65 N.E.2d 399 (1945); Cooper v. State Bd. of Med. Exam'rs, 35 Cal.2d 242, 217 P.2d 630, 18 A.L.R.2d 593 (1950); Commonwealth v. Cronin, 336 Pa. 469, 9 A.2d 408, [736 P.2d 643] 125 A.L.R. 1455 (1939). For almost the first hundred years of statehood the discipline and removal of judges lay with the judiciary itself and with the electorate. Now the judiciary is the only one of the three branches of government for which a separate administrative body has been established to review the performance of its elected officials. The independence of the referees of government must not be compromised nor judges intimidated by a judicial qualifications commission that fails to remember that its dual function is not only to protect the public from judges who violate the Code of Judicial Conduct, but also to protect judges from harassment and meritless complaints. The above principles apply to our analysis of the proceedings below.

II

We turn to the Commission's investigation, prosecution and adjudication of the allegations made against Judge Deming.

CONSTITUTIONALITY OF PUBLIC HEARING

Judge Deming argues that Const. art. 4, § 31 (amend. 71) and RCW 2.64.110 (in the form and wording at the time) mandated that all Commission proceedings be kept confidential and that the holding of a public hearing was

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patently unconstitutional. Regarding confidentiality of proceedings, Const. art. 4, § 31 (amend. 71) [1] provided:

The commission shall establish rules of procedure for commission proceedings including due process and confidentiality of proceedings.

RCW 2.64.110 provides in part:

The commission shall establish rules for the confidentiality of its proceedings with due regard for the privacy interests of judges or justices who are the subject of an inquiry and the protection of persons who file complaints with the commission. Any person giving information to the commission or its employees, any member of the commission, or any person employed by the commission is subject to a proceeding for contempt in superior court for disclosing information in violation of a commission rule.

Pursuant to Const. art. 4, § 31 (amend. 71) and RCW 2.64.110, the Commission promulgated JQCR 4(g):

If the commission determines that the public interest in maintaining confidence in the judiciary and the integrity of the administration of justice so require, it may order that some or all aspects of the proceeding before the commission may be publicly conducted or otherwise reported or disclosed to the public. The judge will be given notice and an opportunity to be heard on the issue before the commission determines to make a hearing public.

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Provisions similar to Const. art. 4, § 31 (amend. 71) have been construed to allow some discretion in bodies comparable to the Commission regarding the holding of a public hearing. For example, the Michigan Supreme Court construed Mich. Const. art. VI, § 30(2) not to mandate that all judicial tenure commission hearings be kept confidential.

The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

[736 P.2d 644] In re Probert, 411 Mich. 210, 223, 308 N.W.2d 773 (1981). Pursuant to this provision, the Michigan Supreme Court enacted a rule providing that Judicial Tenure Commission hearings held subsequent to the filing of a complaint were to be conducted in public. Rule .22, Rules of the Judicial Tenure Commission, Gen. Ct. Rule 932 (1980). The North Dakota Supreme Court likewise made such a determination regarding similar language pertaining to judicial qualification hearings. See N.D.Cent. Code § 27-23-03(5); Rule 4, Rules of the Judicial Qualifications Commission.

If the Legislature had intended Const. art. 4, § 31 (amend. 71) and RCW 2.64.110 to mandate absolute confidentiality it could have used more explicit language. [2] The language of Const. art. 4, § 31 (amend. 71) indicates that some discretion in the Commission as to the holding of a public hearing was intended. The extent of that discretion, however, rests on important concerns favoring confidentiality.

Regarding the need and reasons for confidentiality in judicial disciplinary proceedings, J. Shaman and Y. Begue, Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process, 58 Temple L.Q. 755, 760

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(1985) posits:

Confidentiality is widely considered an essential element of judicial discipline. Proponents of confidentiality maintain that it serves several functions, including: (1) encouraging participation in the disciplinary process by protecting complainants and witnesses from retribution or harassment, and reducing the possibility of subornation of perjury; (2) protecting the reputation of innocent judges wrongfully accused of misconduct; (3) maintaining confidence in the judiciary by avoiding premature disclosure of alleged misconduct; (4) encouraging retirement as an alternative to costly and lengthy formal hearings; and (5) protecting commission members from outside pressures.

(Footnote omitted.) See also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 835, 98 S.Ct. 1535, 1539-40, 56 L.Ed.2d 1 (1978); Comment, A First Amendment Right of Access to Judicial Disciplinary Proceedings, 132 U. Penn L.R. 1163, 1181-87 (1984). In re Inquiry Concerning a Judge, 333 So.2d 22, 23 (Fla.1976) states:

The need and reasons for confidentiality are: (1) to protect the judicial officer from unsubstantiated charges, and (2) to protect the complainant from possible recriminations, thereby keeping open sources of information. Confidentiality, however, should not be absolute in these types of proceedings when the reasons for the confidentiality doctrine no longer exist. This is particularly so when there is public knowledge of the incident, and confidence in the administration of justice is threatened due to the lack of information concerning disciplinary proceedings.

(Italics ours. Footnote omitted.)

During the investigatory phase of an inquiry into alleged misconduct confidentiality is mandated. Disclosed allegations, even though groundless, could prove damaging not only to a judge's reputation, but also to the administration of justice by adversely affecting a judge's ability to perform his or her duties. In addition, "[e]xoneration rarely commands the same public attention as a charge of wrongdoing." Rushford v. Civiletti, 485 F.Supp. 477, 479 (D.D.C.1980).

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Therefore, confidentiality during the investigatory phase protects a judge from the disclosure of vexatious and groundless accusations. Two interests conflict and compete to be weighed in the balance. On the one hand there is the interest in maintaining the effectiveness of the judiciary; on the other hand, there is the desire that hearings concerning[736 P.2d 645] the qualifications of public officials be conducted in public. After a determination that probable cause supports the allegations and a complaint is filed by the Commission, the solicitude for the protection of the judiciary lessens while the concern for the interests of the public increases. It was only between the time of the filing of a complaint based on probable cause and the time the matter reached this court that discretion in the Commission as to confidentiality was allowed . when this proceeding was being conducted.

Const. art. 4 § 31 (amend 71) and RCW 2.64.110 indicate that confidentiality is the norm. RCW 2.64.110 expressly provides for contempt of court proceedings against those who leak or disclose confidential information. Indeed, statements by any person on the Commission or in its employ to the news media or to any other person not in the employ of the Commission concerning a matter under investigation and violative of the statute would not only be contempt of court but a breach of duty as an employee or member of the Commission. Before public disclosure of information and a public hearing was appropriate to these proceedings the following had to have occurred: (1) the filing of a formal complaint against a judge; (2) a finding of probable cause supporting the allegations made against a judge; (3) sufficient public knowledge of the allegations such that (a) a confidential hearing would not serve to protect the interests of the judge, and (b) a public hearing would best provide the judge with an opportunity to confront the allegations made against him or her; (4) a determination that there was no need to protect the complainants from possible recrimination, retribution or harassment, and that a public hearing would not eliminate sources of information; and (5) a determination that confidence

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in the administration of justice was threatened due to the lack of information concerning the disciplinary proceeding. Additionally, a judge had to be given notice and an opportunity to be heard regarding the holding of a public hearing. [3]

DUE PROCESS CONSIDERATIONS

The Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). Young v. Konz, 91 Wash.2d 532, 539, 588 P.2d 1360 (1979), stated:

In speaking of due process, we have said:

The essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.

In re Hendrickson, 12 Wn.2d 600, 606, 123 P.2d 322 (1942).

Our state system, which provides for nonattorney judges in small sparsely populated areas, only in misdemeanor and gross misdemeanor cases, with de novo review from all cases, unless review is voluntarily waived, clearly meets this standard.

Accord, Shaw v. Vannice, 96 Wash.2d 532, 537, 637 P.2d 241 (1981); see also Gnecchi v. State, 58 Wash.2d 467, 470, 364 P.2d 225 (1961).

De novo review of the Commission's proceeding provided Judge Deming additional due process protection. Nevertheless, it is appropriate to discuss each alleged violation of due process to help insure that each judge against whom a citizen complains will receive from the Commission an opportunity to be heard at a meaningful time and in a meaningful manner.

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A.

NOTICE AND OPPORTUNITY TO BE HEARD CONCERNING THE HOLDING OF

A PUBLIC HEARING

The October 21, 1985, letter which the Commission sent to Judge Deming indicated[736 P.2d 646] that the applicability of JQCR 4(c)(4) and 4(g), which pertain to the holding of a public hearing, were being considered and advised that "anything pertaining thereto you wish the Commission to consider should be submitted to the Commission Office by October 31, 1985." This letter alerted Judge Deming of the possibility of a public hearing and was "reasonably calculated to apprise [petitioner] of proceedings which will affect him." Duffy v. Department of Soc. & Health Servs., 90 Wash.2d 673, 679, 585 P.2d 470 (1978). The notice requirement of due process was met regarding the holding of a public hearing.

In response to the Commission's letter. Judge Deming's counsel submitted a letter asking for oral argument on the matter. The Commission did not allow oral argument. It asserts that oral argument was not necessary because oral argument on a motion is not a due process right. See Parker v. United Airlines, Inc., 32 Wash.App. 722, 728, 649 P.2d 181 (1982), which held that oral argument was not required before the grant of a summary judgment motion because "the trial court's order clearly shows ... that the trial court considered all pleadings, briefs, and affidavits of the parties." We agree that due process consideration did not require the right of oral presentation. While it might have been helpful to have permitted oral argument

on the motion, it was not a requirement of due process that oral argument be permitted.

However, the holding of a public hearing was of major concern and moment to the accused and once it was decided that it would be held, the judge and the judicial system stood to be diminished regardless of the outcome of the hearing. Over the centuries the intangible yet precious value of one's reputation has been recognized.

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A good name is better than precious ointment; ... Ecclesiastes, ch. 7, v. 1.

A good reputation is more valuable than money. Maxim 77, Publilius Syrus, circa 42 B.C.

The purest treasure mortal times afford is a spotless reputation. W. Shakespeare, Richard II, act 2, scene 2, line 177.

Reputation said: If once we sever,

Our chance of future meeting is but vain:

Who parts from me, must look to part forever,

For Reputation lost comes not again.

C. Lamb, Love, Death and Reputation, stanza 4.

In Olympic Forest Prods, Inc. v. Chaussee, Corp., 82 Wash.2d 418, 422-24, 511 P.2d 1002 (1973), it was stated:

For over a century it has been recognized that "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 [17 L.Ed. 531] (1864). The fundamental requisites of due process are "the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914), and "notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). Thus, "at a minimum" the due process clause of the Fourteenth Amendment demands that a deprivation of life, liberty or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." Mullane, at 313. Moreover, this opportunity "must be granted at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 [1191] (1965).

Synthesizing decisions "representing over a hundred years of effort," the United States Supreme Court recently refined these fundamental requirements of procedural due process into the following standard:

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty

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through the judicial [736 P.2d 647] process must be given a meaningful opportunity to be heard.

Boddie v. Connecticut, 401 U.S. 371, 377, 28 L.Ed.2d 113, 91 S.Ct. 780 [785-86] (1971).

However, while the minimal requisites of due process are definite, their form may vary according to the exigencies of the particular situation.

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been

evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162, 95 L.Ed. 817, 71 S.Ct. 624 (1951). (Frankfurter, J., concurring.)

This flexibility means that "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." Bell v. Burson, 402 U.S. 535, 540, 29 L.Ed.2d 90, 91 S.Ct. 1586 [1589-90] (1971). The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them. See Goldberg v. Kelly, 397 U.S. 254, 267, 25 L.Ed.2d 287, 90 S.Ct. 1011 [1020] (1970). Also, in determining the specific procedures required by due process under any given set of circumstances we must consider:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection

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implicit in the office of the functionary whose conduct is challenged, [and] the balance of hurt complained of and good accomplished ...

Joint Anti-Fascist Refugee Comm. v. McGrath, supra at 163 (Frankfurter, J., concurring.)

No harm would have occurred had the opportunity for oral argument been granted. Great harm could have resulted from its refusal.

We conclude that (a) oral argument was not required by due process, (b) it would have been preferable to grant oral argument to the accused for his protection and (c) the lack of oral argument did not prejudice him. The allegations against Judge Deming had been carried by the news media throughout the state, especially in Pierce County. A private hearing would not have spared him from the disclosure of the allegations. Further, the holding of a private hearing would have damaged the public's confidence in the administration of justice and led to suspicions as to the objectiveness of the hearing. A public hearing provided Judge Deming with the best opportunity to confront the allegations and clear his name. The harm done, if any, cannot now be undone by the holding of a private hearing. A remand on this issue would serve no purpose. Given that this case is one in which a public hearing was appropriate in light of the aforementioned concerns, the fact that Judge Deming was not allowed to present oral argument regarding the holding of a public hearing did not amount to a prejudicial due process violation.

B.

NOTICE OF THE CHARGES

The notice requirements relating to the Commission proceedings are set forth [736 P.2d 648] by JQCR 6(b). [4] We interpret

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JQCR 6(b) to mean that the accused judge, prior to the preliminary hearings held to determine the existence of probable cause, is

entitled to a copy of the specific charges brought against him and a list of the witnesses to be called. Furthermore, pursuant to JQCR 6(c), the judge is entitled to be present at the preliminary probable cause hearing and may present evidence to rebut the allegations and charges. On July 3, 1985, the Commission provided Judge Deming with a statement of allegations informing him of the investigation and the nature of the charges against him. General and specific allegations were set forth. Judge Deming was able to submit a detailed response to the allegations. In addition, the formal complaint provided him with detailed incidents of alleged improper behavior. Pursuant to JQCR 6(b), petitioner received ample notice of the charge against him.

C.

THE RIGHT TO PRESENT EVIDENCE AND TO CONFRONT ACCUSERS.

Judge Deming asserts that he was denied the right to present evidence as guaranteed by JQCR 10. [5] He argues

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that this right was curtailed by the Commission's ruling on the motion in limine regarding witnesses' sexual histories and certain statements not made in his presence. The application of the Rules of Evidence supports the grant of the motion in limine. Evidence which is not relevant is inadmissible. ER 402. Even if relevant, such evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403. The grant of the motion in limine was proper because the witnesses' past sexual histories and certain statements not made in the presence of Judge Deming were not relevant. The proper focus of the inquiry was the conduct of Judge Deming. The past sexual activity of his accusers, if made a subject of inquiry in the public hearing, would have unfairly and irretrievably damaged their own reputations and was irrelevant as to the appropriateness of his conduct. In addition, Judge Deming did not make any offers of proof as to any of the excluded evidence. He also failed to challenge the motion in limine after the Commission granted it.

Judge Deming alleges that the right of confrontation was curtailed by a request that he turn away form a witness during her deposition. While we find no basis for this ruling from the record, neither is there a showing that it was improper. The record indicates that petitioner had ample opportunity to present evidence and confront his accusers.

[736 P.2d 649] D.

THE RIGHT TO A PROMPT RESOLUTION OF THE ALLEGATIONS

Judge Deming argues that he was denied the right to a prompt resolution of the allegations in the complaint as guaranteed by JQCR 10(a). He asserts that over 6 months passed between the time the Commission began investigating the matter and the time it filed the formal complaint. To hold that investigations should be limited raises the possibility of a less than thorough investigation. However, when an allegation of judicial misconduct has been made

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against a judge, two considerations come into play. If the allegations have merit as a violation of the Code of Judicial Conduct, they should be speedily investigated and a formal complaint filed. If the allegations are without merit, they should be speedily dismissed. A judge who is violating the Code of Judicial Conduct should be disciplined as soon as possible so that the inappropriate practice will be stopped. A judge who is unfairly accused has a right to a prompt resolution of the allegations considered under JQCR 5 and to a prompt investigation under JQCR 6.

The record before us and the findings of the Commission reflect that a number of the improprieties which occurred took place in 1983 and 1984, yet formal charges were not filed until July 3, 1985. If prejudice could be shown from such a delay, dismissal of the charges would be proper. However, once the charges were filed, the Commission moved with appropriate dispatch. Once an investigation has been completed, a judge is entitled to a speedy closing of the file or a prompt filing of charges with a hearing to follow within a reasonable time. In July 1985, the Commission informed Judge Deming of the nature of the charges. He responded in August. The Commission filed its complaint in October. The hearing was held in December. We find 90 days to be a reasonable time in these circumstances. Following the hearing Judge Deming received a prompt resolution of the allegations. Judge Deming also contends that he was given inadequate time to prepare for the hearing. We reject this argument because at no time was a continuance requested.

E.

THE ATMOSPHERE OF THE FACT-FINDING HEARING

Judge Deming asserts the public fact-finding hearing was conducted in a "circus" atmosphere. The purpose of a public hearing is not to be educational or entertaining to the onlookers but to ascertain the truth. The hearings could have been conducted with greater decorum, but this fact does not require a remand. First, Judge Deming contends

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that witnesses were not properly excluded. However, he never asked for the exclusion of witnesses. See ER 615. Second, the interruptions ended after the Commission admonished the persons making them. Such interruptions are possible at any trial or hearing and we do not see how petitioner was prejudiced. Third, the acknowledgment of the presence of the media by the Commission did not prejudice Judge Deming. His counsel acknowledged the media as well.

F.

THE AUTHORITY OF THE COMMISSION

DRJ 12(a) provides that "[t]he Commission may informally admonish or reprimand a judge, but only with the agreement of that judge." Judge Deming asserts that the holding of a public hearing amounted to a public censure, therefore, the Commission exceeded its authority. The holding of the public hearing did not usurp this court of its power to impose the appropriate sanction. As the imposition of censure, suspension or removal remains solely with this court, we do not find that the Commission exceeded its authority.

G.

CONCLUSION

We find that Judge Deming had an opportunity to be heard at a meaningful [736 P.2d 650] time and in a meaningful manner. The infirmities of the Commission's proceeding were not such that the additional due process protection provided by the de novo review by this court cannot act to cure them. We add, however, that even though a judicial disciplinary proceeding is not criminal in nature, because of the potentially severe consequences to a judge, certain due process protections are required. Every judge charged by the Commission is entitled to: (1) notice of the charge and the nature and cause of the accusation in writing; (2) notice, by name, of the person or persons who brought the complaint; (3) appear and defend in person or by counsel; (4) testify in his own behalf; (5) the opportunity to confront witnesses

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face to face; (6) subpoena witnesses in his own behalf; (7) be apprised of the intention to make the matter public; (8) appear and orally argue the merits of the holding of a public hearing; (9) prepare and present a defense; (10) a hearing within a reasonable time; (11) the right to appeal. [6]

We hold that a judge accused of misconduct is entitled to no less procedural due process than one accused of crime. See U.S. Const., amends. 5, 6, 14; Const. arts. 1, § 22 (amend. 10), 4, § 31 (amend. 71). The lawyer charged with misconduct in a disbarment proceeding is entitled to procedural due process. In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968). As stated therein:

Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.... He is accordingly entitled to procedural due process, which includes fair notice of the charge. ... Therefore, one of the conditions this Court considers in determining whether disbarment by a State should be followed by disbarment here is whether "the state procedure from want of notice or opportunity to be heard was wanting in due process."

A judge is entitled to the same procedural due process protection when facing disqualification as a lawyer facing disbarment.

Justice William O. Douglas concurring in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 177-80, 71 S.Ct. 624, 651-53, 95 L.Ed. 817 (1951) stated:

It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. The powers being used are the powers of government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him.... When the Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the

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Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.

* * *

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil.... The rudiments of justice, as we know it, call for notice and hearing--an opportunity to appear and to rebut the charge.

* * *

It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law....

* * *

The Loyalty Board convicts on evidence which it cannot even appraise. [736 P.2d 651] The critical evidence may be the word of an unknown witness who is "a paragon of veracity, a knave, or the village idiot." His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused. The accused has no opportunity to show that the witness lied or was prejudiced or venal.

Without knowing who her accusers are she has no way of defending....

Dorothy Bailey was not, to be sure, faced with a criminal charge and hence not technically entitled under the Sixth Amendment to be confronted with the witnesses against her. But she was on trial for her reputation, her job, her professional standing. A disloyalty trial is the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice.

(Citations omitted.) The sentiments expressed by Justice Douglas apply with equal force here.

THE APPEARANCE OF FAIRNESS

Judge Deming argues that the appearance of fairness doctrine provides procedural protections beyond the minimum

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requirements of due process. The issue presented raises due process considerations. The application of the appearance of fairness doctrine is inappropriate here. Washington Med. Disciplinary Bd. v. Johnston, 99 Wash.2d 466, 663 P.2d 457 (1983). As to the combination of functions in one agency, it was stated:

[W]e detect no inherent unfairness in the mere combination of investigative and adjudicative functions, without more, that would prompt invocation of the appearance of fairness doctrine. The bare fact that the same administrative adjudicators also are clothed with investigative powers does not mean the case will be decided on an improper basis or that there will arise a prejudgment on the ultimate issues. We must presume the board members acted properly and legally performed their duties until the contrary is shown. Hoquiam v. PERC, 97 Wn.2d 481, 646 P.2d 129 (1982); Rosso v. State Personnel Bd., 68 Wn.2d 16, 20, 411 P.2d 138 (1966). We are convinced the mere combination of adjudicative and investigative powers in one agency, without more, would not be viewed by a reasonably prudent and disinterested observer as denying any party a fair, impartial, and neutral hearing.

Johnston, at 479-80, 663 P.2d 457. As stated in the concurring opinion by Justice Utter, "the appearance of fairness doctrine should consist of no more than importing procedural due process safeguards into quasi-judicial proceedings of legislative bodies." Judge Deming argues that the addition of the prosecutorial function to the adjudicative and investigative functions constitutes the "something more" required by Johnston which raises the "specter of unfairness" to any disinterested observer.

In Johnston the majority, in several instances, notes that the Board discussed "the concentration of investigatory, prosecutory, and adjudicatory functions in one body." Johnston, at 476, 663 P.2d 457. Thus, Johnston implies that the combination of investigatory, prosecutory and adjudicatory functions in one body does not necessarily constitute the "something more" which violates due process requirements.

There are important distinctions between this case and Johnston. First, the majority of members on the Commission

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were attorneys, unlike the medical disciplinary board members in Johnston. Courts in other jurisdictions have rejected similar challenges to judicial boards and commissions. See, e.g., Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); In re Rome, 218 Kan. 198, 542 P.2d 676 (1975); In re Hanson, 532 P.2d 303

(Alaska 1975). Nicholson v. Judicial Retirement & Removal Comm'n, 562 S.W.2d 306 (Ky.1978), rejecting that the mere combination of all three functions in a single body violated due process, held that respondent had failed to overcome "the presumption of honesty and integrity of the members[736 P.2d 652] of the Commission, most of whom are members of the bench or bar and cognizant of the proper standards applicable at each stage of the proceedings." Nicholson, at 309. Second, the Commission only has authority to make recommendations. In Johnston, the Board had the power to impose sanctions. In re Nowell, 293 N.C. 235, 244, 237 S.E. 2d 246 (1977), held that "[a]n agency which has only the power to recommend penalties is not required to establish an independent investigatory and adjudicatory staff." See also Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). Third, Commission rules provide safeguards against bias and prejudgment. For example, Judge Deming had the opportunity to file an affidavit of prejudice against any Commission member pursuant to JQCR 9(b) and to preemptorily challenge one Commission member pursuant to JQCR 9(c). He did not take advantage of this opportunity. Last, the investigation and prosecution of this case was conducted by staff personnel who should not participate in the decision-making process and who, from the record, did not do so. This separation is proper. See, In re Diener, 268 Md. 659, 304 A.2d 587 (1973), cert. denied sub nom. Broccolino v. Maryland Comm'n on Judicial Disabilities, 415 U.S. 989, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974). The distinctions between this case and Johnston support a holding that the requirements of due process have not been violated.

The failure to strictly adhere to a complete separation of the investigatory, prosecutory and adjudicatory phases is not always a violation of due process.

The concentration of functions in a single agency may be unfortunate and subject to much criticism, but where it has been designed by the Legislature and generally comports with notions of fairness and due process, it is almost uniformly upheld. See Withrow v. Larkin, [421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975) ]; Kennecott Copper Corp. v. FTC, 467 F.2d 67, 79 (10th Cir.1972), cert. denied, 416 U.S. 909, 40 L.Ed.2d 114, 94 S.Ct. 1617 (1974). See generally B. Schwartz, Administrative Law § 111 (1976).

Johnston, 99 Wash.2d at 477, 663 P.2d 457. The record supports the conclusion that here the adjudicatory function was separated from the investigatory and prosecutorial function. We find no due process violation. Johnston is controlling.

EFFECTIVE ASSISTANCE OF COUNSEL

Judge Deming asserts that he did not have the effective assistance of counsel at the public hearing. He argues that initial counsel's consistent inaction and neglect cannot be dismissed as trial tactics upon which attorneys frequently, if ever, differ or disagree.

A reversal based on ineffective assistance of counsel has two components. First, counsel's performance must fall below an objective standard of reasonableness. The losing party carries the burden of proof that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984). In applying this two-prong test, judicial scrutiny must reconstruct the circumstances of counsel's challenged conduct and determine whether there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. Strickland, at 691-96, 104 S.Ct. at 2066-69. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, at 694, 104 S.Ct. at 2068.

The record reveals that initial counsel's alleged deficiencies and unprofessional errors did not alter the outcome of

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the proceeding. Initial counsel gave no guaranty of a successful or a letter-perfect defense. See State v. Rhoads, 101 Wash.2d 529, 535-36, 681 P.2d 841 (1984); In re Richardson, 100 Wash.2d 669, 675, 675 P.2d 209 (1983); State v. Renfro, 96 Wash.2d 902, 909, 639 P.2d 737, cert. denied 459 U.S. 842, 103 S.Ct. 94, 74 L.Ed.2d 86 (1982). There has been no showing that original counsel's performance prejudiced the defense.

[736 P.2d 653] III

THE CODE OF JUDICIAL CONDUCT

Washington State judges are bound to abide by the Code of Judicial Conduct. Canon 1 of that Code provides:

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 provides:

(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 3(A)(3) provides:

A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Canon 3(B)(1) provides:

A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of

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the administrative responsibilities of other judges and court officials.

Canon 3(C)(1) provides:

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned ...

The application of the Canons of Judicial Conduct pertains to a judge's performance of his or her judicial office and any activity undertaken in the performance of that office.

EVIDENCE SUPPORTING JUDGE DEMING'S VIOLATION OF THE CODE

In a judicial disciplinary proceeding, the applicable standard of proof is "clear, cogent and convincing evidence." JQCR 14(d). Clear, cogent and convincing evidence is evidence which is weightier and more convincing that a preponderance of the evidence, but which need not reach the level of "beyond a reasonable doubt." Davis v. Department of Labor & Indus., 94 Wash.2d 119, 126, 615 P.2d 1279 (1980); Bland v. Mentor, 63 Wash.2d 150, 385 P.2d 727 (1963). Judge Deming contends that this high standard of proof requires more than one person's word against another. In re McDonough, 296 N.W.2d 648, 692 (Minn.1979), rejects such a contention, stating:

The clear and convincing standard arises from an appreciation of the gravity of a disciplinary proceeding and the magnitude of the loss to which a disciplined judge is subjected. No mechanistic corroboration requirement is necessary; uncorroborated evidence may be clear and convincing if the trier of fact can impose discipline with clarity and conviction of its factual justification. In fact, depending on its source, uncorroborated evidence may be more reliable than that remotely corroborated by a dubious source.

(Italics ours.)

We turn to whether clear, cogent and convincing evidence supports the conclusion that Judge Deming violated the Code of Judicial Conduct.

The Commission alleges that Judge Deming used

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his position to attempt to enhance the position of a probation department employee with whom he was involved in a personal relationship. At the time of the incident Judge Deming was probation liaison judge, the judge designated to work [736 P.2d 654] most closely with the probation department. He had frequent contact with the Director of the Probation Department, who testified before the Commission as follows:

I received a phone call from Judge Deming before court, before 9:00 in the morning, and he said, "If you want my continued support as a probation liaison judge, you will promote [name of employee with whom Judge Deming was sexually involved] to the probation supervisor position," and then he said, "Do you understand what I am saying?"

Judge Deming labels this allegation a blatant lie. We find this witness's testimony to be credible when considered with the corroborative testimony of the many other women who testified, as did the Commission which was best suited to observe and determine credibility. Determinations of credibility are to be given considerable weight. See, In re Crowell, 379 So.2d 107, 109 (Fla.1979); Matter of Cieminski, 270 N.W.2d 321, 326 (N.D.1978). Further, Judge Deming's testimony demonstrates his lack of credibility concerning those areas where we find he violated the Code of Judicial Conduct. The evidence shows that Judge Deming lent the prestige of his office to advance the private interests of another. Such conduct violated Canon 2(B).

Judge Deming also stipulated that in spite of the relationship with the probation department employee, he retained his position as probation liaison judge and allowed his "friend" to appear in his court and make probation recommendations. This clearly raised an appearance of impropriety. The record indicates this relationship was known and talked about at the courthouse. It exacerbated problems within the probation department. One witness testified that Judge Deming's "friend" would use her ongoing relationship with Judge Deming "as a power play to intimidate,

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harass and antagonize other employees in that office." Another witness testified that flirtatious comments made to her by Judge Deming always increased his "friend's" hostility toward her. Two members of the probation department quit because of the harassing and retaliatory behavior of this woman. This relationship had a deleterious effect on administrative efficiency in the Pierce County District Court. Allowing his "friend" to appear in his courtroom did little to promote "confidence in the integrity and impartiality of the judiciary". Judge Deming's actions did not constitute criminal conduct but to the extent that his actions affected his judicial performance, as they did, this violated Canons 2(A), 3(B)(1) and 3(C)(1).

The Commission found that Judge Deming made a myriad of improper and offensive comments and sexual innuendos to women, either in public or in his courtroom in the presence of others. Allegations of sexual harassment were made by women from four groups: (1) District Court personnel; (2) Pierce County District Court probation personnel: (3) Pierce County Prosecuting Attorney personnel; and (4) Pierce County Department of Assigned Counsel (DAC). The witnesses at the public hearing testified as to numerous alleged incidents of sexual harassment and intimidation. We set forth illustrative excerpts but note that these examples are not exhaustive. A third-year law student, who worked as a Rule 9 intern for the DAC, testified:

Q Was there ever an occasion in connection with your duties as a Rule 9 intern that you felt that Judge Deming acted towards you in an improper manner?

A While I was in court?

Q Either while you were in court or in his chambers or in the office surrounding his chambers?

A There was. When I was back in chambers one time trying to get information from Lettie, Judge Deming came back and asked me if I would come into his chambers and take my clothes off and bend over.

Regarding this same incident another Rule 9 intern testified that "She'd come back the day that the incident happened where he had asked her to take her clothes off and

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bend over. She was very upset when she came back to the office." Judge [736 P.2d 655] Deming states this incident never happened and that this woman lied because a friend asked her to lie. Judge Deming also explains this testimony by alluding to a plot by a group from the DAC which was vindictive toward him.

A docket clerk for the District Court testified:

Q I wonder if you could describe to the Commission exactly what he did?

A He came out to my desk and he told me to stand up, he wanted to give me a hug and he gave me a hug, and when he did that he reached up very quickly and he unlatched my bra strap.

Q After he unlatched your bra strap, did he make a comment to you?

A He said something to the effect of, "Gee, I haven't lost my touch," and he was kind of tickled with himself.

Judge Deming stated unequivocally that this did not happen. He speculated that "other people" talked the docket clerk into lying. He admitted that he has hugged this woman on numerous occasions in a lot of circumstances. Further, he testified that he thinks she lied because of problems she had with Judge Deming's judicial assistant.

A Deputy Prosecuting Attorney testified as follows:

... I said, "Judge Deming, I have an order I need for you to sign," and I handed him the order. He read it, and as he was signing it, he still had it in his possession, and he said to me, "Is that a pin?" I looked down at my lapel and I didn't understand what he was talking about. He said, "No. There. Is that a pin?" That was at my breast line, and I had a blouse with buttons on it, and there was a gap so I had pinned it with a safety pin, and the way there was--I mean it was pretty obvious that I had pinned my blouse with a safety pin, and I had looked down, and so then I knew what he was talking about. He said, "Is that because you're so big?" And then he handed me back the order, and I took the order and left.

Judge Deming stated that he did not make this statement and called it an embellishment. This same young woman also testified:

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Q Was there a time when you had to testify as a witness in Judge Deming's court?

A Yes.

Q Would you describe on what occasion that was?

A It was a case where I had filed charges of some traffic offense, either a DWI or a licensing offense from the officer's report rather than the officer filing a citation. That was unusual. The citation evidently had been lost, and so I took the report and filed it in our citation form, and there was a question about that.

Q After you testified as a witness in his court, did Judge Deming call you?

A Yes.

Q What did he say to you when he called you?

A He called me and he said that he had reached a heightened state of excitement seeing me on the witness stand.

She further testified:

... I was training a deputy who had just been hired on ... I was showing him that sometimes we have to make xeroxes of things, so we were at the xerox machine, and Judge Deming came in through the doorway right there by the xerox machine. I don't remember if he put his arm around me, but he said to me, "You were great last night," and then he walked off.

This statement is corroborated by two witnesses. Judge Deming alleges that this woman has a bad recollection and that he did not make such a comment to her. Further, if it was said, he states that it was not said in a vacuum.

A probation officer testified as follows:

Q Were there ever any occasions when Judge Deming attempted to touch you in an uninvited manner?

A Yes.

Q Would you describe to the Commission how this occurred?

[736 P.2d 656] A In open court three times when I was getting--when I was there on a violation hearing and I was getting ready to leave and another case was coming up, he would ask me to approach the bench, and I would go up there to the little witness stand that he had and he'd stand there like he was going to tell me something. He would ask me to come closer, and I would,

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and he would say, "I just wanted to touch you," and he touched me on the arm and then I would leave.

Q How many times did this occur?

A Three.

Q How did you react to these instances?

A I would be embarrassed, and then just walk out and leave.

Q In the summer of 1985 was there an incident that took place in his assistant's office?

A Yes. He would ask me if it was okay if he touched me and I would--I think I said no and he kind of chased me around his clerk's desk. He ended up jumping over the top of one of them to touch me ...

Judge Deming attributed this woman's "lie" to her involvement with the Director of the Probation Department and the pressures of being a pawn. The Probation Director, this young woman's supervisor, testified:

After she complained [to the Personnel Department about Judge Deming] and Personnel was investigating, I noticed that [she] would--she would be very, very apprehensive about going into the courtroom, so much so that it reached the point she asked a male staff person, Milt Harkness, to accompany her. She felt that Judge Deming did not say those things in front of Mr. Harkness. And I felt so terribly for her that she had to go through that and I just decided not to allow her to go into his courtroom anymore. I transferred all of her cases finally to a lot of the other staff members in the Probation Department.

This testimony indicates that the Probation Director's perception of the situation between this woman and Judge Deming was such that she decided it to be necessary to keep her out of his courtroom. Thus, this probation department employee was unable to properly perform her job.

Another Deputy Prosecuting Attorney testified that at the end of the docket one day Judge Deming said: " 'Counselor,' or something to get my attention, and he said, 'I would really like to jump your bones.' " Judge Deming asserted this young woman's statement is taken out of context and that her recollection is erroneous. He admitted,

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however, that he remembers a conversation where these words were used.

Yet another young woman, from the DAC, testified about an incident which took place in court:

... I was standing, and His Honor looked over at me and called my name. He said, "[Name]," and I looked up, and he held his hand to his face. There were people on his left. He held his hand to his face, and he winked at me, and then he kissed at me (demonstrating) like that. I looked down. (Noise Interruption) Is that a comment? I looked down and my client said something to the effect, "What's going on," because he saw it. I turned around, and there is a gallery with the people, the defendants, the other defendants, my client was sitting behind me, and they're looking up at me ...

* * *

I looked back, and of the people sitting there some of them were glaring at me, and some of them were giggling. Some of them were talking to the people next to them, and in general it was a very confusing and embarrassing position to be put in.

Judge Deming denied that the kisses in court ever happened.

A Rule 9 Intern from the DAC testified:

A I have a cat. I have a cat who had hormone problems. Her hair fell out once. And I was in--I don't remember if I was waiting for arraignments [736 P.2d 657] to start or what but I was talking to Lettie Hendrickson and I said, "My cat, her hair fell out and the doctor gave her a shot of hormone," blah-blah-blah.

* * *

Q So [this conversation] would have been in the Judge's antechamber?

A Yes.

Q Go ahead.

A So Judge Deming walked up and he kind of looked at--he had been listening and he turned around and said, "Well, did you hear the hair fell out of [Name]' § pussy?

This woman also testified:

Q Did he ever make any comments in court while on the bench that you thought were offensive to you?

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A I remember on April 2nd, 1984 I had a case in which all I had to do was get a motion to consolidate clients, an order to consolidate. I had the motion previously and the Judge had granted it, and I have presented the order. So I was sitting there waiting. I had cases in other courtrooms pending, and the prosecutor, Doug Clough (ph. sp.), looked over at me, and I go, "This will be really fast," I was whispering to him, "let me go." So Doug said, "Well, Your Honor, Miss [Name] is here on a matter that will be very quick," at which time he smiled and said, "Oh, she's here for a quickie, uh."

A transcript of Judge Deming's "quickie" comment is in the record. The comment was taped as it was made at the end of a District Court proceeding.

Judge Deming asserted that his accusers lied because: other people talked them into lying; of politics and personality disputes; of the pressures of being a pawn; they were part of the pack; they did not like him; or they were "goofy." Judge Deming implied that one witness may have lied because she had talked to the Commission's counsel. Several witnesses asserted that Judge Deming intimated affairs, which he denied in each case. Regarding the testimony of one witness, Judge Deming admitted that he touched her in a hallway but asserted that it was a joke. Several witnesses indicated that they felt unable to respond to Judge Deming's harassment because they were intimidated by his authority.

Judge Deming's explanation of the testimony of his accusers is not credible in view of the overwhelming testimony which contradicts his view of the evidence. The widespread nature of the allegations against Judge Deming discredit any assertion of a plot against him. His attempts to explain the reasons why the witnesses testified as they did ring untrue. He offers no credible reason as to why so many individuals would be vindictive. The totality of the testimony about incidents of sexual harassment is overwhelming. Clear, cogent and convincing evidence supports the conclusion that Judge Deming sexually harassed these

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women.

The victims of Judge Deming's inappropriate actions were women who had to appear in his courtroom or were under his supervision and control. His actions were unprofessional, demeaning and embarrassing to the involuntary participants, who suffered varying degrees of anger, anguish, intimidation and humiliation. Judge

Deming's sexual harassment and intimidation of women subject to his authority is inexcusable, and violates the Code of Judicial Conduct. These actions were all related to the performance of his judicial duties and show a lack of the necessary qualifications to be a judge and were violations of Canons 1, 2 and 3(A)(3).

Judge Deming's conduct while in court or dealing with judicial business cannot be condoned. Whether it reflects a misguided sense of humor, an insecurity, an inability to relate on an acceptable basis with persons of the opposite sex or some other social maladjustment is not material to the issues raised. Nor is it material that we feel a sense of sadness and appreciate the tragic consequences of his lack of social graces, restraint and decorum. The flaw in his judicial temperament is inconsistent with service as a judge.

[736 P.2d 658] Comments made by Judge Deming while sentencing defendants were also challenged by the Commission as improper. We do not find that all of the complained of comments merit sanctions. A judge, within reason, is entitled to latitude in his statements to defendants from the bench without being critiqued by others so long as he or she maintains decorum. However, taunts about homosexuality in prison, threats of police brutality, and threats of improper sentencing do not befit the dignity of our judicial system.

THE APPROPRIATE SANCTION IS REMOVAL

We must determine the appropriate sanction having found that Judge Deming violated the Code of Judicial Conduct. Three sanctions may be imposed by this court: censure, suspension or removal. Const. art. 4, § 31 (amend. 71).

Judge Deming argues that in view of all of the facts, his misconduct, if any, does not rise to a level warranting removal. He argues mitigating factors make a reprimand or censure more appropriate. The mitigating factors suggested by Judge Deming are: (1) he has acknowledged the inappropriateness of the romantic relationship with the Probation Department employee; and (2) he fully cooperated with the Commission.

Generally, in determining the appropriate sanction, this court will give serious consideration to the Commission's recommendation. In this case the Commission unanimously recommended removal. However, this court must ultimately decide the appropriate sanction.

In making this decision, our primary concern will be to provide sanctions sufficient to restore and maintain the dignity and honor of the position and to protect the public from any future excesses. ... These sanctions must also be sufficient to prevent reoccurrences.

In re Buchanan, 100 Wash.2d 396, 400, 669 P.2d 1248 (1983).

In Buchanan we censured a judge who we found to have sexually harassed women (both verbally and physically), made racial slurs and retaliated against witnesses who testified against him before the Commission. We indicated that such conduct warrants a strong, if not the strongest, available sanction. Buchanan, at 400-01. Censure was the strongest available sanction in Buchanan because at the time the sanction was imposed the judge no longer served on the bench.

In In re Crowell, 379 So.2d 107 (Fla.1979), a judge was removed from office for a pattern of conduct which demonstrated his unfitness to hold judicial office.

Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evince of an accumulation of small and ostensibly innocuous incidents which, [taken] together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary.

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In re Kelly, 238 So.2d 565, 566 (Fla.1970). While some of Judge Crowell's conduct is subject to varying inferences as to its harmfulness or innocuousness, the evidence as a whole shows a continuing pattern of conduct that does not comport with the standards of impartiality and restraint required of judicial officers.

(Italics ours.) Crowell, at 110.

The North Carolina Supreme Court removed a judge from office in In re Martin, 302 N.C. 299, 275 S.E.2d 412 (1981), because he made sexual advances toward two female defendants. The court stated at 316, 275 S.E.2d 412:

[T]he proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office.

The Wisconsin Supreme Court in Matter of Seraphim, 97 Wis.2d 485, 294 N.W.2d 485, cert. denied 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (1980), found five instances of unsolicited conduct toward certain[736 P.2d 659] women, found by the women to be offensive and embarrassing, constituted gross personal misconduct.

While certain of the incidents, viewed individually may not amount to what can be considered gross personal misconduct, taken as a whole respondent's conduct does constitute a violation of Rule 11. It is significant that the panel found respondent's conduct toward each of these women to be wholly unsolicited.... [N]ot only did the women find respondent's conduct offensive and embarrassing, but several testified that they were particularly appalled by the fact that a member of the judiciary would act in such a way.

Seraphim, at 510, 294 N.W.2d 485. See also In T. Brooks, How Judges Get Into Trouble, 23 The Judge's Journal, 4, 7 (1984).

To determine the appropriate sanction, we consider the following nonexclusive factors: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct

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occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

We find that removal is the appropriate sanction because of the totality of Judge Deming's conduct which violated Canons 1, 2 and 3 of the Code of Judicial Conduct. His conduct has degenerated the respect of the public for the judiciary. Applying the evidence to the above factors we conclude that Judge Deming has demonstrated a lack of those personal and professional qualities which are

necessary to qualify one to hold judicial office in the State of Washington. The nature, extent and frequency of the acts of sexual harassment, all involving his judicial position, reflect an unacceptable pattern of behavior. This misconduct occurred both in and out of the courtroom, often in public situations. He exploited his official judicial position for which there can be no excuse. Nothing in the record suggests that additional time on the bench would result in an end to this inappropriate conduct.

The misjudgment displayed by Judge Deming in allowing a Probation Department employee, with whom he was engaged in a sexual relationship, to appear in his courtroom is apparent. Especially disturbing is the attempt to use his official position to advance the interests of this person. The impropriety of his conduct is obvious and the impropriety clear.

Judge Deming has acknowledged that at certain times his conduct was inappropriate. However, his general position remains that the allegations made against him stem from a plot instigated by an antagonistic group. Clear, cogent and convincing evidence shows otherwise.

Our decision that the actions of Judge Deming warranted

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his removal is based solely on our de novo review of the record and of the additional evidence received. The numerous allegations, which are supported by clear, cogent and convincing evidence in the record, indicate that Judge Deming often engaged in conduct which cannot be condoned. Judge Deming's conduct has irretrievably damaged public confidence in his ability to properly carry out judicial responsibilities. The sanction of removal is necessary to restore and maintain the dignity and honor of the judicial branch of government and best protect the public.

CONCLUSION

Based on our de novo review of the record we are convinced that clear, cogent and convincing evidence shows that Mark Deming does not possess the standards necessary to qualify him to seek or to hold judicial office. His violations of the Code [736 P.2d 660] of Judicial Conduct necessitate disqualification from office and, were he still serving in a judicial capacity, removal.

DOLLIVER, DORE, ANDERSEN, GOODLOE and DURHAM, JJ., concur.

UTTER, Justice (concurring).

With no basis in either the law or the facts, the majority reaches out to overturn a rule of the Judicial Qualifications Commission that was established pursuant to article 4, section 31 (amendment 71) of the Washington State Constitution and RCW 2.64.110. Although its discussion is not necessary to dispose of this case, the majority, without the benefit of argument in either the briefs or oral presentation to the court, also purports to vest judges accused of misconduct with the full panoply of rights afforded by the state and federal constitutions to persons accused of a crime. Its effort is futile as the discussion is clearly dicta and not binding on this court in future cases. I must, therefore, disagree.

In footnote 4 of its opinion, the majority cites JQCR 6(b), which sets forth the notice requirements relating to proceedings by the Judicial Qualifications Commission. The

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opinion notes that the issue was not raised by these proceedings because Judge Deming was fully informed of the identity of those bringing charges against him. It then, however, proceeds to disapprove and overrule, sua sponte, the portion of the rule that vests the Commission with discretion to

decide whether the judge under investigation should be informed as to the identity of the individuals who have filed verified statements instigating a preliminary investigation. The majority concludes--without explanation or justification--that an accused judge should also receive all the protections afforded by the state and federal constitutions to one accused of a crime. In so doing, the majority has rendered an advisory opinion that contributes nothing to the resolution of the case before the court, and grossly extends constitutional protections available to members of the judiciary. This result is not only unseemly, but it opens this court to the justifiable criticism that it has ignored constitutional precedent in order to grant a measure of self-interested protection to the judiciary not available to any other citizens similarly situated.

The prohibition against rendering advisory opinions is one that has been rigorously observed by this court. Fundamental requirements of standing, justiciability, and the doctrine of mootness all derive from the basic requirement that cases be advanced by plaintiffs with an actual stake in the outcome of a genuine controversy. See Lawson v. State, 107 Wash.2d 444, 460, 730 P.2d 1308 (1986); DiNino v. State ex rel. Gorton, 102 Wash.2d 327, 684 P.2d 1297 (1984); Diversified Indus. Dev. Corp. v. Ripley, 82 Wash.2d 811, 514 P.2d 137 (1973); Conaway v. Time Oil Co., 34 Wash.2d 884, 210 P.2d 1012 (1949); Adams v. Walla Walla, 196 Wash. 268, 82 P.2d 584 (1938). The court adheres strictly to this rule, although it has the power to render advisory opinions on those rare occasions where the interest of the public in the resolution of an issue is overwhelming.

It does not do so often; but when a proper case presents itself, this court exercises its discretion and gives its

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opinion, even though its judgment will not operate on any controversy between parties before it. The power to render such opinions should of course be exercised with great reluctance and only when there are urgent and convincing reasons for doing so ...

(Italics mine.) In re Elliott, 74 Wash.2d 600, 616, 446 P.2d 347 (1968).

In Citizens Coun. Against Crime v. Bjork, 84 Wash.2d 891, 895, 529 P.2d 1072 (1975), we stated that the power of the court to render advisory opinions is only to be exercised

where the question presented is one of great public interest and has been brought to the court's attention in an action where it is adequately briefed and argued ...

(Italics mine.) See also State ex rel. Distilled Spirits Institute v. Kinnear, 80 Wash.2d 175, 492 P.2d 1012 (1972) and Seattle[736 P.2d 661] v. State, 100 Wash.2d 232, 668 P.2d 1266 (1983).

No challenge to JQCR 6(b) has been raised, much less briefed by the parties in the instant case. Where, as here, the effect of an advisory opinion is to nullify a rule of a commission delegated rulemaking power by statute under constitutional mandate, this court should adhere closely to the position that a court should not interfere with a rule made by an agency

where its adoption is within the authority conferred by the controlling law, and it is not wholly unreasonable, or such a breach of discretion as to transcend the purpose for which the power to adopt it was conferred. The court will not aid in making or revising a rule, or pass on the wisdom or policy of a rule, or substitute its opinion for that of the administrative body. It is confined to deciding whether a rule is lawful and reasonable as applied to the facts of a particular justiciable case.

(Italics mine.) Robinson v. Peterson, 87 Wash.2d 665, 668-69, 555 P.2d 1348 (1976).

JQCR 6(b) represents one manifestation of the balance presented in judicial misconduct inquiries that is stressed throughout RCW 2.64.110 and the JQCR: "... due regard for

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the privacy interests of judges or justices who are the subject of an inquiry and the protection of persons who file complaints with the commission." (Italics mine.) RCW 2.64.110. Complainants against those in positions of power and authority may be uniquely subject to intimidation and retribution. As illustrated by the facts in the instant case, the Commission may need to rely on those who work within the court system in order to be alerted of instances of misconduct. Vesting the Commission with the discretionary power to keep the name of complainants confidential within the confines of the rights affirmatively granted the accused in JQCR 10(a) accounts for both issues balanced in these cases.

In footnote 4, the majority also declares that a judge accused of official misconduct must be accorded the full panoply of rights due to one accused of a crime. The majority reiterates its assertion at page 651, citing In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1225-26, 20 L.Ed.2d 117 (1968), which concerned a lawyer facing disbarment procedures. Ruffalo, however, made no such assertion concerning the scope of an accused lawyer's rights. Ruffalo had been given no notice that his alleged misconduct would be considered a disbarment offense until testimony was completed on all the material facts pertaining to that phase of the case. The cause was reversed because the accused had no notice as to the reach of the grievance procedure or the precise nature of the charges. This is in strong contrast to the instant case, where Judge Deming was made entirely aware of the misbehavior of which he was accused and the potential consequences of an adverse decision. The majority cites at great length to the discussion of the requirements of due process in Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash.2d 418, 422-24, 511 P.2d 1002 (1973). However, the majority fails to apply the essential principle of that discussion: that due process is a fluid concept that is measured by the nature of the interest that may be adversely affected. Loss of judicial office simply cannot be

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equated with the loss of freedom and rights that threaten a criminal defendant.

PEARSON, C.J., and BRACHTENBACH, J., concur.

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1 The Washington Legislature referred to the people a constitutional amendment which has been adopted and which effects a change in the language relating to confidentiality. SJR 136 (1986 Reg.Sess.) added the following paragraph:

Whenever the commission receives a complaint against a judge or justice, it shall first conduct proceedings for the purpose of determining whether sufficient reason exists for conducting a hearing or hearings to deal with the accusations. These initial proceedings shall be confidential, unless confidentiality is waived by the judge or justice, but all subsequent hearings conducted by the commission shall be open to members of the public.

Retained in the Constitution was the succeeding paragraph which reads:

The legislature shall provide for commissioners' terms of office and compensation. The commission shall establish rules of procedures for commission

proceedings including due process and confidentiality of proceedings.

Further the amendment changed the name of the commission to Commission on Judicial Conduct.

2 For example, the following language has been held to mandate confidentiality:

Del. Const. Art. IV, § 37 ("All hearings and other proceedings of the Court on the Judiciary shall be private ..."");

Idaho Code § 1-2103 ("All papers filed with and the proceedings before the judicial council or masters appointed by the Supreme Court, pursuant to this section, shall be confidential...."");

Md. Const. Art. IV, § 4B ("All proceedings, testimony, and evidence before the Commission shall be confidential and privileged ...").

(Italics ours.)

3 Since hearing the oral argument of this cause, SJR 136 has been adopted by the vote of the people. See note 1.

4 JQCR 6(b) provides:

The judge who is the subject of a preliminary investigation will be notified by the commission within 7 days after the filing of a verified statement. The judge shall also be advised of the nature of the charge, and, in the discretion of the commission, the name of the individual making the verified statement, if any, or that the investigation is on the commission's own motion.

Though not challenged in these proceedings, since Judge Deming was fully informed as to the persons bringing the charges, it is improper to place within the discretion of the Commission the decision as to whether the judge complained against should be informed as to the identity of the individuals making the verified statement. While complaints against a judge may not charge criminal violations, they strike at his or her reputation, livelihood and raison d'etre. A judge should be informed of his accusers in order that he or she may know the source and nature of the complaint, and be able to answer it with comprehension. The consideration given a judge should not be less than that given a criminal accused. See U.S. Const. amend. 6 and Const. art. 1, § 22.

5 JQCR 10(a) provides:

"The judge has a right to notice of the allegations concerning the judge which have been found by the commission to warrant a preliminary investigation. The judge shall have the right and reasonable opportunity at a factfinding hearing to defend against the allegations in the complaint by the introduction of evidence. The judge has the privilege against self-incrimination. The judge may be represented by counsel and may examine and cross-examine witnesses. The judge has the right to testify or not to testify on his or her own behalf. The judge has the right to issuance of subpoenas for the attendance of witnesses to testify or produce evidentiary matters. The judge has the right to a prompt resolution of the allegations in the complaint."

6 As observed by footnote 1, the adoption of SJR 136 and the resulting constitutional change removes items (7) and (8) as procedural steps.

# APPENDIX C

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**133 N.J. 67**
**627 A.2d 106**
**In the Matter of Judge Edward J. SEAMAN, A Judge of the Superior Court of the State of New Jersey.**
**Supreme Court of New Jersey.**
**Argued March 16, 1993.**
**Decided July 16, 1993.**

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Patrick J. Monahan, Jr., Trenton, on behalf of the Advisory Committee on Judicial Conduct.

Morris Brown, Woodbridge, for respondent (Wilentz, Goldman & Spitzer, attorneys; Mr. Brown and Christine D. Petruzzell, of counsel; Mr. Brown, Ms. Petruzzell, and Donald E. Taylor on the brief).

PER CURIAM.

This is a judicial-disciplinary case. The proceedings commenced with the filing of a complaint with the Advisory Committee on Judicial Conduct (ACJC or Committee) against respondent, Judge Edward J. Seaman, a judge of the Superior Court in Middlesex County. The complaint was made by B.D., a former law clerk of respondent, charging him with judicial misconduct in [627 A.2d 109] violation of several canons of the Code of Judicial Conduct and of the Court's Disciplinary Rules. The gravamen of the complaint was that respondent had abused his authority by mistreating the complainant while she was employed as his law clerk. The mistreatment took the form of various kinds of sexual harassment.

The ACJC issued a presentment in which it found many of the allegations of the complaint to have been established by clear and convincing evidence. The presentment recommended that respondent be publicly censured. Respondent moved for an order dismissing the complaint pursuant to Rule 2:15-13. This Court denied that motion and simultaneously issued an Order to Show Cause why respondent should not be disciplined.

I

This matter first arose when, in August 1989, respondent's law clerk, B.D., filed a complaint with the Affirmative Action Officer for the Middlesex County Court House. The complaint, denominated an "Affirmative Action Complaint," alleged that during the course of B.D.'s clerkship, respondent had engaged in a pattern of abusive behavior consisting of sexual harassment of complainant.

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According to the complaint, respondent repeatedly made remarks of a sexual nature to complainant. The complaint also alleged that respondent had repeatedly touched complainant in an inappropriate manner.

That complaint was eventually referred to the ACJC, which interviewed complainant on October 25, 1989. The interview was reduced to writing. As a result of complainant's interview, the ACJC lodged a formal complaint against respondent charging him with violating the Code of Judicial Conduct. The basis for the charges was the alleged acts of sexual harassment set forth in the Affirmative Action Complaint and further described in the interview. The complaint alleged that by engaging in that course of conduct respondent had violated: Canon 1, "A judge should uphold the integrity and independence of the judiciary"; Canon 2, "A judge should avoid impropriety and the appearance of impropriety in all activities"; Canon 2A, "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"; Canon 3A(3), "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity ..."; and Canon 3A(4), "A judge should be impartial, and should not discriminate because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap." Additionally, the complaint alleged that respondent's actions had violated Rule 2:15-8(a)(6), as "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

The ACJC held hearings on March 11 and April 16, 27, and 29, 1992, to investigate the allegations against respondent. Although authorized "to conduct formal hearings with three members in attendance" (R. 2:15-3(b)), no fewer than six of the eight members who participated in the matter were present at any time. At those hearings, the witnesses presented against respondent were complainant; Susan Leib and Robin Pedersen, law clerks of the assignment judge of Middlesex County; and complainant's mother, C.D. Testifying for the respondent were himself; his wife;

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Judge Breitkopf, the assignment judge; William F. Lamb and Stephen Leary (respectively a prosecutor and a private attorney with whom complainant had interviewed for positions); and Grace Berrue, Nancy Malkiewicz, and Joseph Hixon, members of respondent's office staff.

Applying a "clear-and-convincing" standard to the evidence adduced, the ACJC, as noted, found that respondent had engaged in a great many of the separate incidents of sexual harassment set forth in the complaint and, by that conduct, had violated Canons 1, 2, 2A, 3A(3), and 3A(4) of the Code of Judicial Conduct, as well as Rule 2:15-8(a)(6). The ACJC recommended that respondent receive a public censure. One member of the ACJC, who concurred in the [627 A.2d 110] recommendation of a public censure, found that only three incidents of sexual harassment had been established by clear and convincing evidence.

II

A.

Matters of judicial discipline brought before this Court on the presentment of the ACJC receive a de novo review of the record and are subject to a clear-and-convincing standard of proof. See, e.g., In re Collester, 126 N.J. 468, 476, 599 A.2d 1275 (1992) (applying "clear-and-convincing" standard in assessing evidence in case of judicial discipline). Clear-and-convincing evidence is "that which 'produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,' evidence 'so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue.' " In re Boardwalk Regency Casino License Application, 180 N.J.Super. 324, 339, 434 A.2d 1111 (App.Div.1981), modified, 90 N.J. 361, 447 A.2d 1335 (1982) (quoting Aiello v. Knoll Golf Club, 64 N.J.Super. 156, 162, 165 A.2d 531 (App.Div.1960)); see R. Biunno, Current N.J. Rules of Evidence, comment 6 on Evid.R. 1(4) (1993). In our review of a judicial-disciplinary matter, we must engage in an independent

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consideration of the record and determine, as a matter of first impression, the material facts that have been established by clear and convincing evidence. Because the focus of judicial-disciplinary matters is necessarily on the canons of judicial conduct, we inquire into whether the facts as determined demonstrate conduct on the part of the respondent that is incompatible with those canons.

B.

We must state, prefatorily, that the inquiry before the Court is not whether respondent's behavior constituted sexual harassment as such. Although undoubtedly all forms of behavior that cross the legal threshold of sexual harassment would constitute judicial misconduct, many forms of offensive interpersonal behavior that would violate the Code of Judicial Conduct would not meet the legal definition of sexual harassment. Nevertheless, we cannot overstress that although we must address the ultimate issue of whether judicial conduct violates the canons, the charges of misconduct against respondent equate with sexual harassment. That form of conduct is personally offensive, highly invasive, psychologically hurtful, and often deeply embarrassing to the victim. For that reason, we have chosen to maintain complainant's anonymity by referring only to her initials, despite the fact that the charges against respondent have become public and complainant's privacy has been shattered. Charges of judicial misconduct are ordinarily made public when found in a presentment of the ACJC. The ACJC followed conventional practice and used complainant's full name in its presentment. In the future, we direct that judicial-disciplinary cases involving abuse of the judicial office through sexual harassment, or other activities that humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim. The purpose behind that practice is to protect the victim's privacy and encourage reporting of such offenses.

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C.

Many of the facts forming the general background to the events that are the subject of the complaint are not controverted or materially disputed. The record reveals that complainant first met respondent in March 1988, when she applied for a position as respondent's law clerk for the 1988-1989 term. Complainant was hired by respondent and began working in September of 1988.

Complainant's duties included reading and evaluating pre-trial motions, doing whatever legal research was required, and writing recommendations to respondent on the cases that came before him. Complainant worked in a room with about a dozen other clerks. The room was several yards from the office suite in which respondent [627 A.2d 111] worked. In the course of her work, however, complainant frequently visited respondent's chambers and met with him in his office. Complainant testified at the hearing below that she saw respondent "a couple of times throughout the morning, maybe a couple of times throughout the afternoon" in the course of her working day, although as respondent described his schedule, the frequency with which he saw complainant would have been much lower.

Assisting respondent, in addition to complainant, were several other court personnel. Those persons included Grace Berrue, respondent's secretary; Joseph Hixon, a court aide for respondent; and Nancy Malkiewicz, a court clerk by designation and respondent's administrative assistant in handling settlement conferences.

Complainant claimed that respondent's misconduct took place shortly after the commencement of her clerkship in September 1988 and persisted through June 1989. At the hearing below, however, complainant and respondent gave sharply conflicting accounts of the evidence relating to respondent's alleged abusive conduct.

Complainant testified that respondent, in October 1988, began directing various remarks of a sexual nature at her. Those remarks, according to complainant, continued throughout her

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clerkship. For example, complainant claimed that respondent had a conversation with complainant, sometime in the spring of 1989, in which he expressed the wish that a pen complainant was holding were actually respondent's penis. Respondent, according to complainant, boasted of his sexual prowess, asked her to repeat a vulgar sexual remark to him, and assured complainant that, were they to have sexual relations on his desk, he would be sure to avoid a crack on the desk that might scratch her. Complainant stated that although she had disregarded those sorts of comments by respondent, he continued to subject her to such remarks.

In addition to her claims of verbal harassment, complainant testified to improper physical contact by respondent.

Two of those episodes, unlike most of the other incidents to which complainant testified, were witnessed by third parties. In the first incident, complainant was speaking with Susan Leib and Robin Pedersen when respondent came into the room and reached under complainant's mid-calf length skirt, apparently touching complainant's knee. When complainant recoiled, respondent left the room. In the second incident, complainant was conversing with Pedersen when respondent entered the room, stood behind her, lifted complainant's skirt, and examined the back of her knees.

Both Leib and Pedersen testified to the first incident. For the second, only Pedersen was present, but she testified in detail as to respondent's behavior.

Complainant also testified that on other occasions respondent had initiated unwanted sexual contact with complainant. For example, in one of those episodes complainant alleged that respondent grabbed complainant's hand and attempted to place it on his crotch. Complainant pulled away before her hand made contact with respondent's body. In another episode, in the fall of 1988, complainant averred that respondent told her that if she wanted a favorable job recommendation from him she would have to sit next to him on his office sofa.

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Several witnesses for complainant offered testimony about some of the incidents as related to them by B.D. They also testified about her general behavior, attitude, and demeanor during her clerkship while these incidents of sexual harassment were occurring. Complainant herself stated that respondent's behavior had embarrassed and troubled her. Complainant's mother, C.D., testified that although complainant seemed quite happy for about the first month of her clerkship, in October 1988 complainant underwent a marked personality change. C.D. noted of complainant that "[s]he became very quiet, stayed in her room a lot. Cried a lot." That change continued throughout the year. C.D. also testified that complainant had told her of respondent's salacious remarks about the pen, about his sexual prowess, and about respondent's attempt to place complainant's hand on his crotch. Complainant[627 A.2d 112] related those incidents to her mother during the fall of 1988, roughly contemporaneous with the events of which she complained.

Complainant's colleagues, Susan Leib and Robin Pedersen, also testified that complainant had related some of those episodes to them, although not contemporaneously. Both Leib and Pedersen, who witnessed the first skirt incident, suggested that complainant was somewhat bashful and even naive about sexual matters. Complainant was given the moniker "Sister B." because, as one witness explained, complainant was "very straight ... [and] rather naive and she was very modest and wouldn't use swear words, and if people told

off-colored [sic] jokes she didn't understand them, and always kind of saw only the good side to jokes and things like that."

Leib noted that complainant had told her of respondent's "pen" remark, and also testified that complainant had told her of respondent's remark about joining him on his office couch. Pedersen also testified to being told, by complainant, about the pen and couch remarks. Pedersen, however, also recalled complainant telling her about respondent's remark about the scratch on his desk and respondent's request that complainant repeat a "dirty word" to him.

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According to the testimony, in June 1989, complainant viewed a film on sexual harassment sponsored by the Affirmative Action Office of the state judiciary. As complainant recounted it, the film precipitated the realization that she had been the victim of respondent's sexual harassment. After speaking about several of the incidents with Susan Leib and Robin Pedersen, complainant requested and received from Judge Breitkopf a transfer from her position with respondent. Judge Breitkopf testified that complainant "made allegations that seemed to [him] to be sufficient that [he] should do something about them," but Judge Breitkopf's testimony does not further specify those allegations. Complainant thereafter brought the matter to the attention of the Affirmative Action Officer assigned to the Middlesex County Court House. According to her testimony, she later typed out a complaint, labeled "Affirmative Action Complaint," which she brought to the attention of Judge Breitkopf.

Respondent, for his part, denied all the allegations against him. However, in addition to making general denials, respondent took issue with several specific allegations of complainant.

With respect to the first "skirt incident" respondent claimed that a paper had fallen to the floor, he had bent down to retrieve it and accidentally startled the complainant. Respondent insisted that he had never touched complainant during the episode. When pressed on why Susan Leib and Robin Pedersen would testify that he had placed his hand under complainant's dress and had touched her knee, respondent claimed that he did not know why, but that Leib and Pedersen might have been biased against him because complainant had told them that respondent was speaking ill of them to other lawyers.

Although respondent's staff claimed that they had never seen respondent improperly touch complainant, Joseph Hixon and Nancy Malkiewicz did recall that respondent had put his arm around complainant's shoulders, and that that was characteristic behavior for respondent. Moreover, Robin Pedersen, when cross-examined on her reaction to the first skirt incident, remarked that "though

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extreme," the lifting of complainant's skirt was "not out of character" for respondent. Pedersen further testified that respondent told "dirty jokes to the clerks" and once put his hand on her back. Pedersen commented that although she had not been shocked by respondent's touching her, she had been surprised that he "went that far."

With respect to complainant's overall comportment, respondent and his witnesses depicted complainant as overly sensitive to criticism and responding badly to his legitimate complaints about her work. Respondent's staff did not find complainant to be particularly bashful. Members of the office staff related that for most of the year complainant had said very complimentary things about respondent and had never spoken[627 A.2d 113] about allegations of sexual harassment. By the end, however, complainant's attitude had changed; she had

become "arrogant" toward respondent and "didn't seem too interested in the job."

Further, respondent claimed that complainant had not expressed any dissatisfaction with her working environment to him. Evaluating complainant's work for the fall of 1988, respondent deemed complainant's work "average." Respondent noted, however, that the quality of complainant's work had deteriorated as the year progressed. Respondent testified that he had spoken several times with complainant about deficiencies in her work and had explained to complainant that the timing of her job interviews in the spring of 1989 had been inappropriate. According to respondent, the deterioration in complainant's work product had been accompanied by a change in complainant's attitude. Respondent testified that complainant began ignoring him when he was present and speaking ill of him to other court personnel.

Respondent also introduced character testimony from his wife and staff. That testimony noted that respondent was a devoted father and husband; a consistent church-goer; one who enjoyed recreational and sports activities; and a competent, conscientious, and hardworking judge who kept a very regular routine. Although

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respondent admitted that he told off-color jokes, he insisted that he never made such remarks in complainant's presence.

Respondent, both on direct examination of his own witnesses and on cross-examination of complainant and some of her witnesses, elicited testimony questioning complainant's general veracity. That testimony concerned three incidents in which complainant was alleged to have been untruthful.

The first incident involved complainant's assertion, to Susan Leib, that she had been a "runner-up" for a Rhodes Scholarship. Evidence from the Rhodes Committee contradicted that assertion. The second involved complainant's stating that she was reluctant to accept a job offer from a law firm because her mother had advised her to have a say in choosing her office and her secretary, and an associate of the firm had advised her that the benefits package was inadequate. Both complainant's mother and the associate denied rendering such advice to complainant. The third episode involved complainant's statement, when seeking two days off for bereavement, that her grandmother had died. In fact, complainant's great aunt was the deceased.

III

A.

Our findings of fact depend critically and inescapably on our assessment of the credibility of various witnesses. That behooves us to explain our analysis of the issues of credibility and the reasoning that brings us to our determinations of fact.

In a sexual harassment case litigated under the civil rights laws, the impact of respondent's conduct on the victim is an essential element of the cause of action. See, e.g., Drinkwater v. Union Carbide Corp., 904 F.2d 853, 859 (3d Cir.1990); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir.1990); Lehmann v. Toys 'R' Us, 132 N.J. 587, 626 A.2d 445 (1993). In a judicial disciplinary proceeding, the effect of judicial misconduct on other persons is not an essential element, although it can be a relevant

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factor in assessing the gravity of the misconduct and appropriate discipline. E.g., In re Connor, 124 N.J. 18, 26, 589 A.2d 1347

(1991). Thus, we need not decide, for example, whether the harassment complained of created a "hostile working environment" as such for complainant. However, because the claimed misconduct has taken the form of sexual harassment, there are aspects of sexual harassment cases that are germane to our analysis in this case. In particular, in the adjudication of sexual harassment cases, fact-finding poses special concerns. The weighing of evidence based on the assessment of the credibility of witnesses is an integral part of that process. Hence, the growing body of knowledge about sexual harassment and [627 A.2d 114] the law surrounding that subject are highly instructive in guiding our determinations of fact in this case.

One of respondent's major arguments is that the evidence, consisting primarily of complainant's own testimony, falls far short of satisfying the clear-and-convincing standard of proof necessary to support the charges of sexual harassment as the basis of judicial misconduct, and, indeed, the evidence is so wanting that the presentment should have been dismissed. Respondent thus stresses that virtually all of the evidence in support of the complaint is uncorroborated; it consists only of complainant's assertions concerning the occurrence of the incidents and is not bolstered even indirectly by the testimony of other witnesses. Respondent claims that uncorroborated victim testimony cannot meet the clear-and-convincing standard.

As a matter of principle, and as a practical matter in this case, we reject that contention. True, the majority of incidents recounted by complainant were not witnessed by others and, in general, were not directly corroborated. It does not follow from that, however, that the evidence presented at the hearings below could not meet the clear-and-convincing standard of proof.

First, we observe that uncorroborated testimony of a victim is sufficient to meet the law's highest standard of evidence--guilt beyond a reasonable doubt. See, e.g., People v.

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Martin, 112 Ill.App.3d 486, 68 Ill.Dec. 151, 445 N.E.2d 795 (1983); In the Interest of Winslow, 46 Ill.App.3d 962, 5 Ill.Dec. 299, 361 N.E.2d 622 (1992); King v. State, 598 N.E.2d 589 (Ind.App.1992); State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989); State v. Middelstadt, 579 P.2d 908 (Utah 1978). For crimes of sexual assault, some state courts have explicitly held that the uncorroborated testimony of a victim witness is sufficient, if credited by the jury, to sustain a finding of guilt beyond a reasonable doubt. See, e.g., State v. Cantrell, 234 Kan. 426, 673 P.2d 1147 (1983). That juries may convict on the uncorroborated testimony of an accomplice, and the burden of proof on virtually all other criminal offenses can be met with the testimony of a lone victim or witness, is well established. See Anderson v. Bessemer City, 470 U.S. 564, 575, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 529-30 (1985).

We recognize that the most serious forms of sexual harassment are also the least likely to occur in public and, therefore, the least likely to be witnessed by third parties. See generally Susan Estrich, Sex at Work, 43 Stan.L.Rev. 813 (1991). In sexual harassment cases, the Equal Employment Opportunity Commission (E.E.O.C.) itself can find a cause of action based solely on a reasoned decision to credit the charging party's testimony. E.E.O.C. Guidelines, at 10-13. Further, as one federal district court has stated, "The court is far from suggesting that a plaintiff claiming sexual harassment must produce corroborating evidence in order to prevail. In the nature of things, sexual harassment is very frequently a secret activity, carried on without the potential embarrassment that onlookers might provide." Tindall v. Housing Auth., 762 F.Supp. 259, 263 (W.D.Ark.1991).

The clear-and-convincing evidence standard has also been applied and satisfied in disciplinary proceedings similar to this one. The Washington Supreme Court, in In re Deming, 108 Wash.2d 82, 736 P.2d 639 (1987), found that the clear-and-convincing standard does not require that testimonial evidence be corroborated. In holding that, the court relied on In re McDonough, 296 N.W.2d 648 (Minn.1979), in which the Minnesota Supreme Court rejected

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the contention that the clear-and-convincing standard implies corroboration. In Deming, the judge being disciplined also asserted that the standard of proof could not be met when it was a case of "one person's word against another." 736 P.2d at 653. In rejecting that position, the Deming court noted that as long as the trier of fact "can impose discipline with clarity and conviction," ibid., the clear-and-convincing standard is satisfied, and "no mechanistic corroboration requirement is necessary." Ibid.

[627 A.2d 115] We conclude that uncorroborated evidence may satisfy a burden of proof based on the standard of clear-and-convincing evidence.

B.

We are satisfied from our independent review of the record that the evidence demonstrates clearly and convincingly that respondent engaged in a course of conduct constituting an abuse of his authority as a judge with respect to his supervisory responsibilities over an employee. That conduct consisted of a pattern of sexually harassing behavior that was personally offensive to his employee and inimical to her dignity, privacy, and emotional well-being. We conclude that respondent has thereby violated the Code of Judicial Conduct and the Court's Disciplinary Rules.

We base that conclusion on the existence of a number of incidents of harassment that collectively and cumulatively indicate and demonstrate a pattern of conduct that consists of repeated acts of sexual harassment and, indeed, imply that other incidents of similar behavior likely occurred whether or not specifically alleged in the complaint or recounted in the testimony.

The incidents that most readily and obviously establish such a pattern of repeated behaviors are those the occurrence of which were directly corroborated by third persons or indirectly corroborated by complainant's reporting the occurrences of those incidents to other persons. Specifically, Susan Leib and Robin Pedersen both witnessed respondent reaching under complainant's skirt. Leib testified that as complainant was leaning against a filing

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cabinet in the clerks' office, respondent "came over to her ... [and] put his hand on her knee or something under her dress." Pedersen verified that respondent had "reached his hand up under [complainant's] skirt," but thought respondent might have touched complainant's thigh. Pedersen also testified that, later on the same day as the first skirt incident, respondent had "lifted up the back of [complainant's] skirt and looked at her legs."

As to the indirectly corroborated incidents--the "pen", "crotch", "couch", "sexual prowess", "desk", and "dirty word" incidents--in sexual harassment cases, the victim's communication of the alleged harassment to others can serve to corroborate or support testimony of those events. Thus, in Spencer v. General Electric Co., 697 F.Supp. 204, 207 (E.D.Va.1988), testimony from a co-worker partially corroborated the plaintiff's complaint of sexual harassment by their supervisor, where the co-worker testified that on one occasion the plaintiff had come to his

office, upset and frightened, and had told him that the supervisor had asked her to sleep with him and on several occasions thereafter she had complained to the co-worker of the supervisor's pressure to have sex with him. In Lehmann v. Toys 'R' Us, the victim on several occasions communicated to others the occurrence of incidents of sexual harassment. 132 N.J. at 596, 626 A.2d 445.

We also note that some other state courts apply the "totality-of-the-evidence" standard in disciplinary proceedings. That standard allows uncorroborated victim-witness evidence to be validated by evidence that is corroborated. See, e.g., Deming, supra, 736 P.2d at 657. A corollary of that principle is that corroboration of some evidence can serve indirectly to corroborate or validate other evidence. In this case, we find that the testimony of the two law clerks about the "skirt incidents" bolsters the credibility of complainant's testimony with respect to both the specific incidents that were the subject of her testimony and the pattern of sexual harassment generally.

Here, complainant did express to her mother, C.D., that respondent had been making lewd remarks to her and that those

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remarks had left complainant deeply disturbed. Similar sentiments were expressed by complainant to Susan Leib and Robin Pedersen. We find that the testimony of C.D. and the two law clerks bolsters the credibility of complainant's testimony with respect to both the specific incidents that were the subject of the testimony and the pattern of sexual harassment generally.

[627 A.2d 116] In reaching that conclusion we have considered and weighed with great care respondent's attacks on complainant's credibility on additional grounds. On balance, we do not find that the several factors stressed by respondent impugn complainant's credibility.

Respondent points to complainant's statements about the Rhodes Scholarship, the law firm offer, and the death of her grandmother to argue that complainant is untruthful. We find that complainant greatly exaggerated or distorted the truth with respect to those incidents. They demonstrate that complainant is not a scrupulously truthful person and is prone to exaggerate in a self-serving way; they do not demonstrate that she would, or did, lie about something as profoundly destructive of another person as engaging in an unremitting course of sexual harassment. Consequently, we reject respondent's contention that those incidents compel the sweeping judgment that all complainant's specific allegations against him are untrue and that a pattern of sexually offensive conduct did not occur.

Respondent further contends that complainant's testimony was too vague to be believable. The vagueness of her testimony, he urges, greatly undermines the credibility of complainant's allegations.

Respondent's argument, in that respect, correctly focuses the analysis on the intrinsic quality of complainant's testimony. Vagueness or lack of specificity is one aspect of the quality of testimony and its inherent believability. But we note from the outset that our finding of misconduct consisting of a pattern of repeated acts of sexual harassment, on the part of respondent, is directly supported by several specific events that were corroborated, and indirectly and inferentially supported by the likely occurrence

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of other similar events. Nevertheless, the testimony of complainant with respect to such other uncorroborated incidents, though not the subject of specific findings, bear on her credibility.

As we review the record, the vagueness in complainant's testimony with respect to all of the incidents of sexually offensive behaviors appears to be largely chronological in the sense that the testimony is not precise with respect to the times and dates on which particular incidents occurred. However, complainant's allegations are not vague with respect to the general periods or the sequence in which incidents occurred.

In adjudicating sexual harassment cases, courts have found that imperfect recall years after a series of events has occurred is not necessarily discrediting. See, e.g., Ashway v. Ferrellgas, 59 F.E.P. 375, 1989 WL 384851 (1989), aff'd in part, rev'd on other grounds, 945 F.2d 408 (1991). In complainant's case, given the passage of three years between the alleged events and her testimony, complainant's ability to place events in the time frame of certain months or seasons demonstrates a recall of chronology not nearly as inadequate as respondent claims. The trauma and embarrassment of the events, coupled with a good deal of internalized denial on complainant's part, may have contributed to the defects in her recollection. We therefore do not find that this form of vagueness is dispositive of whether complainant's testimony is worthy of belief.

We also note that complainant's testimony about many of the alleged incidents is, apart from specific dates and times, quite detailed, e.g., a remark about a crack on respondent's desk, his comments about his sexual prowess, and the like. In sexual harassment cases, factors adding to the credibility of a complaining witness include the level of detail that is recalled in the recounting of the incident. See, e.g., Christoforou v. Ryder Truck Rental, Inc., 668 F.Supp. 294, 298-99 (S.D.N.Y.1987) (finding plaintiff's testimony to be essentially credible when plaintiff testified to a fairly detailed incident; court did not credit testimony about subsequent incidents that were "extremely vague and unspecific").

In addition, complainant's testimony was quite consistent. Her testimony did not vary significantly from the versions of the events originally set forth in her Affirmative Action Complaint and later in [627 A.2d 117] the interview. Neither of those documents, although marked in evidence, do we consider probative in themselves. Nevertheless, considered only as prior statements, they do not have any impeaching impact. Consistency of testimony, both internally and between witnesses, is an important indicator of truthful testimony. Christoforou Truck Rental, supra, 668 F.Supp. at 299; see Jackson v. Veteran's Admin., 768 F.2d 1325 (Fed.Cir.1985) (crediting testimony about incident of sexual harassment because of its consistency); Anderson, supra, 470 U.S. at 575, 105 S.Ct. at 1512, 84 L.Ed.2d at 529-30 (in the criminal context, when witness has told a coherent, plausible story that is internally consistent and uncontradicted by extrinsic evidence, that story may be credited).

Respondent also stresses complainant's motive to lie because she was angered and disappointed by her perception that he refused or neglected to give her a favorable job recommendation. However, complainant's testimony exhibited characteristics inconsistent with the fabrication of a vindictive employee. For example, complainant's testimony reveals a systematic understatement of the allegations against respondent. Complainant's testimony concerning certain events--the skirt incidents, the attempted contact with respondent's crotch and the couch comment--was less inflammatory or extreme than the testimony of the witnesses who had observed those events or had those events recounted to them by complainant. The refusal to conform her testimony to the more serious versions proffered by other witnesses does not suggest

making up charges to destroy her former employer.

Respondent further argues that complainant cannot be believed because her conduct throughout was inconsistent with that of a

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person who, as complainant claimed to have been, had been victimized continuously and maliciously over a long period of time.

Respondent points out that complainant never expressed her dissatisfaction with respondent's alleged behavior until June 1989. Further, not only did complainant not express dissatisfaction, she actually conveyed a sense of good will and respect for respondent for most of her clerkship. Respondent notes, for example, that complainant brought him gifts back from her vacation in New Mexico, asked his advice on a law firm job offer, requested that he swear her into the bar, invited him to a family luncheon that followed her swearing in, and continued to show him small kindnesses around the office, like asking him to a clerks' pizza party and bringing baked goods to the office to share with respondent.

Complainant acknowledged that she had not reported being harassed by respondent and had shown respondent various kindnesses. However, complainant also stated that the reason for those behaviors toward respondent was her desire to finish her clerkship. As complainant noted, keeping her first job out of law school, which could determine her future opportunities, was very important to her. Complainant also testified that after the fall she began to avoid respondent. There was testimony from respondent's staff that, later in the clerkship, complainant spent large amounts of time in the courtrooms of other judges and was rarely around respondent, except when her duties demanded it. Respondent himself noted that complainant began ignoring him and spending a great deal of time watching trials in another judge's courtroom. Those actions are entirely consistent with the behavior of someone seeking to avoid respondent.

Complainant's failure to notify others of respondent's harassing behavior; her continuing to serve as respondent's clerk even though he was allegedly subjecting her to degrading remarks and unwanted physical contact; her apparently pleasant demeanor toward respondent, including bringing respondent small gifts and offering social invitations--all are aspects of the larger phenomenon of nonreporting. In understanding complainant's failure to

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report respondent's misconduct, we note that the E.E.O.C. has found that "the fact that an employee has not promptly reported the sexual advance is not dispositive of the issue of whether or not [the advances] [627 A.2d 118] were unwelcome." Ernest G. Hadley, A Guide to Federal Sector Equal Employment Law & Practice, Ch. VI, B(5) (1990). In sexual harassment litigation, courts and agencies have admitted expert testimony that reticence about complaining is common in cases of sexual harassment. See Robinson v. Jacksonville Shipyards, 760 F.Supp. 1486, 1506-07 (M.D.Fl.1991) (admitting and crediting consultant's testimony that women may not complain about sexual harassment because of fear, embarrassment, and feelings of futility). The E.E.O.C., in a footnote to Trammel v. Postmaster General, 01871154, 1922/B14 (1988), noted that "[o]ne can be offended by certain conduct while still being reticent to report it for fear of losing one's job, creating controversy, not being believed, not being supported, or generally making matters worse." One federal appeals court has described the peculiar problems faced by victims of sexual harassment as a "cruel trilemma ... [i]n which a victim must choose among acquiescence in the harassment,

opposition to it, or resignation from her job." Vinson v. Taylor, 753 F.2d 141 (D.C.Cir.1985) (citing Bundy v. Jackson, 641 F.2d 934, 946 (D.C.Cir.1981) (ruling that in D.C. Circuit plaintiffs would not be required to resist their harassers).

Surveys of victims' reactions confirm that reasoning. One study has reported that although 53.1% of women surveyed had experienced sexual harassment at work, only 22.5% of the total survey respondents reported ever having discussed the general subject matter with a co-worker. Fewer than one in five women who had experienced sexual harassment at work ever reported it to any authority. Barbara Gutek, Sex and the Workplace 46, 54 (1985). Silence may well signal the shame, humiliation, fear, and dependence of the victim. Susan Estrich, Sex at Work, supra, 43 Stan.L.Rev. at 829. The extent to which a woman may react to insults, propositions, and even physical abuse may have less to do

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with the severity of the harassment than with the woman's need to keep her job. Id. at 846.

A study directed by Governor Florio, through Executive Order 88, offered many of the same reasons for underreporting. That study found that "[f]ear of retaliation, loss of privacy, and unease about confidentiality" along with a "lack of faith in the complaint process" played a significant part in the phenomenon of underreporting in sexual harassment cases. Review Committee on Sexual Harassment, New Jersey Department of Personnel, People Working Together: A Report on Sexual Harassment, section V (1993) (hereafter, "Report on Sexual Harassment").

Moreover, a survey of similar cases from other jurisdictions reveals that complainant's apparently-inconsistent behavior is not at all uncommon. See, e.g., In re Seitz, 441 Mich. 590, 495 N.W.2d 559 (1992) (describing disciplinary findings against state court judge, including sexual misconduct, in which court secretary, with whom judge was romantically obsessed, continued to work with judge and support him in his disputes with chief judge until such time as employee left for another position, complaining that judge had made her remaining impossible); In re Buchanan, 100 Wash.2d 396, 669 P.2d 1248 (1983) (describing disciplinary proceedings against state court judge involving sexual misconduct toward women clerks and other court employees, "the employees tolerated this conduct out of fear of reprisals"); see also In re Deming, supra, 108 Wash.2d 82, 736 P.2d 639 (describing disciplinary proceedings against state court judge, involving, inter alia, sexual misconduct, in which court observed that "several witnesses [to judge's improper touching of a female employee] indicated that they felt unable to respond to Judge Deming's harassment because they were intimidated by his authority"). A court has found that judicial misconduct occurred even when the victim arguably placed himself at risk. In re Miera, 426 N.W.2d 850 (Minn.1988) (finding sexual misconduct where the victim, a court reporter, complained that state court judge had made sexual advances toward him on an evening when judge stayed at victim's apartment;

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victim allowed judge to stay over the very next week, at which time judge again made sexual advances).

[627 A.2d 119] Respondent also challenges complainant's contention that she did not recognize that she was a victim of sexual harassment until seeing a film on the subject. Respondent claims that complainant, as a law student, must have known the definition of sexual harassment long before seeing a film on the subject. Thus, complainant must not have told the truth in

her account of how she came to file a complaint against respondent.

That conclusion does not seem necessary to us. Complainant, on cross-examination, explained that she did not recognize, until seeing the affirmative action film, that respondent's offensive conduct met the legal criteria for sexual harassment. Complainant's explanation does not suggest that she did not consider herself to have been abused and victimized by respondent's conduct. Rather, it implies that she did not fully appreciate the special nature of her victimization and its legal implications. Not every law student has studied the elements of a sexual harassment claim. By the time of the affirmative action seminar, June 5, 1989, in which she saw the film, complainant's distress may have grown to the point that it overcame her fear of the harm to her career that such a complaint might bring. The film, besides communicating factual information about what constitutes sexual harassment, very likely may have had the effect of persuading complainant that she need not and ought not tolerate respondent's conduct. Affirmative action seminars are meant not only to inform but also to embolden and empower employees about the respectful and fair treatment that is due them. Indeed, complainant's testimony about the effect of the film confirms that purpose: "I believe [the film] gave me the confidence to comply with the sexual harassment laws and to report the sexual harassment that I had experienced." As a State Commission on Sexual Harassment has found:

[H]arassment and other forms of employment discrimination are so pervasive that women, particularly, do not recognize sexual harassment as each episode occurs. Rather, something dramatic such as an unexpected termination or denial of promotion will trigger the awareness of a pattern of abuse that will act as a catalyst for filing a complaint. [Report on Sexual Harassment, sec. V.]

In complainant's case, we believe the affirmative action film acted as just such a catalyst for the recognition that she had been subjected to a pattern of abusive conduct by respondent.

In considering the failure of complainant to report respondent's misconduct sooner, we note that complainant did not work directly with other clerks, and was not on particularly close terms with respondent's secretary, the court clerk, or other judges' clerks. Therefore, contemporaneous complaints or disclosures to those persons could not be expected and their absence does not demonstrate that complainant fabricated her allegations against respondent. However, the fact that complainant disclosed several incidents of respondent's harassment to Susan Leib and Robin Pedersen, after she had become friendly with them, lends credibility to complainant's testimony. The versions of Leib and Pedersen, with regard to those reported incidents, are entirely consistent, and are also largely consistent with complainant's testimony.

Complainant's testimony at the hearings below confirms the impressions of Leib, Pedersen, and C.D., complainant's mother, that complainant was ashamed and upset about respondent's conduct. Those feelings may well have contributed to complainant's reluctance to report respondent's misconduct. Complainant's testimony, however, adds another dimension to our understanding of why complainant failed to expose respondent sooner: the vulnerability she felt as a judicial clerk. During cross-examination by respondent's counsel about her failure to do anything sooner about respondent's alleged harassment, the following colloquy took place:

Q: Did you tell anybody about the remarks or actions you have just described?

A: No.

Q: Why not?

[627 A.2d 120] A: I was confused; I was embarrassed; I was humiliated; I didn't really know what was going on, and I just wanted to take the first job that I got out of law school and do the best that I could at it.

Q: Did you give any thought to quitting your clerkship?

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A: Starting right out of law school, I didn't really want to quit the first job that I ever had.

Plaintiff's reticence is particularly understandable in the context of a judicial clerkship. The judge-clerk relationship is unique. The importance of a judicial clerkship to the career of a young lawyer is enormous. A judicial clerkship can be an auspicious beginning to a legal career. See Trenton H. Norris, The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform, 81 Calif.L.Rev. 401, 403-04 (1993) (describing importance of clerkship to future careers of new lawyers). Judicial clerkships are marked by both strong dependence and a significant power imbalance between judge and clerk. See Paul R. Baier, The Law Clerks: Profile of an Institution, 26 Vand.L.Rev. 1125, 1129-31, 1153-61 (1973). The vulnerability of a clerk to a judge is even greater than that in most supervisor-employee relationships. By alienating his or her judge, a clerk risks great professional jeopardy.

Accordingly, we find that complainant's failure to complain sooner, and her continued kindnesses toward respondent, can be viewed as a need to maintain appearances, and, indeed, served to mask her resentment of respondent's offensive conduct. That conclusion is strongly supported by the power dynamics inherent in a judicial clerkship.

In determining the issues of credibility, we are further impelled to remark on the adequacy of the written record in the proceedings before us. In making findings of credibility, observing live testimony is doubtless the ideal. That being acknowledged, we are nonetheless convinced that the written record before us has provided an ample basis for an accurate assessment of the credibility of those who testified, particularly of respondent and complainant.

We appreciate that issues of credibility are not like problems in geometry. When articulating the reasons why we have found a solid basis for believing a witness, we do not presume that any single argument will definitively settle the issue or resolve all possible doubts. Arguments for credibility are almost always

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probative, almost never dispositive. The best one can do, when justifying why belief is invested in one witness rather than another, is to offer a plausible explanation.

Although our determination that respondent engaged in a pattern of misconduct in based upon our finding complainant and her witnesses more credible than respondent, we nonetheless emphasize that our finding today is not the result of taking sides in a "swearing contest." Rather, the episodes that we have found clearly and convincingly to demonstrate a pattern of misconduct--the two "skirt" incidents; the remarks about the pen, couch, respondent's sexual prowess, "scratch on the desk", and "dirty word"; and the "crotch" incident--had some direct or indirect corroboration by third parties. Together with the general credibility of complainant's testimony with respect to

other incidents, they provide firm support for our ultimate conclusion that there were repeated acts of a sexually offensive nature by respondent.

C.

Based upon those findings, we conclude that respondent abused his judicial and official authority as a judge with respect to his supervisory responsibilities over an employee. That misconduct is evidenced by a pattern of behavior that was offensive and inimical to the employee. That misconduct violates Canons 1, 2, 2A, 3A(3), 3A(4) of the Code of Judicial Conduct and Rule 2:15-8(a)(6).

The Code of Judicial Conduct comprises seven canons that provide guidance on the manner in which judges are to comport themselves. The canons, although rules to be enforced, also exhibit an aspirational[627 A.2d 121] and hortatory character. Because of that, the behaviors encompassed by each canon are not separable into rigid and distinct categories. Nevertheless, the canons are not mere platitudes. They direct each judge in conducting himself or herself in office, and guide the Court in determining when judicial misconduct has occurred.

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The ultimate and permeating objective of the canons, however, is to maintain the integrity of the judiciary and public confidence in that integrity. Accordingly, the canons evidence concern not only for the reality of judicial integrity, but for the appearance of that reality. See Pressler, Current N.J. Court Rules, comment on Canons 1 and 2 (1993). It is obvious from the canons of the Code of Judicial Conduct that integrity--in both actuality and appearance--can be maintained only if judges demonstrate probity, impartiality, and diligence. In this case, there is no suggestion that respondent showed bias in the exercise of his judicial duties or neglected those duties in any manner. The record, however, gives clear and convincing evidence that respondent showed a lack of uprightness in his dealings with complainant. In that way, respondent compromised the integrity of the judiciary and engaged in manifest improprieties in violation of Canons 1, 2 and 2A. Moreover, although we have noted that respondent maintained his independence when adjudicating cases before him, the attentiveness, consideration and fairness enjoined by Canon 3A(3) and 3A(4) include treating all those with whom a judge deals, including employees, in a dignified and nondiscriminatory fashion. That, clearly, respondent did not do. It is also painfully manifest that respondent's conduct casts disrepute on the judiciary and was highly prejudicial to the administration of justice. R. 2:15-8(a)(6).

Respondent is guilty of judicial misconduct in violation of the Code of Judicial Conduct and our Disciplinary Rules. What remains to be determined is the appropriate discipline to be imposed.

IV

The single overriding rationale behind our system of judicial discipline is the preservation of public confidence in the integrity and the independence of the judiciary. See In re Coruzzi, 95 N.J. 557, 579, 472 A.2d 546 (1984); In re Spitalnick, 63 N.J. 429, 431, 308 A.2d 1 (1973). As we have noted before, "This Court

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cannot allow the integrity of the judicial process to be compromised in any way by a member of either the Bench or the Bar." Spitalnick supra, 63 N.J. at 431, 308 A.2d 1. Accordingly, institutional concerns figure prominently in cases involving judicial discipline. As the Supreme Court of Minnesota has observed, the standard of judicial conduct is a high one precisely "so

that the integrity and independence of the judiciary may be preserved." Miera, supra, 426 N.W.2d at 855. Judicial misconduct "brings the judicial office into disrepute and thereby prejudices the administration of justice ... and diminishes public respect for the judiciary." In re Winton, 350 N.W.2d 337, 340 (Minn.1984). Because public confidence in judges is essential to maintaining the legal system, "misconduct by a judge brings the office into disrepute and thereby prejudices the administration of justice." Ibid.

Consonant with those institutional concerns, the determination of sanctions in judicial-discipline cases is not so much to punish the offending judge as to "restore and maintain the dignity and honor of the position and to protect the public from future excesses." Buchanan, supra, 669 P.2d at 1250. We concur with the Supreme Court of Maine in its description of the fundamental purpose behind disciplining a judge:

[T]o instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the public that the judiciary of this state is dedicated to the principle that ours is a government of laws and not of men. [In re Ross, 428 A.2d 858 (Me.1981).]

[627 A.2d 122] In keeping with that high purpose, we do not discipline for "mere error[s] in judicial activity or professional activities." In re Mattera, 34 N.J. 259, 270, 168 A.2d 38 (1961); see also In re Alvino, 100 N.J. 92, 494 A.2d 1014 (1985) (holding that omission of certain administrative duties, when no willfulness was involved and judge sincerely thought matters unimportant, did not warrant judicial discipline). Rather, the disciplinary power is ordinarily reserved for conduct that "is marked with moral turpitude and thus reveals a shortage in integrity and character." Mattera, supra, 34 N.J. at 70, 168 A.2d 38. Thus, we have held that

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"[j]udicial misconduct, for example, involving dishonesty of any kind will ordinarily require removal as the appropriate discipline." Id. 100 N.J. at 97, 494 A.2d 1014; accord Coruzzi, supra, 95 N.J. at 566, 472 A.2d 546 (holding that without exception, a judge who accepts a bribe must be removed from office).

The determination of appropriate discipline requires more than establishing some instance or instances of unethical conduct. See Collester, supra, 126 N.J. at 472, 599 A.2d 1275. We must undertake "a more searching and expansive inquiry ... carefully scrutiniz[ing] the substantive offenses that constitute the core of respondent's misconduct, the underlying facts, and the surrounding circumstances in determining the nature and extent of discipline." Ibid. Among the surrounding circumstances to which we give heed are the considerations of public policy and the legitimate interests to which the State of New Jersey has made a governmental commitment. Id. at 473, 599 A.2d 1275.

The commitment of this State and its judiciary to end gender discrimination--and one of its most egregious expressions, sexual harassment--clearly weighs heavily in our determination of the discipline to be imposed on respondent. See Lehmann v. Toys 'R' Us, supra, 132 N.J. at 609-610, 626 A.2d 445 (noting, in context of sexual harassment case, that Legislature has declared that "discrimination is 'a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State' ") (citation omitted). The Commissioner of Personnel for the State of New Jersey has described sexual harassment as "a serious

problem in our state and our nation. It is behavior that we cannot tolerate." Report on Sexual Harassment, sec. I.

Other aggravating factors serve to define the gravity of misconduct. Those include the extent to which the misconduct, like dishonesty, or a perversion or corruption of judicial power, or a betrayal of the public trust, demonstrates a lack of integrity and probity, Coruzzi, supra, 95 N.J. at 572, 472 A.2d 546; whether the

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misconduct constitutes the impugn exercise of judicial power that evidences lack of independence or impartiality, In re Yaccarino, 101 N.J. 342, 502 A.2d 3 (1988); whether the misconduct involves a misuse of judicial authority that indicates unfitness, ibid.; whether the misconduct, such as breaking the law, is unbecoming and inappropriate for one holding the position of a judge, Collester, supra, 126 N.J. at 473, 599 A.2d 1275; In re Connor, 124 N.J. 18, 27, 589 A.2d 1347 (1991); whether the misconduct has been repeated, Collester, supra, 126 N.J. at 473, 599 A.2d 1275; and whether the misconduct has been harmful to others, Connor, supra, 124 N.J. at 26-27, 589 A.2d 1347; In re Albano, 75 N.J. 509, 384 A.2d 144 (1978); In re Yengo, 72 N.J. 425, 371 A.2d 41 (1977).

Clearly, respondent has engaged in a most serious form of misconduct. That misconduct involves not only the mistreatment of a person in his employ, but flagrant disregard for the law. Canon 3A(4) directs explicitly that "[a] judge ... should not discriminate because of ... sex." Sexual harassment of women by men is among the most pervasive, serious, and debilitating forms of gender discrimination.

In assessing aggravating factors, we are also attentive to the harmful impact of the misconduct on respondent's victim. The record contains testimony that complainant, soon after respondent began his harassing[627 A.2d 123] activities, became anxious and depressed. That response is entirely consistent with a growing body of research on the physiological and psychological effects of sexual harassment on its victims. See Report on Sexual Harassment, sec. V (quoting testimony of Myra Terry, President of New Jersey chapter of National Organization of Women, that "[victims of sexual harassment] experience physical symptoms such as problems sleeping, nervousness, headaches, and weight gain or loss ... 90% report suffering psychological stress, 63% physical stress, and 75% find that their work performance is adversely affected"). Respondent has been found to have committed acts of sexual crudity deeply offensive to another person. As the ACJC concluded, respondent "[a]s a judge had the obligation to treat [complainant]

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with dignity. He did not live up to that obligation." The harm, as with any act of invidious discrimination in violation of civil rights laws, extends well beyond the victim, but is, as we noted earlier, a threat to democratic society. Lehmann v. Toys 'R' Us, supra, 132 N.J. 609-610, 626 A.2d 445.

Additionally, we find especially important the vulnerability of respondent's victim. See In re Yengo, supra, 72 N.J. at 438, 371 A.2d 41 (finding the vulnerability of victim of judge's abusive language significant: "She (the victim) was disadvantaged and defenseless ... whereas he was a judge and his conduct must be evaluated as such") (emphasis in original); see also Albano, supra, 75 N.J. at 514, 384 A.2d 144. As we have noted, judges and their clerks have a relationship unique in our profession. The clerkship has become an informal but fixed institution on which the judiciary critically depends. If women are to gain their rightful representation in the legal profession, they must not be subjected to discrimination,

particularly in its most egregious forms. We are well aware that sexual harassment, like other forms of discrimination, debilitates its victims and has, as its ultimate effect, the continued subordination of women.

With respect to mitigating factors, we generally are mindful that a matter represents the first complaint against a judge, of the length and good quality of the judge's tenure in office, of exemplary personal and professional reputation, of sincere commitment to overcoming the fault, of remorse and attempts at apology or reparations to the victim. Connor, supra, 124 N.J. at 26, 589 A.2d 1347. We have also found relevant consideration of whether a judge found guilty of misconduct will engage in similar misconduct in the future, or whether the inappropriate behavior is susceptible to modification. Ibid.

Some of those factors in mitigation bears on the sanction to be imposed on respondent. We note that he has long served on the bench with distinction. Respondent enjoys an outstanding personal and professional reputation. This complaint is the first charge of misconduct to be brought against respondent.

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Nevertheless, in assessing mitigating factors, we must note that respondent has not acknowledged his wrongdoing or expressed contrition. Throughout the proceedings, respondent steadfastly maintained his innocence, unequivocally denying that the allegations against him were true. Additionally, respondent tried to cast blame on his victim, depicting her as vindictive and emotionally unstable. Respondent also suggested that two of the witnesses to one of his acts of misconduct, also women clerks, were lying under oath for malicious purposes. We do not penalize respondent for defending himself, but we cannot give respondent the benefit of contrition as a mitigating factor.

Further, although the offensive behavior found to have occurred here was not the second or third time in which respondent was found guilty of such misconduct, it did involve a prolonged and continuing course of behavior. See Corvelli v. Board of Trustees, 130 N.J. 539, 547-48, 617 A.2d 1189 (1992) (holding that in case of police chief who persecuted inferior officer by assigning him to patrol dangerous park each night, misconduct actually involved multiple, daily decisions and constituted course of conduct rather than isolated incident).

[627 A.2d 124] Although we find respondent's long service on the bench, exemplary reputation, and prior record as factors in mitigation of sanction, those factors are outweighed by the recurrent nature of respondent's course of misconduct, the severity of the harm inflicted by that misconduct on his victim and on public trust in the judiciary, and the imperative of public policy--the overriding social goal of achieving a society where all citizens are treated with respect regardless of gender--that respondent's misconduct so obviously violates. Accordingly, we amend the sanction imposed by the ACJC, public censure, and direct that respondent be suspended, without pay, from judicial office for a period of sixty days. During his suspension, respondent is to complete an educational program designed to heighten awareness of what constitutes sexual harassment, and to reinforce what sort of behavior is expected by the sexual harassment policy of the judiciary of this

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State. That program will be approved by the Court, which will also verify respondent's compliance. Failure to adhere to that directive will precipitate action to impose more severe discipline.

In our system of judicial discipline, suspension stands in order of severity between a censure and permanent removal

from judicial office. See Connor, supra, 124 N.J. at 28, 589 A.2d 1347. In Connor the offense was very serious--drunk driving--but we "decline[d] to impose a suspension ... because of his good record as a judge and because his transgressions do not directly affect the performance of his judicial duties." Ibid. Nevertheless, in Connor the offending judge acknowledged his guilt, made a public apology, and exhibited "genuine self-confrontation and commitment to rehabilitation." Id. at 26, 589 A.2d 1347. Those factors, which weighed heavy in the Court's determination of sanction in Connor are regrettably and manifestly absent in respondent's case.

In In re Collester, supra, 126 N.J. at 468, 599 A.2d 1275, a judge was convicted of a second drunk driving offense. There we emphasized that the repeated nature of the judge's misconduct demanded discipline more severe than censure. Id. at 475, 599 A.2d 1275. The Court's determination, however, was also strongly influenced by other factors, including the judge's deportment when his misconduct was discovered. Id. at 473-74, 599 A.2d 1275.

In this case, we are confronted with a prolonged course of judicial misbehavior that was especially harmful to its victim. We are convinced that "respondent's misconduct must seriously shake public confidence in the judiciary, and, unless bolstered by a prompt and appropriate disciplinary response, that confidence is bound further to weaken and erode." Id. at 476, 599 A.2d 1275. Accordingly, we suspend respondent from judicial office for sixty days. A temporary removal from office will impress upon respondent the magnitude of the offense he has committed, reaffirm public confidence in the integrity of our courts, and provide a powerful deterrent to future misconduct, of this type, by respondent or others who hold judicial office.

So ordered.

ORDER

This matter having come before the Court on a presentment of the Advisory Committee on Judicial Conduct, and respondent having been Ordered to show cause why he should not be disciplined, and good cause appearing;

It is ORDERED that JUDGE EDWARD J. SEAMAN is hereby suspended, without pay, from his judicial office for sixty days, commencing July 16, 1993, and ending September 13, 1993; and it is further

ORDERED that during his suspension, respondent is to complete an educational program designed to heighten awareness of what constitutes sexual harassment and to reinforce what sort of behavior is expected by the sexual harassment policy of the judiciary of this State, the program to be approved by the Court, which will also verify respondent's compliance.

WITNESS, the Honorable Alan B. Handler, Presiding Justice, at Trenton, this 16th day of July, 1993.

[627 A.2d 125] WILENTZ, C.J., and CLIFFORD, J., did not participate.

For suspension--Justices HANDLER, POLLOCK, O'HERN, GARIBALDI and STEIN--5.

Opposed--None.

# APPENDIX D

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**13 S.W.3d 525 (Tex.Rev.Trib. 1998)**
**In re James L. "Jim" BARR, Judge, 337th Judicial District Court of Texas**
**Inquiry No. 67**
**SUPREME COURT OF TEXAS**
**February 13, 1998**
**Opinion Overruling Rehearing March 1, 1999.**

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Robert Flowers, David Zimmerman, Austin, for Petitioner, State Commission on Judicial Conduct

George J. Parnham, Wendell A. Odon, Jr., Houston, for Respondent, James L. "Jim" Barr.

OPINION

Chief Justice Richard Barajas, delivered the opinion of the Review Tribunal in which Chief Justices Cornelius, Ramey and Davis, and Justice Stover, join. [1].

Justice Holman filed a concurring and dissenting opinion in which Justice Wright joins.

This action results from the recommendation by the State Commission on Judicial Conduct that Respondent, James L. "Jim" Barr, be removed as Judge of the 337th Judicial District Court of the State of Texas, and further, that he be prohibited

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from holding judicial office in the future. [2] Judge Barr has rejected the findings, conclusions, and recommendations of the Commission, and in response, challenges the findings and ultimate recommendation that he be removed from office. We affirm the Commission's findings in part, reverse in part, and affirm the ultimate recommendation of removal.

I. SUMMARY OF THE EVIDENCE

The comprehensive record in the instant case reflects that the State Commission on Judicial Conduct adopted the findings of fact which were entered by a Special Master. The Special Master found that Judge James L. "Jim" Barr engaged in willful or persistent conduct that is clearly inconsistent with the proper performance of his duties, in violation of TEX. CONST. art. V, 1-a(6)A (1993), and further, that Judge Barr willfully violated various provisions of the Texas Code of Judicial Conduct. See TEX. CODE JUD. CONDUCT (1993), reprinted in TEX.GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1997). Among other things, the Special Master specifically found that Judge Barr, through sexual comments and gestures, violated the constitution of the State of Texas and the Texas Code of Judicial Conduct, in motioning to an assistant district attorney, from the bench, by crooking his index finger as if he wanted her to approach, and stating to her, "I just wanted to see if I could make you come [reach an orgasm] with one finger;" in telling an assistant district attorney who sought to return to her office while a jury deliberated that "You are so nice to look at, if you leave, all I'll have to look at all afternoon are swinging dicks;" in telling an assistant district attorney that she must be on her

period, reasoning that "Women always carry around their purse when they're on their period;" and, in stating that a certain attorney could "go screw himself" in response to an attempt to reset a criminal case. The Special Master further found that Judge Barr, throughout his tenure on the bench, has periodically referred to assistant district attorneys who are female as "babes."

The Special Master further found that Judge Barr willfully ordered that a writ of attachment be issued to bring a sheriff's deputy before him at a time that neither the prosecution nor defense had requested that such a writ be issued nor filed an affidavit that the sheriff's deputy was a material witness in a criminal case. The Special Master also found that Judge Barr willfully and verbally instructed that the sheriff's deputy be taken into custody without the benefit of having reviewed the recitations contained in both the subpoena and writ of attachment; and, that such action was contrary to established provisions of the United States Constitution and the constitution of the State of Texas. The Special Master found that Judge Barr willfully set bail for the sheriff's deputy at $ 50,000 with the intent that the deputy spend time in jail in the absence of receiving evidence as to the deputy's financial condition. The Special Master found that Judge Barr willfully excluded the sheriff's deputy's counsel from being present with his client as his client was being addressed by the Judge from the bench.

The above findings, among others, and the supporting evidence will be detailed in the discussion of each of Respondent's issues presented for review.

## II. PROCEDURAL HISTORY

The record in the instant case establishes that on December 19, 1996, Judge James L. "Jim" Barr, Respondent, was served with Notice of Formal Proceedings. On January 28, 1997, upon request of the Commission, the Texas Supreme Court appointed

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the Honorable Noah Kennedy as Special Master to hear evidence on the charges and report thereon to the Commission. In March 1997, a formal hearing on the merits was conducted before the Special Master at the South Texas College of Law, Houston, Texas. On April 14, 1997, the Special Master filed his initial findings of fact with the Commission in which he concluded that a preponderance of the evidence showed Judge Barr to have engaged in judicial misconduct, as alleged. On May 2, 1997, the Commission requested that the Special Master make findings concerning the "willfulness" of Judge Barr's conduct. The Commission also requested that the Special Master conduct a hearing to make findings concerning additional alleged misconduct which was said to have occurred on April 22, 1997. Subsequent to the initial hearing, the Commission amended its original Notice of Formal Proceedings. On September 11 and 12, 1997, a second evidentiary hearing was conducted. On September 19, 1997, the Special Master made additionalfindings of fact, and supplemental findings on September 23, 1997. On October 9, 1997, the Commission agreed with and affirmed the Special Master's findings of fact. On October 13, 1997, the Commission petitioned the Supreme Court for appointment of a Review Tribunal and this panel was announced on October 23, 1997. Thereafter, on October 24, 1997, the State Commission on Judicial Conduct filed its findings and conclusions with this Review Tribunal seeking review of its recommendation that Respondent be removed from office, and further, that he be prohibited from holding judicial office in the future.

## III. DISCUSSION

In a civilized society, members of the judiciary are significant public figures whose

authority necessarily reaches all points within their respective jurisdiction, if not beyond. Members of the judiciary of the State of Texas, whether a municipal judge in Fort Stockton, a justice of the peace in Cameron County, the county court at law judge in Liberty County, a state district judge in Ozona, a justice on the Sixth Court of Appeals, Texarkana, or the Chief Justice of the Texas Supreme Court, all serve as the collective guidon of the banner representing fairness and impartiality in our state. It is for that reason, plus others, that the judiciary must nurture and maintain respect for their decisions, as well as the judiciary of the State of Texas as a whole. The Texas jurist must be held to the highest standards of integrity and ethical conduct, much more so than the standards to which members of the executive and legislative branches are held accountable. Consequently, the ultimate standard for judicial conduct in the State of Texas must be more than effortless obedience to the law, but rather, must be conduct which constantly reaffirms one's fitness for the high responsibilities of judicial office and which continuously maintains, if not furthers, the belief that an independent judiciary exists to protect the citizen from both government overreaching and individual self-help.

In the instant case, Respondent advances six reasons why this Review Tribunal should reverse the findings of the Special Master and ultimately the State Commission on Judicial Conduct, and reject the Commission's recommendation that he be removed. [3] Specifically, Respondent suggests that the evidence is insufficient to establish a showing of "willful" violations of the constitution of the State of Texas and the Texas Code of Judicial Conduct; that the Commission unconstitutionally and incorrectly interpreted Texas law in its finding of "willful" violations against the Respondent; that

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the application of the Texas Code of Judicial Conduct and law to Respondent is unconstitutional for reasons of overbreadth and vagueness; that the Commission found violations of the Texas Code of Judicial Conduct for recommended behavior, rather than prohibited behavior; that the Commission's findings violate Respondent's right to freedom of speech and expression; and, that the recommendation of removal is inappropriate.

A. Procedural Standards

Judicial conduct proceedings brought in accordance with the constitution of the State of Texas and established rules for the removal or retirement of judges, are neither criminal nor regulatory, but rather are civil in nature. Their purpose is not necessarily to punish, but to maintain the honor and dignity of the judiciary of the entire State of Texas and to uphold the administration of justice for the benefit of all its citizens. See In re Thoma, 873 S.W.2d 477, 484-85 (Tex.Rev.Trib. 1994). The burden was upon the Examiner for the State Commission on Judicial Conduct to establish, before the Special Master, the allegations against Judge Barr by the civil standard of preponderance of the evidence. Thoma, 873 S.W.2d at 485; see also In re Brown, 512 S.W.2d 317, 319-20 (Tex. 1974). In that regard, to the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES, the civil rules of procedure, both trial and appellate, are applicable. TEX. R. REM'L/RET. JUDGES, 56 Tex.B.J. 823 (1993), Rules 10(d), 12(e) and (g). Moreover, during the course of any hearing conducted in the furtherance of formal proceedings, whether before a special master or the Commission, only legal evidence is to be received. [4] Thoma, 873 S.W.2d at 485; TEX. R. REM'L/RET. JUDGES, Rule 10(e). Absent a statement of objections to the report of the special master, the Commission may adopt the findings of the special master as its own. Thoma, 873 S.W.2d at 485; TEX.

R.REM'L/RET. JUDGES, Rule 10(j). The findings of the special master, as adopted by the Commission, are tantamount to findings of fact filed by a trial judge in a trial without a jury, and as a result, we review such findings in that light. Thoma, 873 S.W.2d at 485. The record in this case shows that the State Commission on Judicial Conduct overruled Respondent's Objections to the Findings of Fact filed with the Commission on October 7, 1997, and adopted and affirmed the Findings of Fact of the Special Master, including the Special Master's supplemental letter of September 23, 1997, in their entirety.

The extensive record in the instant case includes a reporter's record. Consequently, the Commission's adopted findings of fact are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal and factual sufficiency of the evidence supporting findings in a civil case, either by a trial court or by a jury. Id., (citing Cullen Ctr. Bank & Trust v. Texas Commerce Bank, 841 S.W.2d 116, 121 (Tex.App.--Houston [14th Dist.] 1992, writ denied); Green Tree Acceptance, Inc. v. Holmes, 803 S.W.2d 458, 461 (Tex.App.--Fort Worth 1991, writ denied)).

A factual insufficiency point requires us to examine all of the evidence in determining whether the finding in question is so against the great weight and preponderance of the evidence as to be manifestly unjust. Id.,(citing generally In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)). As in appeals of civil matters, this Review Tribunal cannot substitute its findings for those of the Commission. If there is sufficient competent evidence of probative force to support the findings and recommendation, they must be sustained. Id., (citing Oechsner v. Ameritrust Texas, N.A., 840 S.W.2d 131, 136 (Tex.App.--El Paso 1992, writ denied)). It is not within the province of this Review Tribunal to interfere with the Commission's resolution of conflicts in the evidence or to pass on the weight or credibility of the witnesses' testimony. Where there is conflicting evidence, the findings of the Commission on such matters will be regarded as conclusive. Id.

In considering a "no evidence" legal insufficiency point, we consider only the evidence that tends to support the Commission's findings and disregard all evidence and inferences to the contrary. Id., (citing Garza v. Alviar, 395 S.W.2d 821 (Tex. 1965)). If there is more than a scintilla of evidence to support the questioned finding, the "no evidence" point fails. [5] 873 S.W.2d at 486.

B. Issues Presented for Review

1. Sufficiency of the Evidence to Establish "Willful" Violations

Judge Barr contends that the State Commission on Judicial Conduct improperly found that he "willfully" violated the provisions of the Texas Code of Judicial Conduct because his "off-color," lewd and sexually explicit remarks cannot be "willful" because they were not made in bad faith but rather were made in a context absent applicable standards; and, that his actions relating to the issuance to his orders cannot be "willful," as that term is legally defined and as it pertains to the Texas Constitution, since his actions were lawful. [6]

Respondent maintains that the Special Master erred, as did the Commission, in relying upon a segment of the definition of "willful" as contained in Thoma. We disagree.

The term "willful," in the context of removal of members of the Texas judiciary for misconduct, has been defined as follows:

The term "willful," as applied in TEX. CONST. art. V, 1-a(6)A, is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct.

Thoma, 873 S.W.2d at 489-90. As noted in Thoma, willfulness involves more than an error of judgment or a mere lack of diligence. By way of further exposition, the Thoma Review Tribunal additionally noted that "willfulness" necessarily encompasses conduct involving moral turpitude, dishonesty, corruption, misuse of office, or bad faith generally, whatever the motive. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority may in and of itself constitute bad faith. Id. A judge acts intentionally, or with intent, when the act is done with the conscious objective of causing the result or of acting in the manner defined in the pertinent rule of conduct. See In re Conduct of Schenck, 318 Ore. 402, 870 P.2d 185, 189 (Or. 1994). Gross indifference is indifference that is flagrant, shameful and beyond all measure and allowance. It is such conduct, particularly by members of the judiciary, that is not to be excused. A judge is subject to discipline for "willful" violation of any canon of judicial conduct

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as long as she or he intends to engage in conduct for which she or he is disciplined, whether or not she or he has specific intent to violate the canon. See In re Flanagan, 240 Conn. 157, 690 A.2d 865 (Conn. 1997).

a) Sexually Offensive Comments and Gestures

We must note that the specific matters before this Review Tribunal as they relate to Judge Barr's sexually offensive comments and gestures are not whether his behavior constituted "sexual harassment" as such. Likewise, we do not address whether Judge Barr's comments and gestures were inadvertent expressions of unconscious juvenile prejudices or the result of an ingrained pattern of speech. We acknowledge, without hesitation, that while all forms of behavior that cross the legal threshold of sexual harassment would constitute judicial misconduct, many forms of offensive interpersonal behavior that would otherwise violate the Texas Code of Judicial Conduct may not meet the legal definition of sexual harassment. Nonetheless, while we address the issues of whether Judge Barr's lewd and offensive comments and gestures violated the Texas Code of Judicial Conduct, we note that the charges of misconduct against him do equate to a form of sexual harassment.

Gender bias in general, and sexual harassment in particular, is personally offensive, extraordinarily invasive, psychologically damaging, and deeply embarrassing to the intended victim. See In the Matter of Seaman, 133 N.J. 67, 627 A.2d 106, 110 (N.J. 1993). It is insulting, belittling, and inappropriate in an exchange between a judge and attorney and is to be condemned for the simple reason that it is wrong. Sexual harassment in the administration of justice is harmful and offensive conduct which clearly indicates a lack of respect for the judge's victim, and, by reasonable extension, a lack of respect for the citizens of the State of Texas at large. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, 10.28 (2d ed. 1995).

For the above reasons, this Review Tribunal has chosen to maintain the anonymity of the various complainants by referring only to their initials, despite the fact that the charges against Judge Barr have become public and the privacy of each of the complainants has been shattered. Charges of judicial misconduct are ordinarily made public when found in formal proceedings brought by the Texas Judicial Conduct Commission. The Texas Judicial Conduct

Commission followed conventional practice and used the full names of each of the complainants in its notice of formal proceedings, and ultimately in its petition for removal. In the future, we urge that disciplinary cases involving abuse of the judicial office through sexual harassment, or other activities that serve to humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim. The purpose behind that practice is to protect the victim's privacy and encourage reporting of such offenses. See Seaman, 627 A.2d at 110.

Many of the findings which form the general background to the events that are the subject of the complaint against Respondent are not controverted nor materially disputed. [7] The record in the instant case establishes, and Respondent concedes, the following finding of the Special Master and ultimately the Commission:

Throughout Judge Barr's tenure on the bench, he has periodically addressed the female Assistant District Attorneys in his court as "babes."

In a permissive society, it is irrelevant whether a judge's conduct or speech is no different from that of the "ordinary person," since improper conduct which may be

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overlooked when committed by the ordinary person, even an attorney, cannot be overlooked when committed by a member of the Texas judiciary. See Cincinnati Bar Ass'n v. Heitzler, 32 Ohio St. 2d 214, 291 N.E.2d 477, 482 (Ohio 1972), cert. denied, 411 U.S. 967, 36 L. Ed. 2d 687, 93 S. Ct. 2149 (1973). By seeking and accepting the responsibilities of the office of judge, regardless of the level of office, a judge undertakes to conduct herself or himself both officially and personally in accordance with the highest standards that the citizens of Texas can expect. See id.

On June 12, 1991, the Supreme Court of Texas entered an order creating a task force to study gender bias in the Texas legal system. The formation of the Gender Bias Task Force of Texas was prompted by increasing national concern over the treatment of women in our nation's courts, both as litigants and as legal professionals. GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT, at 1 (1994). Women in the courts in any capacity may find themselves subjected to inappropriate, overly familiar and demeaning forms of address, comments on their appearance, their clothing, and their bodies, sexist remarks and jokes, and unwelcome verbal and physical advances. [8] WOMEN IN THE LAW 15.04[1] (C.H. Lefcourt ed., Release # 2, July 1988); JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, 3.09 (2d ed. 1995).

In the instant case, Judge Barr does not contest the factual finding nor the finding of willfulness, that throughout his tenure on the bench, which dates to 1988, he has periodically addressed the female Assistant District Attorneys in his court as "babes." While we need not define "babe" in its most derogatory and sexist sense, [9] we note that at a minimum, it connotes a young girl and/or a naive and inexperienced person. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 83 (10th ed. 1997). Given the above, we find Judge Barr's sexist manner in addressing female Assistant District Attorneys in his court as "babes" to be inappropriate because it undermines an attorney's role in the judicial process by indicating that she is not to be taken seriously and thus jeopardizes the proper administration of justice by hindering the female attorney from properly representing her client, in this case, the State of Texas. We find that Judge Barr's admitted actions in addressing female prosecutors as "babes" were willful conduct that was clearly inconsistent with the proper performance of his duties, cast public discredit upon the

judiciary of the State of Texas, as well as on the administration of justice, and thus are violative of Article V, Section 1-a(6)A of the Texas Constitution [10]

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and Canons 3B(3), [11] (4), [12] and (6) [13] of the Texas Code of Judicial Conduct.

The record in the instant case establishes, and Judge Barr concedes, the additional findings of the Special Master and ultimately the Commission:

In November 1995, while presiding over a criminal trial, Respondent was approached by an Assistant District Attorney, Ms. L.D., to be allowed to return to her office while the jury was deliberating. Respondent, in replying to her request, stated, "You are so nice to look at, if you leave, all I'll have to look at all afternoon is swinging dicks."

In 1995 Respondent hosted a Christmas party for his court personnel. The party took place at Respondent's residence. At the party, Respondent motioned to an Assistant District Attorney, Ms. K.A., by crooking his index finger as if he wanted her to approach. Upon approaching, Respondent stated to her, "I just wanted to see if I could make you come [reach sexual orgasm] with one finger." [14] The Assistant District Attorney was present at Respondent's residence for the party by virtue of her official relationship with the court.

At the same Christmas party 1995, Respondent approached an Assistant District Attorney, Ms. L.D. and asked her if she was leaving the party. When Ms. L.D. replied in the negative, Respondent stated, "Well, then you must be on your period. Women always carry around their purses when they're on their period." The Assistant District Attorney was present at Respondent's residence for the party by virtue of her official relationship with the court.

Shortly after the Christmas party, in January 1996, during a break in a criminal trial over which Respondent presided, Respondent motioned to yet another Assistant District Attorney, Ms. S.R., by crooking his index finger as if he wanted her to approach. Upon approaching, Respondent stated to her, "I just wanted to see if I could make you come [reach sexual orgasm] with one finger," and then laughed.

Once again, we note that Judge Barr, has conceded the inappropriateness of each of the above loathsome and wretched comments, including his willfulness of voicing such comments, and has purportedly apologized to his victims, "regardless of whether or not they were offended" by his remarks. Judge Barr's statements in each of the above accounts confound judicial reason and are the antithesis of judicial discretion. Of greater concern is the fact that on each of the four occasions shown above, the victims of his comments were women who had to appear in his courtroom or were otherwise under his supervision. Comments made to Assistant District Attorneys L.D. and S.R. were made during the course of judicial proceedings, i.e., during the course of a criminal trial while taking a break, and while a jury was deliberating a citizen's freedom. It is not material to the issues raised in the instant case whether Judge Barr's disgusting and repulsive comments reflect a misguided sense of humor, an insecurity, an inability

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to relate on an acceptable basis with individuals of the opposite sex, or some other maladjustment. It is not material that we feel a sense of sadness and appreciate the tragic consequences of his lack of social graces, judicial propriety and judicial restraint. Judge Barr's conduct not only diminishes his dignity, but also the public's respect for the judiciary of the State of Texas as a whole. This flaw in Judge Barr's judicial temperament is

inconsistent with service as a jurist in the State of Texas.

We find that Judge Barr's actions shown above constituted intentional and willful conduct, as admitted. The actions of Judge Barr, taken together, were violative of Canons 3B(3),(4), and (6) of the Texas Code of Judicial Conduct, were clearly inconsistent with the proper performance of his duties, cast public discredit upon the judiciary of the State of Texas as well as on the administration of justice and thus are likewise violative of Article V, Section 1-a(6)A of the Texas Constitution.

Finally, the Special Master found, and the Commission ultimately adopted the following two findings:

In January 1996, during the trial of a criminal case, an Assistant District Attorney, Ms. S.R., questioned a witness asking whether he had seen any evidence of another individual being capable of fabrication or lying. Respondent sustained a defense objection to the question. Ms. S.R. then asked the witness the following question: "In your treatment of her and the knowledge that you have of her and her life and family, have you developed an opinion as to her character for being truthful." Respondent immediately asked counsel to approach the bench at which time he leaned forward toward the Assistant District Attorney and stated, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you." Respondent had occasion to preside over a case in which one of the parties was represented by a local attorney, Mr. K.S.S. The case had been set for hearings on more than one occasion, and on the particular date in point, Mr. K.S.S. did not appear in court, but instead sent one of his associates to attempt to reset the case. After a discussion at the bench, the associate related a remark made by Mr. K.S.S. about the court, to which Respondent replied, from the bench, "[Mr. K.S.S.] can go screw himself. . . ." Respondent's comment was quoted in an article appearing in the Texas Lawyer.

In reviewing the above, the Special Master found, and the Commission adopted such findings, that Respondent violated Canons 3B(3) and (4). As noted earlier, Canons 3B(3) and (4) provided in pertinent part as follows:

B. Adjudicative Responsibilities.

. . .

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . . .

. . .

We recognize and take great pride in acknowledging the ethnic, cultural, racial and gender diversity which is found among members of the Texas judiciary. Given that diversity, the proper administration of justice must allow for the personal imprint that judges place on court facilities which they oversee. While we recognize that a judge shall require order and decorum in proceedings before the court, and shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, we are ever mindful that judicial accountability does not require that judges be mere robots or be of precisely the same character with precisely the same personal qualities and attitudes.

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There must always be room in the judiciary of the State of Texas, which serves a pluralistic society, for differences in judicial style. There must always be room for the colorful judge as well as the more conventional judge.

Differences in style and personality do not of themselves suggest misconduct. To the end that a courtroom may truly be a temple of justice and not the personal domain of the woman or man who happens to be presiding, any differences in style must always result in justice administered according to law and must be in accord with minimum standards of propriety. See In the Matter of Ross, 428 A.2d 858, 861 (Me. 1981). Canons 3B(3) and (4) of the Texas Code of Judicial Conduct seek to set those minimum standards. Judge Barr has fallen short.

In each of the final two circumstances, Respondent concedes the underlying facts which form the basis of this complaint. Moreover, on review, Respondent specifically notes that he regrets the language used and at least with respect to the comments made to the Assistant District Attorneys, he has acknowledged that the individuals were personally offended and has apologized. However, Respondent does contest the finding of "willfulness" in each of the final two circumstances, and asks this Review Tribunal to excuse his conduct given the circumstances within which the comments were made.

With respect to the incident of January 1996 wherein Judge Barr leaned forward toward the Assistant District Attorney and stated, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you," Respondent suggests that the remarks were merely a rebuke. We disagree.

As noted above, the term "willful," in the context of removal of members of the Texas judiciary for misconduct, has been defined as follows:

The term "willful," as applied in TEX. CONST. art. V, 1-a(6)A, is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross indifference to his conduct.

Thoma, 873 S.W.2d at 489-90. Since Judge Barr has admitted the underlying conduct, we need not determine whether he acted intentionally, or with intent. Respondent effectively has admitted that the acts, i.e., the comments, were spoken with the conscious objective of attempting to rebuke the District Attorney. Respondent is susceptible to discipline for "willful" violations of Canons 3B(3) and (4) in the instant case as long as he intended to engage in conduct for which he is disciplined, whether or not he formed the specific intent to violate those canons. See In re Flanagan, 690 A.2d at 865.

Members of the judiciary have been disciplined for engaging in discourteous conduct toward attorneys. The discourteous conduct may be categorized, for analytic purposes, as primarily (1) impatient, (2) vindictive, (3) undignified, and (4) sarcastic. JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, 3.03 (2d ed. 1995).

In the instant case, the record shows that Judge Barr's comment to Assistant District Attorney S.R. occurred during the course of a criminal trial at a bench conference outside the hearing of the jury. The Assistant District Attorney had previously asked a question to which a defense objection had been sustained. The record indicates that the Assistant District Attorney proceeded to ask the same question, albeit in a different form, that was likewise improper. While judges do enjoy inherent power to issue orders and take the necessary legal action in order to fulfill judicial responsibilities, that power and authority is not unbridled. Respondent's comment, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you," displays impatience and disrespect to a member of the bar, and of greater significance potentially has a chilling effect on an attorney's representation of her or his client and may

interfere with that attorney's right to be heard according to law. We decline to

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extend a judge's inherent power to this extreme and find Judge Barr's comments to be both intentional and willful.

With respect to the final incident, i.e., Judge Barr's comment from the bench that "[Mr. K.S.S.] can go screw himself," Respondent suggests that the remark was not meant to be offensive in any way, but rather a statement made in jest. As noted above, Respondent is susceptible to discipline for "willful" violations of the Texas Code of Judicial Conduct so long as he intended to engage in conduct for which he is disciplined, whether or not he formed the specific intent to violate those canons. It is immaterial that Judge Barr may have perceived his offensive conduct as low-humored horseplay. Judge Barr has admitted the verbal transgression. Accordingly, we find his conduct to be both intentional and willful.

Each of the above comments uttered by Judge Barr represents an undignified and tasteless flaw possessed by a member of the judiciary of the State of Texas. Judge Barr's flaw intensifies when coupled with the fact that on September 15, 1994, he openly admitted to the State Commission on Judicial Conduct to his use of profane, vulgar, and demeaning language as a means of getting or keeping the attention of certain individuals. The Commission, in noting that such language from the bench does not engender respect for the judiciary or the administration of justice, privately warned Judge Barr that his use of profane or vulgar words was not appropriate for the bench in open court.

Judges have extraordinarily little interest in the use of insulting, degrading, vile, and sexist language, while the public interest in judicial dignity and impartiality is correspondingly high. Thus, in the instant case, Judge Barr's right to insult and demean is necessarily outweighed by the public interest to demand dignity. His comments under each of the above circumstances constituted intentional and willful conduct that was clearly inconsistent with the proper performance of his duties, cast public discredit upon the judiciary of the State of Texas as well as on the administration of justice and thus his conduct is violative of Article V, Section 1-a(6)A of the Texas Constitution and Canons 3B(3), (4), and/or (6) of the Texas Code of Judicial Conduct as discussed relative to the above instances. [15]

We have examined only the evidence that tends to support the Commission's findings of willfulness as to Respondent's sexual comments and gestures, and have disregarded all evidence and inferences to the contrary. In applying the above no evidence standard, we find that there is more than a scintilla of evidence to support the questioned findings in each of the above paragraphs. Respondent's no evidence challenge fails as to all of the above findings and his complaint overruled.

Furthermore, we have examined all of the evidence in determining whether the questioned findings of willfulness as to Respondent's sexual comments and gestures are so against the great weight and preponderance of the evidence as to be manifestly unjust. Given the evidence, in particular his admissions, we find that there is abundantly sufficient, competent evidence of probative force to support the Commission's findings as to each allegation. We overrule Respondent's factual sufficiency claim.

b) Improper Exercise of Judicial Process

In Point of Error No. One, Respondent contends that the evidence is both legally and factually insufficient to

support the Special Master's Findings, and ultimately the Commission's Findings that

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he willfully violated TEX. CONST. art. V, 1-a(6)A (1993), and TEX. CODE JUD. CONDUCT, Canon 2A and Canons 3B(3), 3B(4) and 3B(8)(1993). Specifically, Respondent contends that the judiciary has inherent power to issue orders and take necessary legal action in order to fulfill its judicial responsibilities, and as a result, any orders which he issued are legal and not subject to disciplinary review. [16]

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The facts in the instant case, as found by the Special Master and adopted by the State Commission on Judicial Conduct, establish that on November 2, 1995, Brenton Ray Overturf, was indicted for the offense of aggravated robbery. The matter was assigned to the 337th Judicial District Court where Judge Barr was to preside. On November 15, 1995, a pretrial setting was established for the case to be heard in the 337th Judicial District Court on December 19, 1995. On December 5, 1995, a defense subpoena was issued for Harris County Deputy Sheriff Paul Rendon to appear in the 337th Judicial District Court on December 19, 1995 and to produce specified photographs. The subpoena did not bear the signature of the Harris County District Clerk or of any deputy clerk, judge or magistrate. A copy of the subpoena was furnished to Deputy Rendon the following day. Deputy Rendon failed to personally appear pursuant to the subpoena, as directed. [17] That same day, December 19, 1995, attorneys for the State and defense entered into an agreement resetting the Overturf case to January 17, 1996. The record establishes that while the attorneys agreed to the resetting of the case, Judge Barr had no personal knowledge of the agreement to reset. Between the dates of December 19, 1995 and January 17, 1996, the evidence was not produced, as requested.

On January 17, 1996, Respondent called for the Overturf case to be heard. At the hearing, defense counsel sought approval of a motion for discovery and a corresponding discovery order which requested, among other things, the previously sought-after photographs which were purportedly

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in the custody and control of Deputy Rendon. Upon being advised that the photographs had not been produced on December 19, 1995 pursuant to a defense subpoena duces tecum, Judge Barr advised his court clerk, as well as his process server, to issue a writ of attachment for Deputy Rendon, with a witness bond for the law enforcement officer set at $ 50,000. [18] Neither the defendant nor the State ever requested that the writ of attachment be issued nor that a witness bond be set for Deputy Rendon. Moreover, neither the State nor defense filed an application for a writ of attachment or other affidavit stating that Deputy Rendon was a material witness about to move out of Harris County, Texas. The Overturf case was then reset to January 30, 1996.

The writ of attachment, issued pursuant to Judge Barr's order, was signed by an individual who was not the Harris County District Clerk. It required that Deputy Rendon appear in the 337th Judicial Court at 9:00 a.m. on January 17, 1996; however, the writ was not signed until an hour after he was to appear. The writ of attachment refers to Deputy Rendon as the "defendant," rather than a witness. At approximately mid-morning on January 17, 1996, Deputy Rendon appeared in court, escorted by Sheriff's Deputy James A. Phillips, Respondent's process server. Although Judge Barr had not reviewed or made any determination of the factual or legal adequacy of either the subpoena or writ of attachment, Judge Barr then instructed that Deputy Rendon be immediately taken into custody. No hearing, formal or otherwise, was conducted to

determine why Deputy Rendon was not in attendance on December 19, 1995 as subpoenaed, or to show good cause why he did not produce the requested photographs. Moreover, no hearing was conducted to determine the Deputy's financial condition to post the required witness bond.

The record further shows that at approximately 1:30 p.m. on January 17, 1996, attorneys W. Stacey Mooring and Paul Aman, both representing Deputy Rendon, appeared before Respondent for the purpose of discussing the Deputy's confinement, the writ of attachment, and the witness bond. Judge Barr advised counsel that he would not withdraw the writ and release the Deputy from confinement nor would he lower the amount of the witness bond. Additionally, Judge Barr advised counsel that the writ of attachment and bond were being imposed for the purpose of making an example of Deputy Rendon to both the Harris County Sheriff's Department and the City of Houston Police Department. Of greater significance, however, were Respondent's comments to counsel that if they would not contest the writ of attachment and Deputy Rendon remained in jail overnight, he would withdraw the writ of attachment and release him from jail the following day. On the other hand, if the attorneys decided to contest the writ of attachment, he would set the Overturf case immediately, or continue the imposition of the writ and bond until January 30, 1996. The conference with Mooring and Aman concluded with Respondent callously telling counsel that he wanted Deputy Rendon to "smell the smells" and "feel what it is like to be in jail," that he didn't want to fine Deputy Rendon or hold him in contempt, stating "I don't want to be a big asshole, I want to be a small asshole," and that his desire was to "rub the department's and [Deputy Rendon's] nose in it to get the message across."

The record establishes, and the Special Master found, that Judge Barr would not change his mind regarding the action taken against Deputy Rendon, that he knew

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that the $ 50,000 bond was unreasonable, but that he refused to hold a bond reduction hearing the same day as he wanted Deputy Rendon to remain in jail until the following day at which time he would consider a bond reduction, and finally, that Judge Barr admitted that he had not researched the law regarding writs of attachment or witness bonds, but would accept the consequences of his conduct.

As noted above, Respondent contends that the judiciary has inherent power to issue orders and take necessary legal action in order to fulfill its judicial responsibilities, and as a result, any orders which he issued are legal and not subject to disciplinary review. Thus, this case squarely presents an issue of first impression in Texas, i.e., under what circumstances may legal error by a judge constitute grounds for a finding of judicial misconduct.

There can be no greater threat to a free society than judicial anarchy which would certainly be realized through the continued erosion of judicial independence. It is that constant quest for independence that should prohibit the imposition of disciplinary action upon a judge for an incorrect ruling. The potential impact on the independence of the judiciary in the State of Texas cannot be overstated, for the preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings. Judicial independence is the cornerstone of our system of justice as is recognized in the Preamble to the Texas Code of Judicial Conduct, which states that "our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." TEX. CODE JUD. CONDUCT, PREAMBLE (1993).

Furthermore, the provisions of the Code are intended to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct. Id. Consequently, we note that a truly independent judge is one who is able to rule as she or he determines appropriate, without any fear of political retaliation or disciplinary reprisals.

While mere legal error should best be left to the appellate courts of this State, rather than to the disciplinary process, that does not mean that legal error can never constitute judicial misconduct. Generally, there are three circumstances in which legal error may be found violative of one or more of the Canons. These circumstances are:

1) commission of egregious legal error;

2) the commission of a continuing pattern of legal error; or,

3) the commission of legal error which is founded on bad faith.

In re Quirk, 705 So.2d 172, (La. 1997); see also JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, 2.02, (2d ed. 1995), citing Gerald Stern, Is Judicial Discipline in New York a Threat to Judicial Independence?, 7 PACE L.REV. 291, 303-45 (1987).

In various states, courts and/or judicial commissions have imposed discipline for legal errors made by judges which were egregious, were part of a pattern and practice of legal error, and/or made in bad faith. In those cases, there was no dispute that the legal rulings made by those judges were clearly error under their respective statutes or jurisprudence. For example, it has been held to be not only judicial error but also judicial misconduct when judges have consistently failed to advise defendants of their constitutional right to counsel, denied defendants a full and fair hearing, coerced guilty pleas, directed the jury to find a defendant guilty, failed to order recognizance or bail in nonfelony cases, or sentenced defendants to jail when only a fine is provided for by law. [19]

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We are ever mindful of the fact that legal decisions may be made where the law thereunder is arguably unclear or ambiguous, and under those circumstances, judicial disciplinary proceedings are to be discouraged, if not condemned, as a frontal attack on the independence of the judiciary. It is for that reason that we hold that a member of the Texas judiciary may be found to have violated Article V, 1-a(6)A of the Texas Constitution by a legal ruling or action made contrary to clear and determined law about which there is no confusion or question as to its interpretation and where the complained-of legal error is egregious, made as part of a pattern or practice of legal error, or made in bad faith. See Quirk, 705 So.2d 172 at 177-178. So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or judicial overreaching lies in appropriate appellate review. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, 2.02 (2d ed. 1995). We further hold that with respect to judicial disciplinary proceedings, a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority constitutes "bad faith" as a matter of law.

In the instant case, there can be no doubt that a judge is vested with the inherent power to issue orders and take necessary legal action in order to fulfill judicial responsibilities. Likewise, there can be no doubt that under the proper circumstances, a

writ of attachment may be issued to secure the attendance of a witness at a judicial proceeding. Concerns however, are raised as to the manner in which the procedural devices were utilized and more importantly, the overt, articulated motive in pursuing such extreme remedies.

The record establishes that the defense in the Overturf case sought the inspection of certain photographs. No motion for discovery was initially filed seeking the designated photographs, but rather, a subpoena duces tecum was sought and issued

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for a Harris County Sheriff's Deputy who was not the custodian of evidence, was never talked to by the defense, was noted to Respondent as being the wrong person subpoenaed, and who was nonetheless designated as "material." The purpose of the motion for discovery is to have the court order the State, either before or during trial, to produce and permit the inspection of evidence, in this case, the photographs in question which are in the possession, custody or control of the State or any of its agencies, including the Harris County Sheriff's Department. The order of discovery shall specify the time, place and manner of making the inspection. TEX. CODE CRIM.PROC.ANN. art. 39.14 (Vernon 1997). Sanctions are provided for the disobedience of any such discovery order. The defense instead sought a subpoena duces tecum for Deputy Rendon for December 19, 1995. Rendon failed to appear.

At the January 17, 1996 pretrial hearing for Overturf, neither party complained of Rendon's failure to appear at the December 19, 1995 hearing; to the contrary, defense counsel sought the appropriate procedural remedy, i.e., a motion for discovery and corresponding order of discovery. The defense did not seek to have Deputy Rendon subpoenaed for the January 17, 1996 pre-trial hearing and of greater significance, never sought to have the Deputy attached and directly jailed. [20]

In the State of Texas, it is axiomatic that a subpoena may summon an individual to appear before a court to testify in a criminal action on a specified day. TEX. CODE CRIM.PROC.ANN. art. 24.01 (Vernon 1997). If a witness refuses to obey a subpoena, the witness may be fined at the discretion of the court; in the instant case, a fine not to exceed five hundred dollars. Id., art. 24.05. When a fine is entered against a witness for failure to appear and testify, the judgment is conditional; and a citation issued to the witness, at the court's discretion, to show cause why the witness should not be fined. Id., art. 24.07. As noted above, the subpoena in the instant case was fatally defective in that it did not bear the signature of the Harris County District Clerk or of any deputy clerk, judge or magistrate, as required by law. Id., art. 24.07.

An "attachment" on the other hand is a writ issued by a clerk of a court under seal, or by any magistrate, or by the foreman of a grand jury, in any criminal action or proceeding commanding a peace officer to take the body of a witness and bring him before the court or grand jury on a day named, or forthwith, to testify on behalf of the State or the defendant. The writ of attachment shall be dated and signed officially by the officer issuing it. Id., art. 24.11. When a witness who resides in the county of the prosecution has been duly served with a subpoena to appear and testify in any criminal action or proceeding fails to so appear, the State or the defendant shall be entitled to have an attachment for such witness issued conditioned upon a showing that such witness is material and is about to move out of the county. Id., art. 24.12, 24.14. Given that an attachment authorizes a "seizure" of the witness within the meaning of the Fourth Amendment to the United States Constitution and art. I, 9 of the Texas

Constitution, like an arrest warrant or a capias, a writ of attachment should issue only upon a judicial showing that the seizure is justified. See DIX & DAWSON, 41 TEXAS PRACTICE 27.45 (1995). An affidavit or sworn testimony by the defendant reciting what the

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witness would testify to is a minimum requirement. Hardin v. State, 471 S.W.2d 60 (Tex.Crim.App. 1971). Any bail which is set by the judge or magistrate should be reasonable and in such amount as to secure the attendance of the witness.

In the instant case the writ of attachment, issued pursuant to Respondent's order, was sloppy at best. The writ was signed by an individual who was not the Harris County District Clerk. It required that Deputy Rendon appear in the 337th Judicial Court at 9:00 a.m. on January 17, 1996; however, the writ was not signed until an hour after he was to appear. The writ of attachment refers to Deputy Rendon as the "defendant," rather than a witness. Moreover, Judge Barr admitted that prior to taking the step of depriving a citizen of his individual freedom, he had not researched the law regarding writs of attachment or witness bonds.

Judge Barr's actions above were "willful," in that they were done intentionally, or with gross indifference to his conduct. He clearly intended to engage in conduct for which he is disciplined, whether or not he had specific intent at the time to violate the Texas Code of Judicial Conduct. His actions were done with the conscious objective of causing the ultimate confinement of Deputy Paul Rendon in that the legal shortcomings were flagrant, shameful, and beyond all measure and allowance, given his admitted lack of knowledge in the area of writs of attachment. His conduct nonetheless clearly amounted to legal error.

The Special Master found that before Deputy Rendon could leave Respondent's courtroom, immediately after his release from confinement, Respondent called him to the bench. The record shows that as the Deputy and his attorney approached the bench, Respondent instructed counsel to step away from the bench. When the attorney stated, "But Judge, I'm his lawyer," Respondent replied that the Deputy did not need a lawyer since he was not charged with anything. Respondent then instructed the Deputy's attorney to leave the courtroom. There is no evidence that Deputy Rendon requested the presence of counsel at the bench in the instant case.

We have noted that legal error by a judge may constitute grounds for a finding of judicial misconduct if the commission of legal error is founded on bad faith. We have further found that the term "bad faith" as used in connection with the determination that the judge had engaged in unjudicial conduct by acting in bad faith, entails a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority.

The instant case, as it relates to the manner in which Judge Barr purportedly exercised inherent power, is charged with elements of bad faith. The motive of Judge Barr in summarily depriving Deputy Rendon of his freedom is clear: to impress upon law enforcement in Harris County, Texas, both its Sheriff's Department as well as the City of Houston Police Department that they should be more responsive to the trial needs of criminal defendants. Deputy Rendon was merely a pawn in a struggle between the court and the court's own auxiliary law enforcement agencies. It was an improper imposition of harsh judicial power for a reason unrelated to the purpose of the court.

Judge Barr sought to have Deputy Rendon attached and jailed on his own

motion, without the benefit of affidavits or a requisite showing of materiality. Respondent wholly failed to take into account the deficiencies in the underlying documents, i.e., the subpoena and attachment. Those deficiencies are amplified given the fact that the writ of attachment was issued on his own motion. Respondent ordered Deputy Rendon summarily incarcerated without the benefit of a hearing. A "witness" bond for this law enforcement officer was set in the penal amount of $ 50,000, even accounting for the fact that the officer was a resident of Harris County, Texas. Respondent

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refused to consider the Deputy's financial ability to post the required $ 50,000 bond, although Respondent was required to release the Deputy if he was unable to give security upon such bail. Respondent acknowledged that the bond was unreasonable but refused to lower it, as requested, and instead threatened the Deputy's attorneys with a continuation of the writ and bond if they intended to pursue rights afforded the Deputy pursuant to the United States and Texas Constitutions. The attorneys likewise were informed by Respondent that if they did not contest the issue, the Deputy would be released the following day. Respondent openly acknowledged that the motive behind incarcerating Deputy Rendon was not to secure the attendance of a witness to testify, but rather to make an example of Deputy Rendon to both the Harris County Sheriff's Department and the Houston City Police Department. The incarceration was openly penal in nature. Respondent's motives to accomplish a purpose which he knew or should have known was beyond the legitimate exercise of his judicial authority are made all the clearer and conclusive by his desire to have Deputy Rendon to "smell the smells" and "feel what it is like to be in jail," that he did not want to fine Deputy Rendon or hold him in contempt, stating "I don't want to be a big asshole, I want to be a small asshole," and that his desire was to "rub the department's [Deputy Rendon's] nose in it to get the message across." Respondent's motives and actions were furthered knowing that by his own admission, he had not researched the law regarding writs of attachment or witness bonds.

Accordingly, we find that Judge Barr's conduct, as found by the Special Master and ultimately by the State Commission on Judicial Conduct, was willful conduct that violated the Code of Judicial Conduct, Canons 2A, 3B(3), 3B(4), and 3B(8), was clearly inconsistent with the proper performance of his duties, and cast public discredit upon the judiciary or the administration of justice, all in violation of Article V, Section 1-a(6)A of the Constitution of the State of Texas.

We have examined only the evidence that tends to support the Commission's findings of willfulness in each of the paragraphs and charges listed in Item 1, and have disregarded all evidence and inferences to the contrary. In applying the above no evidence standard, we find that there is more than a scintilla of evidence to support the questioned findings in each of the above paragraphs, with the exception of the allegations found in Paragraph Four, Charge 5 of Item 1. Respondent's no evidence challenge fails as to all of the above findings and his complaint overruled as to each paragraph, save and except Paragraph Four, Charge 5 of Item 1 which is sustained. Although the evidence is legally insufficient, we hold that the absence of evidence did not cause, nor could it be reasonably calculated to have caused, the rendition of an improper recommendation, given the facts of the instant case. TEX. R. APP. P. 44.1. [21] Point of Error No. One is overruled, save and except Respondent's challenge to the Commission's finding that he willfully excluded Deputy Rendon's attorney from being present and heard, which is sustained.

Furthermore, we have examined all of the evidence in determining whether the questioned findings in each of the remaining paragraphs and charges listed in Item 1 are so against the great weight and preponderance of the evidence as to be manifestly unjust. Given the evidence, we find that there is abundantly sufficient, competent evidence of probative force to support the Commission's findings as to each of the remaining charges and paragraphs listed in Item 1, save and except Paragraph Four, Charge 5 of Item 1, for

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which we have found no evidence. We overrule Respondent's factual sufficiency claim.

c) Behavior Toward Those with Whom a Judge Interacts in a Judicial Capacity

Respondent next contends that the evidence is both legally and factually insufficient to support the Special Master's Findings, and ultimately the Commission's Findings that he willfully violated TEX. CONST. art. V, 1-a(6)A (1993), and TEX. CODE JUD. CONDUCT, Canons 3B(3) and 3B(4)(1993). [22]

The record in the instant case shows on April 22, 1997, Daimon Rainey was acquitted by a jury in the 337th Judicial Court of the offense of aggravated sexual assault. Respondent presided over the trial. Rainey was escorted to an adjacent holdover cell immediately outside the courtroom. Respondent ordered that Rainey, having been acquitted, be released from custody. The fact that Respondent ordered Rainey's release is not in dispute.

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On the day in question, Harris County Sheriff's Deputy James A. Phillips was assigned to Respondent as his process server. Deputy Phillips refused to comply with Respondent's oral order, citing policies of the Harris County Sheriff's Department which prohibits the immediate release of an individual directly from the courtroom, but rather directs officers to escort the individual to a separate holding area located in the basement of the building. Individuals are purportedly released from that location. [23] Sheriff's Deputy Phillips testified that after the judgment of acquittal, he proceeded to lead Rainey to an elevator in order to escort him across the street to the Harris County Inmate Processing Center for deprocessing and release. As they passed the main entrance to the courtroom door, Rainey walked over to his fiancee and mother and embraced them both. Respondent approached them and asked Rainey if he would like to leave with his family. Rainey stated that he would. Deputy Phillips testified that at the time, Respondent appeared frustrated. Deputy Phillips further testified that Respondent advised Rainey that he was a free man and that he could take the elevator and leave with his family. Deputy Phillips further told him that if he left the floor, he would be either rearrested or detained. The testimony shows that Respondent approached Deputy Phillips, his process server, and within approximately a foot from his face, inquired of the Deputy whether he was countermanding his order for Rainey's immediate release. The testimony shows that while Respondent's voice was not exceptionally loud, it was loud enough that the people in the immediate area could hear it. Deputy Phillips noted that Respondent was angry, speaking in a quivering, breaking, high-pitched voice. At this point, Respondent placed his hand on Rainey's right arm, holding it, and began to lead him toward the elevator. Deputy Phillips, in response, took hold of Rainey's left arm. At that moment, Deputy David B. Clingan, Respondent's bailiff, returned from the jury room and physically removed Respondent's hand from Rainey's right arm. Deputy Phillips testified that Respondent threatened contempt to

which his bailiff replied that Respondent would have to find them in contempt since they were going to take Rainey to be processed out.

Court Bailiff, Sheriff's Deputy Clingan, testified that he too advised Respondent that they could not release Rainey due to the Harris County Sheriff's Department policy that inmates were not to be released directly from the courtroom. He testified that Respondent was upset and agitated during the discussion. He further testified that during the discussions, Respondent

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reached out and grabbed Rainey and told him that he could go down the elevator with him. Finally, Deputy Clingan testified that he immediately grabbed Respondent's wrist with his right hand and grabbed Rainey with his left, and pulled them apart from one another.

Ms. Beth Boswell, Harris County Assistant District Attorney, testified that she was the prosecutor in the case styled: State of Texas v. Daimon Rainey. After the judgment of acquittal, she saw Respondent and his "bailiffs" [Deputies Phillips and Clingan] heading down the hall toward where she was standing, i.e., immediately outside the door between the back hall and the courtroom. Ms. Boswell testified that she very quickly went inside the courtroom to distance herself from the situation, knowing that it did not involve her personally. Finally, she noted that there very definitely was a dispute between the individuals.

Harris County Sheriff's Sergeant Ricky Davis testified that he received a telephone call from Deputy Phillips asking that he come to the 337th Judicial District Court. He stated that upon arrival, the Deputies explained to him that the judge had ordered the inmate's release directly from the courtroom which was against policy. Sergeant Davis further stated that they talked to Rainey's attorney, explained to him the problem, to which the attorney stated that he had no objections to the procedure. Rainey himself stated that he understood the policy and did not have a problem with it. Sergeant Davis noted that they even offered the attorney the opportunity to go with them when they took Rainey over to make sure they were expediting the process to get him released. The attorney declined and stated that he trusted them in that matter. Sergeant Davis testified that once Captain Dan Doehring came to the courtroom, as summoned, that he remained outside while Captain Doehring was in Respondent's chambers. He stated that while outside, he could hear Respondent through closed doors, in a fairly loud voice, telling Captain Doehring that he did not want Deputies Clingan or Phillips back in his courtroom.

In contrast, Respondent contends that the evidence suggests that he remained on the bench immediately after the jury verdict and ordered Rainey's release while on the bench; that at the point in time that the jury was escorted to the jury room by Deputy Clingan, Rainey was seated at counsel's table; that at least one other Harris County District Judge orders the immediate release of individuals who have been incarcerated but acquitted by a jury and that the Harris County Sheriff's Department policies are irrelevant in light of the legality of the Respondent's order; that Respondent's tone of voice during the dispute was less than "loud and angry;" that Rainey's counsel was mistaken in his belief that his client had the choice of being permitted to follow Respondent's order and be immediately released or return to the Inmate Processing Center at the Harris County Sheriff's Department as a "favor" to the deputies and that the term "angrily," in describing Respondent's speech during the dispute is inaccurate; that contrary to the testimony of Deputy Clingan that Respondent grabbed Rainey, that Respondent's portrayal that he "grasped" Rainey is inaccurate; that

Respondent, although not recalling asking Deputy Phillips "are you defying my order," doesn't deny saying it, but that he did not shout; that there is no evidence that Respondent was "shouting in a loud and angry voice;" and finally, that there is no testimony that Respondent shouted and/or spoke in a loud and angry voice in conversing with Harris County Sheriff's Deputy Dan Doehring.

Canon 3B of the Texas Code of Judicial Conduct provides in pertinent part as follows:

B. Adjudicative Responsibilities.

. . .

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(3) A judge shall require order and decorum in proceedings before the judge.

TEX. CODE JUD. CONDUCT, Canon 3B(3)(1993).

As noted above, the evidence is in conflict in various respects. In particular, the evidence is in conflict as to whether the dispute in question between Respondent and his law enforcement staff members occurred during proceedings, as required by Canon 3B(3) of the Texas Code of Judicial Conduct. The clear language of Canon 3B(3) distinguishes conduct during proceedings from other conduct. While we find no guidance in the case law of this state, or any other state for that matter, we hold that the precise language of Canon 3B(3), as it relates to "proceedings," contemplates conduct which takes place in open court, while the judge is on the bench, fulfilling an adjudicative function.

In applying the definition of "proceedings" as set forth above, we note that there is a conflict in evidence. Surprisingly, Respondent contends that he was in fact on the bench at the time his order of release was issued. The record, on the other hand, is replete with testimony as to the various locations where this dispute is said to have started, continued, and concluded. As further noted above, this Review Tribunal cannot substitute its findings for those of the Commission. If there is sufficient competent evidence of probative force to support the findings, they must be sustained. Thoma, 873 S.W.2d at 485. Moreover, if there is conflicting evidence, as in this case, the findings of the Special Master on such matters, as adopted by the Commission, will be regarded as conclusive. Id. In the instant case, the Special Master found that Respondent "had already left the bench as Deputy Phillips was returning to the courtroom, after placing Mr. Rainey in the holdover cell." Consequently, we find as conclusive, the Special Master's factual finding that the dispute was not in the course of proceedings before the judge, as envisioned by Canon 3B(3) of the Texas Code of Judicial Conduct and as we have defined "proceedings" above. TEX. CODE JUD. CONDUCT, Canon 3B(3)(1993).

We turn next to Respondent's conduct off the bench, in particular, his words and conduct toward his law enforcement staff members and their insistence on following an internal sheriff's department policy in violation of a lawful court order. In Texas, a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control. TEX. CODE JUD. CONDUCT, Canon 3B(4)(1993). It is generally accepted that judges can be disciplined for being rude or discourteous toward other justice system personnel. Geiler v. Commission on Judicial Qualifications, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (Cal. 1973)(referring to court employees with obscenities); In re Broome, 245 Ga. 227, 264

S.E.2d 656 (Ga. 1980)(using derogatory language toward another judge); Murtagh v. Maglio, 9 A.D.2d 515, 195 N.Y.S.2d 900 (N.Y. 1960)(belittling the extent of injuries of a law enforcement officer). In applying the Texas Code of Judicial Conduct, Canon 3B(4) to the instant situation, we focus not on the legality or illegality of Respondent's order to release Rainey, but rather assume, as did the parties, that Respondent's order was valid. Instead, we focus on the conduct of Respondent, in relation to his law enforcement staff members, in his manner and choice of language and in personally attempting to enforce his order outside the courtroom.

In recognizing that in Texas, a judge shall be patient, dignified and courteous to those with whom the judge deals in an official capacity, we are not unmindful of the fact that judges are merely human. Certainly, the pressures occasioned by both the volume and the nature of the business, as well as the administrative

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frustrations that go along with the business which comes before a trial court in the State of Texas may on occasion cause even the most patient judge to use intemperate language and be tempted to resort to "self-help" in the enforcement of court's orders, when court personnel refuse to comply with such orders. See Ross, 428 A.2d at 866. While the use of intemperate language, under certain circumstances, is understandable though not condoned, we caution against a judge's retreat from her or his adjudicative responsibilities and pursuit of personal intervention, or "self-help," in the enforcement of judicial orders.

In the instant case, there can be no doubt that Respondent was less than patient and courteous to Deputies Phillips and Clingan, two law enforcement officers assigned to his court and thus subject to his direction and control. However, in carefully reviewing the record, we note that as intemperate as the language was, no vile, obscene or abusive language was used. Nonetheless, we note with caution that Respondent's language comes dangerously close to degrading and diminishing the law, the judge himself, and the State of Texas. Of particular concern is the fact that Respondent's dispute was public and of such a nature to possibly convey to those individuals within earshot, that justice is failing and its proper administration is only achievable through the personal intervention or self-help of judges themselves.

We turn next to the aspect of Respondent's attempt at self-help in the enforcement of his order that Rainey be released from custody upon being acquitted of aggravated sexual assault.

As noted above, an independent and dynamic judiciary is critical if the rights of citizens are to be protected. An infringement on the independence of the judiciary is an immediate threat to the fundamental concept of government under law. Ross, 428 A.2d at 860. Absent a true sense of accountability, judicial conduct that remains unfettered, leads to judicial anarchy. It is for that reason that conduct on the part of a judge that departs from otherwise recognized, established, and accepted procedures for the enforcement of orders and judgments, constitutes lawless conduct which advances a personal brand of justice in which the judge becomes a law unto herself or himself. We find such lawless judicial conduct to be as threatening to the concept of government as is the loss of judicial independence. Id. We clearly, absolutely, unequivocally, and unanimously condemn the use of self-help or other personal intervention on the part of a judge in an effort to enforce a judicial order when established jud icial remedies are available. We also clearly hold that a sheriff's department's policy, however "reasonable" it may be, cannot be allowed to override the law or a lawful court order.

The evidence in the instant case demonstrates an early attempt on the part of Respondent to personally enforce his judicial order. We note however, that Respondent abandoned his brief attempt at such self-help, for whatever reason, and retreated to his proper judicial role. Although the order to release the prisoner was a lawful order that should have been obeyed, we do not focus on whether the policy of the Harris County Sheriff's Department runs afoul of constitutional protections afforded individuals who have just been acquitted of a crime. Instead, we properly focus on whether established and recognized procedures for the enforcement of a judicial order have been properly pursued. In this case, we find the evidence lacking.

We have examined only the evidence that tends to support the Commission's findings of willfulness in Item 3, Charge 1, Paragraphs One through Four, and Item 3, Charge 2, Paragraphs One through Four, and have disregarded all evidence and inferences to the contrary. In applying the above no evidence standard we find that there is more than a scintilla of evidence to support the questioned findings in Item 3, Charge 1, Paragraphs One, Two,

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and Four, and Item 3, Charge 2, Paragraphs One, Two, and Four. Respondent's no evidence challenge fails as to the above findings and his complaint overruled to that extent. Finding that Respondent's complained-of actions did not occur during court proceedings, but rather took place in the courtroom after proceedings had concluded, in the hallway and/or elevator lobby, or Respondent's chambers, we sustain Respondent's no evidence challenge only as to the questioned findings in Item 3, Charge 1, Paragraph Three, and Item 3, Charge 2, Paragraph Three.

Furthermore, we have examined all of the evidence in determining whether the remaining questioned findings in Item 3, Charges 1 and 2 are so against the great weight and preponderance of the evidence as to be manifestly unjust. Given the evidence, we find that there is insufficient competent evidence of probative force to support the Commission's findings as to Item 3, Charge 1, Paragraphs One, Two, and Four, and Item 3, Charge 2, Paragraphs One, Two, and Four. We sustain Respondent's contentions in that regard.

Respondent's Point of Error No. One is overruled, save and except that portion of the point of error which addressed "Behavior Toward Those with Whom a Judge Interacts in a Judicial Capacity," which is sustained. Although the evidence is legally and factually insufficient in this regard, we hold that the absence of evidence did not cause, nor could it be reasonably calculated to have caused, the rendition of an improper recommendation, given the facts of the instant case. TEX. R. APP. P. 44.1. [24]

2. Constitutional Challenges

Respondent, for the very first time on review, has advanced various constitutional arguments. Specifically, Respondent asserts that the State Commission on Judicial Conduct has failed to comply with constitutional provisions which mandate the requiring publication of its annual report, that the Texas Code of Judicial Conduct sets forth prohibited actions which contain vague and indefinite phrases; that he has been denied his First Amendment right to freedom of speech and expression; that his removal from office would disenfranchise voters, given the constitutional scheme under which judges are elected; that the application of the Texas Code of Judicial Conduct and pertinent law as to him is unconstitutional for reasons of overbreadth and vagueness; and, that the State Commission on Judicial

Conduct unconstitutionally and incorrectly interpreted state law.

As noted above, to the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES, the civil rules of procedure, both trial and appellate, are applicable. TEX. R. REM'L/RET. JUDGES, 56 Tex.B.J. 823 (1993), Rules 10(d), 12(e) and (g). Consistent with established rules of procedure, Respondent, after having been served with notice of the pendency of formal proceedings against him, was required to file, and did file his original verified answer. TEX.R.CIV.P. 83; TEX. R. REM'L/RET. JUDGES, Rule 10(b). In addition, once a hearing has been conducted by a special master, as in the instant case, and the report of the special master has been filed with the Commission, the Respondent may file a statement of objections to such report. TEX. R. REM'L/RET. JUDGES, Rule 10(i). This Statement of Objections to Report of Special Master, analogous to an original answer, may set forth all objections to the report and all reasons in opposition to the findings as sufficient grounds for removal or retirement. Id. The original answer, as well as the Statement of Objections to Report of Special Master, may contain matters in bar, defense, or avoidance, as in the case of constitutional protections and/or the violations of constitutional provisions.

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In Point of Error No. Two, Respondent contends that the application of the Texas Code of Judicial Conduct and law is unconstitutional for reasons of overbreadth and vagueness. Specifically, Respondent maintains that the Texas Code of Judicial Conduct is void for vagueness because actions that are inconsistent with the proper performance of a judge's duties and conduct that cast public discredit upon the judiciary or the administration of justice, by definition, contain vague and indefinite phrases that would deny a person due process of law. Respondent additionally claims that the Commission failed to make its annual report as required by law.

Title 2, Chapter 33.005 of the Texas Government Code pertains to judges and the State Commission on Judicial Conduct. Chapter 33.005 provides as follows:

(a) Not later than December 1 of each year, the commission shall submit to the legislature a report for the preceding fiscal year ending August 31. (b) The report must include: (1) an explanation of the role of the commission; (2) annual statistical information and examples of proper and improper judicial conduct; (3) an explanation of the commission's processes; and (4) changes the commission considers necessary in its rules for the applicable statutes or constitutional provisions. (c) The commission shall distribute the report to the governor, lieutenant governor, and speaker of the house of representatives and shall cause the report to be printed in the Texas Bar Journal. (d) The legislature shall appropriate funds for the preparation and distribution of the report.

TEX. GOV'T CODE ANN. 33.005 (Vernon's Supp. 1997).

Citing absolutely no legal authority, Respondent maintains that the State Commission on Judicial Conduct has failed to comply with the requisite statutory provisions because the last report that was published in the Texas Bar Journal was the 1993 Commission Report that was published in May 1994. On review, Respondent does not question whether the State Commission on Judicial Conduct has complied with the statutory provisions in all other respects. However, Respondent has failed to cite any authority to support his assertions. Failure to cite authority in support of a point of error on appeal waives the complaint. In the Matter of D.W., 933 S.W.2d 353, 357 (Tex.App -- Beaumont 1996, writ denied); Romero v.

Parkhill, Smith & Cooper, Inc., 881 S.W.2d 522, 529 (Tex.App.--El Paso 1994, writ denied); Owens-Corning Fiberglas Corp. v. Baker, 838 S.W.2d 838, 843 (Tex.App--Texarkana 1992, no writ); see TEX. R. APP. P. 38.1(h). [25] Additionally, while the subject was briefly discussed by counsel before the Special Master, the record does not show that Respondent secured a ruling on the subject matter from the Special Master, or later the Commission, on the issues discussed immediately above. Therefore, Respondent has waived any complaint on appeal. See Roberts v. Friendswood Development Co., 886 S.W.2d 363, 365 (Tex.App--Houston [1st Dist.] 1994, writ denied). For the reasons set forth above, we find that Respondent has failed to properly preserve error and as a result, the issue submitted is not properly before this Tribunal for review. Accordingly, Respondent's Point of Error No. Two is overruled in its entirety.

We have reviewed the record in the instant case, in particular for matters in bar, defense or avoidance as those matters might relate to constitutional guarantees, and find that Respondent has wholly failed to present any such matters to either the Special Master or Commission for proper adjudication. Predicates for complaints on appeal must be preserved at the trial court level by motion, exception, objection, or some other vehicle. TEX. R. APP.

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P. 33; [26] PGP Gas Products, Inc. v. Fariss, 620 S.W.2d 559, 560 (Tex. 1981). As applied to an action to remove a judge from office, Respondent and the Commission, through its Examiner, are restricted on appeal to the issues and theories on which the case was tried before the Special Master and presented to the Commission on Judicial Conduct, and the Review Tribunal, absent fundamental error, is not authorized to consider an issue or theory that was not before the trial court. Gulf Consol. Int'l, Inc. v. Murphy, 658 S.W.2d 565, 566 (Tex. 1983). If a Respondent raises an issue for the first time on review, no error has been properly presented to the Review Tribunal. See Golden Villa Nursing Home, Inc. v. Smith, 674 S.W.2d 343 (Tex.App--Houston [14th Dist.] 1984, writ ref'd n.r.e.).

Even constitutional arguments not asserted in the trial court are waived on appeal. Osterberg v. Peca, 952 S.W.2d 121, 124-26 (Tex.App.--El Paso 1997, no writ), citing Dreyer v. Greene, 871 S.W.2d 697, 698 (Tex. 1993); Walker v. Employees Retirement Sys. of Texas, 753 S.W.2d 796, 798 (Tex.App--Austin 1988, writ denied); see also, Armstrong v. Randle, 881 S.W.2d 53, 58 (Tex.App--Texarkana 1994, writ denied). Our role on review, among others, is to determine whether the Special Master erred in making findings based on the record before it. Great North Am. Stationers, Inc., v. Ball, 770 S.W.2d 631, 634 (Tex.App--Dallas 1989, error dism'd); see also, Ragsdale v. Progressive Voters League, 790 S.W.2d 77, 85 (Tex.App--Dallas 1989), aff'd in part and rev'd in part on other grounds, 801 S.W.2d 880 (Tex. 1990).

Respondent has failed to preserve error on this complaint of denial of freedom of speech and has further failed to present all remaining constitutional complaints to the Special Master or ultimately the Commission for proper adjudication and preservation for review. Insofar as these issues are unsupported by argument or evidence, they are waived on appeal. Accordingly, we overrule Respondent's Point of Error No. Two in its entirety.

3. Judicial Behavior: Recommended versus Prohibited

In Point of Error No. Three, Respondent, citing absolutely no authority, contends that the State Commission on Judicial Conduct, in sustaining the allegations in Item 1, Charges 2, and 3, improperly found violations of the Texas Code of Judicial Conduct for conduct which is aspirational,

rather than prohibited. Specifically, Respondent contends that a judge cannot be disciplined for violations of "recommended" behavior.

As noted above, the State Commission on Judicial Conduct found that Respondent's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that violated the Texas Code of Judicial Conduct, Canon 2A. [27] Respondent contends that the application of Canon 2A of the Code to this fact situation is prohibited by the rules of the Code itself. We disagree.

Canon 2 of the Texas Code of Judicial Conduct provides in pertinent part as follows:

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2. Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall 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.

. . . TEX. CODE JUD. CONDUCT, Canon 2A (1993)[emphasis added].

On review, Respondent suggests that since Canon 2 is titled "Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities," and Canon 3 is titled "Performing the Duties of Judicial Office Impartially and Diligently," that the crux of Respondent's ethical violations lie in violation of the latter, if at all. Respondent further suggests that the Commission is attempting to apply Canon 2A, which was meant to "apply to a judge violating penal laws," to a Canon 3B(2) situation. Once again, we disagree.

We find the language of Canon 2A to be clear on its face. The requirement that "a judge shall comply with the law" is plain, obvious, and couched in mandatory terms. The language is not restricted to penal violations. The pertinent language is obligatory, deviation from which is prohibited, not aspirational, as suggested by Respondent. Point of Error No. Three is overruled in its entirety.

4. Challenges to Recommendation for Removal

a) Applicability of the "Forgiveness Statute"

Respondent asserts for the first time on review that public policy dictates the application of the "Forgiveness Statute." See TEX.GOV'T CODE ANN. 665.081 (Vernon 1997), formerly TEX.REV.CIV.STAT.ANN. art. 5986 (Vernon 1925). The statute provides that "An officer in this state may not be removed from office for an act the officer may have committed before the officer's election to office." Id. The Texas Supreme Court has held that the statute does not apply to the office of district judge. See In re Carrillo, 542 S.W.2d 105 (Tex. 1976); In re Brown, 512 S.W.2d at 317; and In re Laughlin, 153 Tex. 183, 265 S.W.2d 805 (Tex. 1954); but see, In re Bates, 555 S.W.2d 420 (Tex. 1977)(reserving for future consideration the applicability of the forgiveness statute to removal actions brought under TEX. CONST. art. V 1-a). Likewise, a majority of courts have rejected the forgiveness doctrine, holding that a judge is not immune from discipline for acts committed in a prior term merely because the judge was reelected or reappointed to a new term. See, e.g., In re Diener and Broccolino, 268 Md. 659, 304 A.2d 587 (Md. 1973); In re Greenberg, 442 Pa. 411, 280 A.2d 370 (Pa. 1971); and Sarisohn v. Appellate Div., 21 N.Y.2d 36, 233 N.E.2d 276, 286 N.Y.S.2d 255 (N.Y. 1967).

However, we do not reach the merits of Respondent's argument. As previously discussed, if an issue is raised for the first time on review, no error has been properly presented to the Review Tribunal. See Golden Villa Nursing Home, 674 S.W.2d at 343. Since Respondent has failed to preserve error on this issue and insofar as this issue is unsupported by argument or evidence, it is waived on appeal. Accordingly, we overrule Respondent's Point of Error No. Four as it relates to application of the Forgiveness Statute.

b) Removal from Judicial Office for Persistent Conduct

In the final issue raised within the fourth point of error, Respondent contends that the Commission's conclusions on persistent conduct are each couched in terms of a combination of events, the aggregate of which constitutes persistent conduct. Further, Respondent reasons that if the Review Tribunal sustains any of Respondent's points of error, or portions thereof, then the Tribunal cannot find for removal on the basis of persistent conduct. For the reasons set for below, we agree.

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The findings of the State Commission on Judicial Conduct on the issue of persistent conduct are as follows:

1. Judge Barr's actions 1) on or about January 24, 1996, in stating to prosecutor [Ms. S. R.] that, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you. . .; 2) on or about April 1997, in shouting angrily at Deputies of the Harris County Sheriff's Department; and 3) on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, constitute persistent conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's actions 1) on or about January 24, 1996, in stating to prosecutor [Ms. S. R.] that, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you. . .; 2) on or about April 1997, in shouting angrily at Deputies of the Harris County Sheriff's Department; and 3) on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, constitute persistent conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's actions 1) on or about January 24, 1996, in stating to prosecutor [Ms. S. R.] that, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you. . .; 2) on or about April 1997, in shouting angrily at Deputies of the Harris County Sheriff's Department; and 3) on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, constitute persistent conduct that violated the Code of Judicial Conduct, Canon 3B(3), which provides, "A judge shall require order and decorum in proceedings before the judge."

4. Judge Barr's actions 1) on or about January 24, 1996, in stating to prosecutor [Ms. S. R.] that, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you. . .; 2) on or about April 1997, in shouting angrily at Deputies of the Harris County Sheriff's Department; and 3) on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, constitute persistent conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides, in pertinent part, "A judge shall be

patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity . . . ."

Article V 1-a(6A) of the Constitution of the State of Texas provides:

Any justice or judge of the courts established by the Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice.

TEX. CONST. art. V, 1-a(6)A (1993). As applied to the instant case, Respondent may be removed from office for either the willful or persistent violation of the Texas Code of Judicial Conduct. The term "willful" has been exhaustively defined above. "Persistent" conduct, with respect to judicial disciplinary proceedings, is constant

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conduct which demonstrates a series of associated efforts and determination and which is insistently repetitive or continuous. It is conduct which is very general in scope in that the conduct need not manifest itself in identical fashion. Persistent conduct need not necessarily be of a long duration, but rather connotes conduct which remains unbroken throughout its entire length, no matter how great.

The Commission's adopted findings of fact as to Respondent's persistent conduct are reviewable for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal and factual sufficiency of the evidence supporting all other findings and conclusions of the Commission in the instant case.

We need not recount the entire testimony exhaustively set forth above. We note that we have considered only the evidence that tends to support the Commission's findings of Respondent's persistent conduct, as described above, and have disregarded all evidence and inferences to the contrary. We have previously found the evidence both legally and factually sufficient to support the Commission's findings that Respondent stated to Assistant District Attorney, Ms. S.R. that, "I can't believe you just asked that question. I feel like coming across the bench and slapping the crap out of you . . . ." Respondent has confessed as much. However, given the disposition of Respondent's Point of Error No. One, subpoint c, which relates specifically to "Behavior Toward Those with Whom a Judge Interacts in a Judicial Capacity," we find that the evidence is legally insufficient to support the Commission's findings of persistent conduct, as specifically alleged above. Respondent's Point of Error No. Four, as to persistent conduct, as alleged, is sustained.

5. Conclusion

The RULES FOR THE REMOVAL OR RETIREMENT OF JUDGES provide that subsequent to the conclusion of all hearings, the State Commission on Judicial Conduct is to render its decision to dismiss the complaint, publicly censure the judge, or recommend the removal or the retirement of the judge. TEX. R. REM'L/RET. JUDGES, Rule 10(m). Upon making a determination to recommend the removal or retirement of a judge, the Commission is to request the Chief Justice of The Texas Supreme Court to appoint a review tribunal, composed of seven justices, selected by lot from the courts of appeals of our state. Id., Rules 1(h); 11; 12(a). Within 90 days from the date the record is

filed with the review tribunal, it shall order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation. Id., Rule 12(h)[emphasis added]. A judge may appeal a decision of the review tribunal to the Texas Supreme Court under the substantial evidence rule. Id., Rule 13. Thus we view the responsibility of this Review Tribunal as two-fold:

(1) To review the Commission's adopted findings for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal and factual sufficiency of the evidence supporting findings in a civil case, either by a trial court or by a jury;

(2) Upon review, to order public censure, retirement, or removal, as it finds just and proper, or wholly reject the recommendation.

Unlike a judicial disciplinary sanction where the State Commission on Judicial Conduct has determined that an informal sanction is appropriate, (but not a decision to institute formal removal proceedings), review of which is by a special court of review which holds a trial de novo, this Review Tribunal, as noted above, serves as a review authority. Id., Rule 9. Upon finding that the evidence is factually and legally sufficient to support the findings and conclusions of the State Commission on Judicial Conduct, or any portions of any such findings and conclusions, this Review Tribunal may reject the recommendation of the Commission that sanctions

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be imposed. If the recommendation that sanctions are deserving and accepted, this Review Tribunal must order public censure, retirement [if applicable], or removal. Id., Rule 12(h). A Review Tribunal, convened by the Texas Supreme Court for the purpose of reviewing a judicial disciplinary action which includes a recommendation of removal from office, is not bound by the specific recommendations of the State Commission on Judicial Conduct, although the specific recommendations are given great deference when based on legally and factually sufficient evidence. A Review Tribunal is vested with discretion to fashion a sanction which is available, as it finds just and proper.

This Review Tribunal wholeheartedly adopts the reasoning and language advanced by the Supreme Court of the State of Nebraska in In re Kneifl, wherein that Court discussed the purpose of imposing sanctions for judicial misconduct:

The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned.

In re Kneifl, 217 Neb. 472, 351 N.W.2d 693, 700 (Neb. 1984). When dealing with judicial misconduct, the sanction or sanctions should fit the offense. In determining the appropriate level of sanction to impose for judge's misconduct, the Review Tribunal is obligated to consider the underlying purpose of judicial discipline, which is to protect not only the third branch of government, but also the sovereign which it serves, i.e., the citizens of the State of Texas, from unacceptable judicial behavior. In

adopting the above measure and purpose for the imposition of judicial discipline, we are not oblivious to the fact that a standard may be set for the judiciary that few "ordinary" citizens of this State can live up to. A citizen who serves as a member of the judiciary of the State of Texas is among a chosen few who no longer enjoys the role of an "ordinary" citizen. It is for that reason, among others, that a judge who is a standard-bearer of fairness and impartiality in our society is no longer addressed as Ms., Mrs., or Mr., but rather as "Your Honor."

After careful review, we find that the evidence is legally and factually sufficient to support each and every paragraph, charge and item of the findings and conclusions of the State Commission on Judicial Conduct, save and except those portions of Respondent's Point of Error No. One which pertain to preventing counsel from approaching the bench, and which pertain to "Behavior Toward Those with Whom a Judge Interacts in a Judicial Capacity." As to all other contentions which we have overruled, we find that Respondent has violated Canons 2A, 3B(3), 3B(4) and 3B(8) of the Texas Code of Judicial Conduct and Article V, 1-a(6)A of the Constitution of the State of Texas. Although we have sustained Respondent's challenge to the Commission's findings as to persistent conduct, we note that such error is harmless, given the fact that the Texas Constitution authorizes removal in the instant case for either willful or persistent violation of the Texas Code of Judicial Conduct. TEX. CONST. art. V, 1-a(6)A (1993)[emphasis added]. We have found his conduct to be willful, as defined, and in some instances, done in bad faith.

We sustain those portions of Respondent's Point of Error No. One which relate to "Behavior Toward Those with Whom a Judge Interacts in a Judicial Capacity," and to his preventing counsel from approaching the bench. We further sustain that portion of Respondent's Point of Error No. Four which relates to Respondent's persistent conduct, as alleged. We find any error harmless. We overrule all of Respondent's remaining contentions on review, and affirm the recommendation of the State Commission on Judicial Conduct that Respondent be sanctioned. We accept the recommendation that Respondent, James L. "Jim" Barr be removed as Judge of the 337th Judicial District Court of the State of Texas, however, we reject that portion of the recommendation which would forever ban Respondent from holding judicial office.

JAMES L. "JIM" BARR IS HEREBY REMOVED AS JUDGE OF THE 337TH JUDICIAL DISTRICT COURT OF THE STATE OF TEXAS.

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Notes:

1. The Review Tribunal was composed of Hon. William J. Cornelius, Chief Justice, Sixth Court of Appeals, Texarkana, designated Presiding Justice; Hon. Tom B. Ramey, Jr., Chief Justice, Twelfth Court of Appeals, Tyler; Chief Justice Richard Barajas, Eighth District Court of Appeals, El Paso; Hon. Rex Davis, Chief Justice, Tenth Court of Appeals, Waco; Hon. Dixon W. Holman, Justice, Second Court of Appeals, Fort Worth; Hon. Carolyn Wright, Justice, Fifth Court of Appeals, Dallas; Hon. Earl Stover, Justice, Ninth Court of Appeals, Beaumont.

2. On October 23, 1997, the Supreme Court appointed a Review Tribunal to review the recommendation of the State Commission on Judicial Conduct that Judge Barr be removed from office and prohibited from holding judicial office in the future. The action was brought in accordance with TEX. CONST. art.

V, 1-a (1993) and the TEX. R. REM'L/RET. JUDGES, 56 Tex.B.J. 823 (1993), promulgated by the Texas Supreme Court on May 22, 1992.

3. We address Respondent's Reasons to Reject as points of error with subpoints where necessary. The issues are framed as follows: Point of Error No. One, Sufficiency of Evidence to Establish "Willful" Violations; Point of Error No. Two, Constitutional Challenges; Point of Error No. Three, Judicial Behavior: Recommended versus Prohibited; and Point of Error No. Four, Challenges to Removal Recommendation.

4. Inherent in the requirement that only legal evidence be received, is the procedural standard of requiring timely objections as well as other requirements for the proper preservation of error for review by a Review Tribunal.

5. Respondent, citing no authority, persuasive or otherwise, suggests that this Review Tribunal should abandon the recognized standards of review of legal and factual sufficiency of the evidence and instead adopt a "just and proper" standard in determining the merits of the Respondent's removal from office. We decline Respondent's invitation to adopt such a vague and cloudy standard, instead electing to hold Texas jurists to a higher, more clearly defined, uniform standard.

6. Respondent, citing Eichelberger v. Eichelberger, 582 S.W.2d 395 (Tex. 1979), contends that his actions could not be "willful" since the judiciary has the inherent power to issue orders and take necessary legal action in order to fulfill judicial responsibilities imposed upon a judge by the Constitutions of the United States and the State of Texas. Additionally, Respondent maintains that any orders which he issued were legal, hence not violative of the Texas Code of Judicial Conduct as a matter of law.

7. Respondent openly acknowledges the inappropriateness of the contents of those matters made the basis of comments and gestures. He further notes that he has apologized to the women involved "regardless of whether or not they were offended" by his remarks.

8. The Supreme Court of Texas Gender Bias Task Force reported that two-thirds of the female members of the State Bar of Texas who reported discriminatory behaviors reported problems with male judges, primarily in terms of inappropriate forms of address. One out of three reported that they felt that they received less respect from judges because they are women. GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT, at 30.

9. One need only casually search the Internet through its various search engines, utilizing the query "babes," to discover with consternation the pandemic use of the offending word in its most vile and sexually explicit sense. See Yahoo!, AOL Netfind, Lycos, InfoSeek, Hotbot, and WebCrawler. A sensitized and enlightened Texas judiciary has come to realize that such derogatory forms of address are irrational and unjust, and has seriously taken strides to abandon such references which were once tolerated and which are now considered demeaning and clearly offensive. See TEXAS SUPREME COURT GUIDELINES FOR GENDER-NEUTRAL COURTROOM PROCEDURES, Misc. Docket No. 96-9276 (Tex. 1996).

10. Article V, Section 1-a(6)A provides in pertinent part as follows:

> Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of

Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice . . . . TEX. CONST. art. V, 1-a(6)A (1993).

11. "A judge shall require order and decorum in proceedings before the judge." TEX. CODE JUD. CONDUCT, Canon 3, subd. B(3)(1993).

12. "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . . ." TEX. CODE JUD. CONDUCT, Canon 3, subd. B(4)(1993).

13. "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . sex . . . ." TEX. CODE JUD. CONDUCT, Canon 3, subd. B(6)(1993).

14. Respondent's comment above is an obvious, but tasteless crude sexual reference with a double entendre. A "double entendre" is a word or expression capable of two interpretations with one usually risque. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 347 (10th ed. 1997).

15. We note that in addition to the sexual comments and gestures discussed above, Respondent is alleged to have stated to attorneys for Harris County Sheriff's Deputy Paul Rendon, after their attempt to secure the Deputy's release from confinement that "I don't want to be a big asshole. I only want to be a small asshole." Respondent's conduct in that regard is discussed more fully in this opinion.

16. Respondent challenges the legal and factual sufficiency of evidence to support the following findings:

Item 1, Charge 1:

1. Judge Barr's action on or about January 17, 1996, in ordering that a Writ of Attachment be issued to bring Deputy Paul Rendon before his Court under the circumstances existing in the Overturf case at the time, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's action on or about January 17, 1996, in ordering that a Writ of Attachment be issued to bring Deputy Paul Rendon before his Court under the circumstances existing in the Overturf case at the time, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's action on or about January 17, 1996, in ordering that a Writ of Attachment be issued to bring Deputy Paul Rendon before his Court under the circumstances existing in the Overturf case at the time, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides, in pertinent part, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."

Item 1, Charge 2

1. Judge Barr's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that cast public discredit upon the judiciary or the administration of justice,

and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that violated the Code of Judicial Conduct, Canon 2A, which provides, in pertinent part, "A judge shall comply with the law...." (specifically, by failing to comply with Article 1, Section 13 of the Texas Constitution [prohibiting the requiring excessive bail], and with Articles 17.15, 24.24, and 24.25 of the Texas Code of Criminal Procedure).

4. Judge Barr's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides, in pertinent part, "A judge shall be patient, dignified and courteous to litigants, jurors, lawyers and others with whom the judge deals in an official capacity...."

Item 1, Charge 3:

1. Judge Barr's action on or about January 17, 1996, in instructing that Deputy Paul Rendon be taken into custody, without having personally reviewed the factual and legal adequacy of the recitations in the "Subpoena" and the Writ of Attachment issued to secure Deputy Rendon's presence, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's action on or about January 17, 1996, in instructing that Deputy Paul Rendon be taken into custody, without having personally reviewed the factual and legal adequacy of the recitations in the "Subpoena" and the Writ of Attachment issued to secure Deputy Rendon's presence, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's action on or about January 17, 1996, in instructing that Deputy Paul Rendon be taken into custody, without having personally reviewed the factual and legal adequacy of the recitations in the "Subpoena" and the Writ of Attachment issued to secure Deputy Rendon's presence, was willful conduct that violated the Code of Judicial Conduct, Canon 2A, which provides, in pertinent part, "A judge shall comply with the law...."

4. Judge Barr's action on or about January 17, 1996, in instructing that Deputy Paul Rendon be taken into custody, without having personally reviewed the factual and legal adequacy of the recitations in the "Subpoena" and the Writ of Attachment issued to secure Deputy Rendon's presence, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(8),which provides, in pertinent part, "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."

Item 1, Charge 4

1. Judge Barr's conduct on or about January 17, 1996, in stating to Deputy Paul Rendon's attorney, W. Stacey Mooring and Paul Aman, that, "I don't want to be a big asshole, I only want to be a small asshole...," was willful conduct that violated the the Code of Judicial Conduct, Canon 3B(3), which provides, "A judge shall require order and decorum in proceedings before the judge."

2. Judge Barr's conduct on or about January 17, 1996, in stating to Deputy Paul Rendon's attorneys, W. Stacey Mooring and Paul Aman that, "I don't want to be a big asshole, I only want to be a small asshole...," was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which

provides in pertinent part, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."

Item 1, Charge 5

1. Judge Barr's action, on or about January 18, 1996, in excluding Deputy Paul Rendon's attorney, Paul Aman, from being present with Deputy Rendon when Judge Barr addressed the Deputy from the bench, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's action, on or about January 18, 1996, in excluding Deputy Paul Rendon's attorney, Paul Aman, from being present with Deputy Rendon when Judge Barr addressed the Deputy from the bench, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's action, on or about January 18, 1996, in excluding Deputy Paul Rendon's attorney, Paul Aman, from being present with Deputy Rendon when Judge Barr addressed the Deputy from the bench, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides, in pertinent part, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."

4. Judge Barr's action, on or about January 18, 1996, in excluding Deputy Rendon's attorney, Paul Aman, from being present with Deputy Rendon when Judge Barr addressed the Deputy from the bench, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(8), which provides, in pertinent part, "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."

17. Deputy Rendon testified that he had, in fact, called in to the 337th District Court on December 19th and was placed "on call" by Respondent's law enforcement staff member, Sheriff's Deputy James Phillips. The Special Master, however, found that the evidence in the instant case did not support Deputy Rendon's assertions on this issue.

18. The record shows that immediately after Respondent ordered that a writ of attachment be issued for Deputy Rendon, a bench conference took place between Respondent and counsel for both the defense and State. The State suggested to Respondent that the defense had subpoenaed the wrong person to bring the requested photographs and that he simply was the first law enforcement officer named in the offense report.

19. In the following cases, legal error constituted grounds for a finding of judicial misconduct. However, at the time the judicial actions were taken, they were clearly illegal under existing law. For example, in In re Sanchez, 9 Cal. 3d 844, 512 P.2d 302, 109 Cal. Rptr. 78 (Cal.1973), the California Supreme Court found it was judicial misconduct for a judge to allow a bondsman to determine the amount of bail to be fixed on blank orders given to the bondsman by the judge. In In the Matter of Sardino, 58 N.Y.2d 286, 448 N.E.2d 83, 461 N.Y.S.2d 229 (N.Y. 1983), it was judicial misconduct for a judge to consistently fail to inform the accused of the right to counsel, to consistently fail to conduct even a minimal inquiry into whether the accused was entitled to assigned counsel, to post bail without reference to the statutory standards to be considered, and to order defendants held without bail where bail was required as a matter of law, all in violation of clear constitutional principles and statutes. In In the Matter of McGee, 59 N.Y.2d 870, 452 N.E.2d 1258, 465 N.Y.S.2d 930 (N.Y.1983), it

was judicial misconduct for a judge to routinely fail to advise defendants appearing before him of their constitutional rights including the right to consult an attorney, to pronounce a woman who had appeared in court guilty without informing her of the charge against her or advising her of her right to counsel, to coerce guilty pleas, and to fail to comply with statutory record-keeping requirements. See also In the Matter of LaBelle, 79 N.Y.2d 350, 591 N.E.2d 1156, 582 N.Y.S.2d 970 (N.Y.1992) where it was judicial misconduct for a judge to repeatedly fail to order recognizance or bail as required by the plain reading of two statutes and admitted to be illegal by the judge in his stipulation of facts before the Commission. In In re King, 409 Mass. 590, 568 N.E.2d 588 (Mass. 1991), it was judicial misconduct for a judge's primary consideration in his setting of bail to have been the fact that the racial group to which the defendants belonged "voted against" his brother in an election. See also In the Matter of Inquiry Concerning a Judge, 265 Ga. 843, 462 S.E.2d 728 (Ga.1995) (where it was found to be judicial misconduct for a judge to deny appeal bonds to criminal misdemeanor defendants, each of whom was entitled under the law to be granted appeal bonds); and In the Matter of Reeves, 63 N.Y.2d 105, 469 N.E.2d 1321, 480 N.Y.S.2d 463 (N.Y.1984) (it was judicial misconduct for the judge to have a repeated pattern of failing to advise litigants of their right to counsel and right to appointed counsel.).

20. We note that the Overturf case was continued from December 19, 1995 by agreement of the parties and without the knowledge of Respondent. If a case is continued, Deputy Rendon's obligation under the subpoena is terminated. If the defense in the Overturf case wished to obligate Deputy Rendon to appear at the January 17, 1996 hearing, the defense must have subpoenaed Deputy Rendon again. There is no automatic obligation under a subpoena to appear on the day for which a case is reset. See Gentry v. State, 770 S.W.2d 780, 785-86 (Tex.Crim.App. 1988); see also DIX & DAWSON, 41 TEXAS PRACTICE 27.42 (1995).

21. Effective September 1, 1997, the Supreme Court amended and renumbered this rule from previous TEX. R. APP. P. 81(b)(1).

22. Respondent challenges the legal and factual sufficiency of evidence to support the following findings:

Item 3, Charge 1:

1. Judge Barr's actions on or about April 22, 1997, in loudly, angrily, and publicly insisting that Deputies James Phillips and David Clingan violate Harris County Sheriff Department policy concerning the release of individuals in the custody of the Department, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's actions on or about April 22, 1997, in loudly, angrily, and publicly insisting that Deputies James Phillips and David Clingan violate Harris County Sheriff Department policy concerning the release of individuals in the custody of the Department, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's actions on or about April 22, 1997, in loudly, angrily, and publicly insisting that Deputies James Phillips and David Clingan violate Harris County Sheriff Department policy concerning the release of individuals in the custody of the Department, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(3), which provides, "A judge shall require order and decorum in proceedings before the judge."

4. Judge Barr's actions on or about April 22, 1997, in loudly, angrily, and publicly insisting that Deputies James Phillips and

David Clingan violate Harris County Sheriff Department policy concerning the release of individuals in the custody of the Department, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides in pertinent part, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity...."

Item 3, Charge 2

1. Judge Barr's action on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, by grasping Mr. Rainey's arm with the intention of freeing him from the custody of Deputies James Phillips and David Clingan, was willful conduct that was clearly inconsistent with the proper performance of his duties, and violated Article V, Section 1-a(6)A of the Texas Constitution.

2. Judge Barr's action on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, by grasping Mr. Rainey's arm with the intention of freeing him from the custody of Deputies James Phillips and David Clingan, was willful conduct that cast public discredit upon the judiciary or the administration of justice, and violated Article V, Section 1-a(6)A of the Texas Constitution.

3. Judge Barr's action on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, by grasping Mr. Rainey's arm with the intention of freeing him from the custody of Deputies James Phillips and David Clingan, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(3), which provides, "A judge shall require order and decorum in proceedings before the judge."

4. Judge Barr's action on or about April 22, 1997, in attempting personally and physically to enforce his order that Mr. Daimon Rainey be immediately released from custody, by grasping Mr. Rainey's arm with the intention of freeing him from the custody of Deputies James Phillips and David Clingan, was willful conduct that violated the Code of Judicial Conduct, Canon 3B(4), which provides, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity...."

23. We note once again that the fact that Respondent issued an oral order for the release of Rainey after accepting the judgment of acquittal is not in dispute. Neither is the validity of the oral order. Instead, what is disputed is the conflict between the judicial order and the policy not to immediately release a prisoner upon acquittal. We are not asked to resolve that conflict, consequently, we render no opinion, either expressed or implied on the validity of either. We do emphasize however, the need for proper courtroom security, particularly after an individual's acquittal of such an emotionally packed charge of aggravated sexual assault. Perhaps the better practice might be to remove and separate all interested parties from the courtroom setting and sanitize the courtroom of all sudden emotions. Courthouse security is a current issue of utmost importance. We take judicial notice of recent courthouse shootings in Tarrant and Dallas Counties, and, of course, the bombing of the federal building in Oklahoma City. Gibson v. State, 921 S.W.2d 747 (Tex.App.--El Paso 1996, orig. proceeding) citing Ex parte Williams, 870 S.W.2d 343, 347 (Tex.App.--Fort Worth 1994, pet. ref'd); McCulloch v. State, 740 S.W.2d 74, 75-76 (Tex.App--Fort Worth 1987, pet. ref'd)(court of appeals may take judicial notice of facts that are notorious, well known, or easily ascertainable even if not judicially noticed in the trial court); Lewis v. State, 674 S.W.2d 423, 426 (Tex.App.--Dallas 1984, pet.

ref'd). The recent violence visited upon innocent employees working in, and innocent visitors to public buildings can, and does originate with the criminally accused and victims of crimes alike.

24. Effective September 1, 1997, the Supreme Court amended and renumbered this rule from previous TEX. R. APP. P. 81(b)(1).

25. Effective September 1, 1997, the Supreme Court amended and renumbered this rule from previous TEX. R. APP. P. 74(f).

26. Effective September 1, 1997, the Supreme Court amended and renumbered this rule from previous TEX. R. APP. P. 52(a).

27. The State Commission on Judicial Conduct found that Respondent's action on or about January 17, 1996, in setting a $ 50,000 witness bail in connection with his attachment of Deputy Paul Rendon, was willful conduct that violated the Texas Code of Judicial Conduct, Canon 2A. The Commission likewise found that Respondent's action that same day, in instructing that Deputy Paul Rendon be taken into custody, without having personally reviewed the factual and legal adequacy of the recitations in the "Subpoena" and the Writ of Attachment issued to secure Deputy Rendon's presence, was also willful conduct that likewise violated Canon 2A.

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HOLMAN, Justice, concurring and dissenting.

I concur in the Tribunal's opinion and judgment ordering Respondent's removal from judicial office. I respectfully dissent only to the extent that the opinion and judgment do not also preclude Respondent's eventual return to judicial office. The record in this case persuasively compels a judgment that not only removes Respondent from judicial office now but also prohibits him from holding judicial office in the future and from sitting as a judge on a court of this State by assignment. See TEX.CONST. art. 5, 1-a(6)(C).

Unrefuted evidence portrays Respondent presiding in open court on the occasions specified in the complaint against him, acting in a manner clearly inconsistent with a decorous and dignified performance of judicial duties as he willfully made lewd, vulgar, and demeaning remarks and gestures to female attorneys. Plainly, that style of conduct has been a hallmark of Respondent's judicial demeanor and temperament. When oral argument of this case was presented to the Tribunal, that particular conduct was alluded to as sexual harassment, a characterization that Respondent did not disavow. However, the Tribunal's opinion makes clear that the question of whether the conduct meets a legal definition of sexual harassment is not before us, for the behavior simply violates Texas Code of Judicial Conduct Canons 3B(3), (4), and (6).

Respondent's willfulness in that conduct at the times specified in the complaint and found by the Commission to have occurred displayed his gross indifference to whether any of the women, whose litigation was subject to his rulings, thought his behavior offensive or intimidating. Such behavior by a judge, holder of a judicial office symbolic of honor and justice, debases any courtroom proceeding where the conduct occurs. Respondent concedes that he also made vulgar remarks to female attorneys during a social event outside of court. And whenever and wherever a judge's public demeanor includes instances of vulgar behavior like that complained of in this case, it tarnishes not only the offending judge, it effectively casts public discredit upon the judiciary and the administration of justice. More than two decades ago, the Texas Supreme Court acknowledged that public disrespect for judicial office and the judiciary in general may be caused by a judge's willful or persistent intemperate personal conduct

whether on or off the bench. See Matter of Carrillo, 542 S.W.2d 105, 111 (Tex. 1976).

Respondent asserts that he no longer makes vulgar and demeaning remarks or gestures to female attorneys in court or at social events out of court and that he will not act that way in the future. Nevertheless, during oral arguments before this Tribunal, Respondent conceded and the parties stipulated that the instant case is not the first time a complaint has been filed at the Commission against him for

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using vulgar language while presiding in open court. An earlier case that was grounded upon complaints about Respondent's profane and vulgar remarks to probationers appearing in his court, ended in 1994 when the Commission issued Respondent a Private Warning that "words of profanity or vulgarity are not appropriate for the bench in open court." The evidence in the current case demonstrates that Respondent did not heed the warning.

Accordingly, I respectfully submit that the Tribunal's judgment in this case should not only order Respondent's removal from judicial office, it also should prohibit him from holding judicial office in the future and from sitting by assignment as a judge on a court of this State.

Wright, J., joins in this concurrence and dissent.

OPINION ON REHEARING

BARAJAS, Chief J.

We grant Respondent James L. "Jim" Barr's Motion for Rehearing in order to address constitutional concerns and other matters properly preserved for review.

A. Procedural History on Rehearing

On March 2, 1998, Respondent filed his Motion for Rehearing of the Review Tribunal's Findings and his Motion to Supplement the Record. A Motion for Rehearing may be filed within fifteen (15) days of the date of judgment unless the Review Tribunal directs in its judgment that such a motion will not be entertained. See TEX. R. REM'L/RET. JUDG., 56 TEX. B.J. 823 (1993), Rule 14. Respondent asserted that he did not waive the constitutional challenges, as they were properly raised before the Special Master during a proceeding on March 10, 1997. Respondent sought to supplement the record with the transcript of that March 10th proceeding. The Examiner filed its response to both motions on March 13, 1998 and did not oppose Respondent's Motion to Supplement the Record. However, the Examiner did oppose Respondent's Motion for Rehearing on the ground that the supplementation of the record in no way affected the Review Tribunal's analysis and conclusion regarding preservation of his constitutional arguments.

On April 3, 1998, Respondent filed his First Amended Motion for Rehearing and Request for Remand to make Conclusions of Law. Respondent argued that Rule 16 of the Texas Rules for the Removal or Retirement of Judges required the Commission to make both findings of fact and conclusions of law with respect to the issues of fact and law in the proceedings. TEX. R. REM'L/RET. JUDG., Rule 16. On April 22, 1998, the Review Tribunal issued an order requesting a response to the aforementioned motion. On May 6, 1998, the Examiner filed its Response to Respondent's First Amended Motion for Rehearing and Request for Remand to make Conclusions of Law. The Examiner argued that the Commission in fact made Conclusions of Law, that Respondent failed to preserve the constitutional claims for review, and that supplementing the record with the transcript did not cure Respondent's failure to preserve error. The Examiner also asserted that no basis for remand existed since no

precedent supported it and "good cause" had not been shown as required by TEX. R. REM'L/RET. JUDG., Rule 12(f). [1]

On May 28, 1998, Respondent filed his Reply to Examiner's Response to Respondent's First Amended Motion for Rehearing and Request for Remand to make Conclusions of Law. Respondent argued that the recent opinion In re Lowery, 999 S.W.2d 639 (Tex. Rev. Trib. Feb. 13, 1998, pet. denied)

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specifically reserved the right to a remand if necessary. Respondent also argued that the Rules of Appellate Procedure, under which the Review Tribunal operated, clearly allow a remand. See TEX. R. APP. P. 43.3(a). As discussed in the original opinion, the civil rules of procedure, both trial and appellate, are applicable, to the extent that they do not conflict with the RULES FOR REMOVAL OR RETIREMENT OF JUDGES. TEX. R. REM'L/RET. JUDG., Rules 10(d)(1), 12(e), and (g). On July 29, 1998, the Review Tribunal took the following action:

1. Granted Respondent's Motion to Supplement the Record;

2. Granted Respondent's Motion for Rehearing on the constitutional issues, including the question of the applicability of the "Forgiveness Doctrine;"

3. Granted the Examiner's unopposed Motion to Supplement the Record;

4. Abated and remanded the matter to the Commission for consideration of the constitutional issues raised by the supplemental record;

5. Ordered that no action be taken on the Respondent's Motion for Continuance insofar as the matter had been abated and remanded to the Commission;

6. Ordered that the Commission's conclusions of law as to the constitutional issues raised in the supplemental record, including the question of the applicability of the "Forgiveness Doctrine," be filed with the Review Tribunal on or before October 30, 1998, so as to fully afford the Commission sufficient opportunity to schedule and hear oral argument and otherwise comply with due process.

The Commission filed its Supplemental Conclusions of Law on August 6, 1998. On August 27, 1998, Respondent filed his Objections to the Supplemental Conclusions of Law (along with his Response to the Examiner's Response to Respondent's Request for Oral Argument and Opportunity to Brief Issues of Constitutional Dimensions). On September 2, 1998, the Review Tribunal issued an order overruling Respondent's requests to rebrief and to orally argue before the Commission and ordered the parties to brief the issues regarding the Commission's Supplemental Conclusions of Law. Finally, on September 21, 1998, Respondent filed his brief and on October 1, 1998, the Commission filed its Reply Brief.

B. Discussion on Rehearing

Having properly supplemented the record to accurately reflect the proceedings before the Special Master, Respondent, on Rehearing, properly presents the following issues:

1. Respondent objects to the Commission's Supplemental Conclusion of Law No. One because the constitutional provisions do not give proper notice and fair warning to those to whom they are directed. Respondent further objects that the provisions contain vague and indefinite phrases that deny due process of law;

2. In response to the Commission's Supplemental Conclusions of Law Nos. Five and Six, Respondent contends that the Forgiveness Doctrine applies;

3. Respondent objects to the Commission's Supplemental Conclusion of Law No. Seven. Respondent maintains that the Texas Government Code requires the Commission to publish its annual report; and

4. Respondent objects to the Commission's Supplemental Conclusion of Law No. Eight, complaining that his due process rights have been violated since he was denied the opportunity to make an oral argument before the Commission regarding the constitutional issues.

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1. Challenges of "Vague and Overbroad"

In Point of Error No. One on Rehearing, Respondent objects to the Commission's Supplemental Conclusion of Law No. One because the constitutional provisions do not give proper notice and fair warning to those to whom they are directed. Respondent further contends that the constitutional provisions contain vague and indefinite phrases that deny due process of law.

The Commission's Supplemental Conclusion of Law No. One stated as follows:

The following provisions of the Texas Constitution and of the Code of Judicial Conduct are not unconstitutionally vague or overbroad, either on their face or as applied to Judge Barr's conduct:

1. Article V, Section 1-a(6)A of the Texas Constitution.

2. Code of Judicial Conduct, Canon 2A.

3. Code of Judicial Conduct, Canon 3B(3).

4. Code of Judicial Conduct, Canon 3B(4).

5. Code of Judicial Conduct, Canon 3B(6).

6. Code of Judicial Conduct, Canon 3B(8). [2]

While vagueness and overbreadth doctrines are generally used to challenge the validity of laws defining criminal conduct, the prohibitions against vagueness and overbreadth also extend to regulations affecting conditions of government employment. In re Lowery 999 S.W.2d 639 (Tex. Rev. Trib. Feb. 13, 1998, pet. denied) (citing In the Matter of Seraphim, 97 Wis. 2d 485, 294 N.W.2d 485, 492 (Wis. 1980)). It appears from the cases which have addressed the question of unconstitutional vagueness in this context that a greater degree of flexibility is permitted with respect to judicial discipline than is allowed in criminal statutes. Id. (citing in the Matter of Seraphim, 294 N.W.2d at 492). The constitutionality of necessarily broad standards of professional conduct has long been recognized. Id. (citing In re Gillard, 271 N.W.2d 785, 809 (Minn. 1978)).

A statute may be successfully challenged as vague if it does not clearly define the conduct regulated, and thus does not afford an individual fair warning of what conduct is prohibited. Halleck v. Berliner, 427 F. Supp. 1225, 1240 (D.D.C. 1977). Moreover, a statute which clearly

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defines the conduct regulated may be unconstitutionally overbroad if it includes protected conduct within its prohibitions. Id. A statute is not necessarily invalid as vague or overbroad merely because it is difficult to

determine whether marginal conduct falls within the statutory language. Id.

Arguments in other jurisdictions that constitutional and statutory provisions for the discipline of judges were vague or overbroad have been consistently rejected on the ground that the Code of Judicial Conduct furnished sufficient specification of the judicial conduct which warrants disciplinary action. Id. Statutes and constitutional provisions which define in similarly broad terms the grounds for removal of judges from office have been upheld in In re Lowery S.W.2d (Tex. Rev. Trib. Feb. 13, 1998, pet. denied); Napolitano v. Ward, 317 F. Supp. 79 (N.D.Ill. 1970) ("for cause"); Keiser v. Bell, 332 F. Supp. 608 (E.D.Pa. 1971); Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); Nicholson v. Judicial Retirement and Removal Comm., 562 S.W.2d 306 (Ky. 1978); and In re Gillard, 271 N.W.2d 785 (Minn. 1978).

In light of these decisions, we find no merit in Respondent's contention that the standards he was found to have violated are unconstitutionally vague. While the Canons challenged in this matter may proscribe some speech and conduct which, for other persons in other circumstances, could not be constitutionally proscribed, Respondent's contention that they are unconstitutionally overbroad must be and is rejected. It is well established that judges, in company with other public servants, must suffer from time to time such limits on these rights as are appropriate to the exercise in given situations of their official duties or functions. In re Lowery, S.W.2d (Tex. Rev. Trib. Feb. 13, 1998, pet. denied). The limitations imposed by the rules are made necessary by the very nature of the task which a judge seeks to perform. The citizens of the State of Texas ask nothing more, and expect nothing less. Respondent's Point of Error No. One on Rehearing is overruled.

2. Applicability of Forgiveness Doctrine

In Point of Error No. Two on Rehearing, Respondent contends that the Forgiveness Doctrine is applicable. Given our discussion and disposition of Respondent's identical arguments on original submission, we overrule Respondent's Point of Error No. Two on Rehearing. [3]

3. Commission's Failure to Publish Its Annual Report

In Point of Error No. Three on Rehearing, Respondent contends that the Texas Government Code requires the Commission to publish its annual report. Once again, given our discussion and disposition of Respondent's identical arguments on original submission, we overrule Respondent's Point of Error No. Three on Rehearing.

4. Denial of Opportunity to Make Oral Argument Before Commission

In Point of Error No. Four on Rehearing, Respondent contends that his due process rights have been violated since he was denied the opportunity to make an oral argument before the Commission regarding the constitutional issues addressed above. We disagree.

Absent a statement of objections to the report of the Special Master, the Commission

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may adopt the findings of fact of the Special Master as its own. In re Thoma, 873 S.W.2d 477, 485 (Tex. Rev. Trib. 1994, no appeal); TEX. R. REM'L/RET. JUDG., Rule 10(j). The findings of the Special Master, as adopted by the Commission, are tantamount to findings of fact filed by a trial judge in a trial without a jury, and as a result, are reviewed in that

light. Thoma, 873 S.W.2d at 485. In the instant case, Respondent did in fact file objections to that report. If a statement of objections is filed, the Commission shall give the judge and the examiner the opportunity to be heard orally before the Commission. TEX. R. REM'L/RET. JUDG., Rule 10(j) (emphasis supplied).

The record in the instant case demonstrates that upon proper supplementation, this Review Tribunal abated and remanded the cause to the Commission for entry of supplemental findings of fact and conclusions of law. No findings of fact were made by the Special Master or the Commission as to the constitutional issue complained of on review, nor were any requested. The Commission did however make its Supplemental Conclusion of Law No. Eight, noting that "Judge Barr has been accorded due process of law under the United States and Texas Constitutions, Chapter 33 of the Texas Government Code, and the Procedural Rules for the Removal or Retirement of Judges."

The extensive record in the instant case includes a reporter's record, both on original submission and on supplementation. As noted, we review the Commission's adopted findings of fact for legal and factual sufficiency of the evidence to support them by the same standards applied in reviewing the legal and factual sufficiency of the evidence supporting findings in a civil case, either by a trial court or by a jury. Thoma, 873 S.W.2d at 485. If the Commission's adopted findings of fact are supported by the evidence, given the standards set forth above, they are binding on this Review Tribunal. See County of El Paso v. Ortega, 847 S.W.2d 436, 441 (Tex. App.--El Paso 1993, no writ). On the other hand, this Review Tribunal's review of the Commission's Conclusions of Law are reviewable de novo. Mercer v. Bludworth, 715 S.W.2d 693, 697 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.).

We have once again reviewed the entire record in the instant case, both on original submission and on subsequent supplementation, and find that Respondent was not entitled to present oral argument before the Commission regarding the constitutional issues presented, since no findings of fact were made by the Special Master as to the complained-of issue, or later by the Commission. Respondent's complaint is, in actuality, directed to the Commission's Supplemental Conclusion of Law No. Eight, which is reviewable de novo by this Review Tribunal in any event. Given our disposition of Respondent's constitutional issues, Respondent's Point of Error No. Four on Rehearing is overruled.

Respondent's Motion for Rehearing is overruled in its entirety.

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Notes:

1. Rule 12(f) provides that "the Review Tribunal, may, in its discretion and for good cause shown, permit the introduction of additional evidence, and may direct that the same be introduced before the Special Master or the Commission and be filed as part of the record in the court."

2. The provisions which Respondent contends are vague or overbroad are as follows:

1. Article V, Section 1-a(6)A of the Texas Constitution, providing in pertinent part that a judge may be disciplined, censured, or removed from office "for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice . . . ."

2. Canon 2A of the Texas Code of Judicial Conduct - "A judge shall 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." 3. Canon 3B(3) of the Texas Code of Judicial Conduct - "A judge shall require order and decorum in proceedings before the judge."

4. Canon 3B(4) of the Texas Code of Judicial Conduct - "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. . . ." 5. Canon 3B(6) of the Texas Code of Judicial Conduct - "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so."

6. Canon 3B(8) of the Texas Code of Judicial Conduct - "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 . . . ."

3. We of course note that on original submission, we found that Respondent's claim as to the Forgiveness Doctrine was being raised for the first time on appeal. However, as noted earlier, we have granted supplementation of the record and now note that the issue was in fact raised and preserved for review. Accordingly, we withdraw that portion of the Tribunal's opinion on original submission as it pertains to his waiver of the "Applicability of the 'Forgiveness Statute.'"

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# APPENDIX E

**Opinion Issued May 9, 2017**

**DOCKET NO. SCR 17-0001**

**SPECIAL COURT OF REVIEW**

**IN RE HONORABLE RUSSELL B. CASEY**

## OPINION

The State Commission on Judicial Conduct (the "Commission") alleged that Judge Russell B. Casey engaged in an improper sexual relationship with his former chief clerk, Martha Kibler, and that Judge Casey's conduct violated section 1-a(6)A of article V of the Texas Constitution, *see* Tex. Const. art. V, § 1-a(6)A, and Canon 3B(4) of the Texas Code of Judicial Conduct, *see* Texas Supreme Court, Code of Judicial Conduct Canon 3B(4), *reprinted in* Tex. Gov't Code, title 2, subt. G, appendix B. After convening an informal hearing, the Commission determined that Judge Casey should be publicly reprimanded.[1] Following that determination, Judge Casey requested a review of the Commission's decision, and the Supreme Court selected a court of review.[2] *See* Tex. Gov't Code § 33.034 (authorizing judge who receives "a sanction or censure"

[1] Initially, the Commission alleged that Judge Casey's actions also violated Canon 2A, which requires a judge "to comply with the law and [to] act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *See* Texas Supreme Court, Code of Judicial Conduct Canon 2A, *reprinted in* Tex. Gov't Code, title 2, subt. G, appendix B. Although a violation of that canon served as a basis for the Commission's reprimand, the Commission explained in its briefing to this Court that it is "not seeking a finding . . . regarding a violation of Canon 2A" in this proceeding.

[2] The Special Court of Review consists of The Honorable David Puryear, Justice of the Third Court of Appeals, presiding by appointment; The Honorable Kevin Jewell, Justice of the Fourteenth Court of Appeals, participating by appointment; and the Honorable Ken Wise, Justice of the Fourteenth Court of Appeals, participating by appointment.

to seek "review of the commission's decision," discussing scope of review, and setting out procedures for selecting court of review).

After the court of review was selected, the Commission filed its charging document alleging that Judge Casey's conduct violated the cannon of judicial conduct and the constitutional provision listed above. *See id.* § 33.034(d) (requiring Commission to file "charging document" "[w]ithin 15 days after the appointment of the court of review"). The parties then agreed to and filed a joint stipulation of facts and filed a joint motion requesting the court of review to forgo the scheduled trial de novo and to allow the parties to present the case on briefs. Having considered the parties' arguments and having reviewed the stipulation of facts and accompanying exhibits, the court of review issues this timely decision and affirms the Commission's decision. *See id.* § 33.034(h) (setting out deadline for issuing decision); Tex. R. Rem'l/Ret. Judg. 9(d) (specifying that decision by special court of review "may include dismissal, affirmation of the Commission's decision, imposition of a lesser or greater sanction, or order to the Commission to file formal proceedings").

## BACKGROUND

Judge Casey was elected as a justice of the peace for Tarrant County and began serving in that capacity in 2007. Kibler had worked for the previous justice of the peace and ultimately served as the chief clerk and court manager for Judge Casey. After Judge Casey initiated termination proceedings against Kibler in August 2014, Kibler made a report to the human resources department for Tarrant County; filed a federal lawsuit against Judge Casey alleging, among other things, that Judge Casey sexually harassed her; and made a report to the district attorney's office

that Judge Casey had sexually assaulted her.[3] As part of the federal lawsuit, Judge Casey and Kibler both gave testimony through depositions.

In his testimony regarding the federal lawsuit, Judge Casey admitted to having a sexual relationship with Kibler. When discussing how the relationship started, Judge Casey stated that several years ago, perhaps as early as 2008, he and Kibler were working "after hours," that the two of them began discussing how long it had been since either of them had had sex, that Kibler offered to and then performed oral sex on him, and that the incident occurred in Kibler's office at the courthouse. When describing other encounters, Judge Casey stated that he asked Kibler to perform oral sex on him "over the course of the years," estimated that she performed oral sex "less than 10" times, related that Kibler refused "four or five times," explained that he inserted his penis into Kibler's vagina on two occasions, and recalled that the last sexual encounter occurred in June 2014, and Judge Casey also explained that these encounters always occurred at the courthouse or at a conference related to court business and admitted that the courthouse was county property. Regarding the reasons why he initiated termination proceedings against Kibler, Judge Casey testified that he attempted to fire Kibler in August 2014 after discovering that Kibler had been "asking one of her subordinates to" approve her mileage and "claiming money that did not belong to her." In addition, Judge Casey testified that he later told county auditors that he believed that Kibler "was using" court "deposits for her own personal use." Finally, Judge Casey admitted that he denied the relationship when he was first asked about it by human resources because he was embarrassed.

[3] A grand jury was called regarding the sexual-assault allegations, but the grand jury decided not to indict Judge Casey.

In her deposition, Kibler also described the sexual incidents that occurred between her and Judge Casey. Regarding the first incident, Kibler explained that in 2009, Judge Casey closed the door to her office while the other employees were in a nearby office, locked the door, told her how good he treated her, sat down, "took his penis out," pulled his pants down, asked her to "just do that," and stated that if she did, "he would never ask [her] again." When describing the incident, Kibler said that she was in shock, that she told him to "put the penis up," that she headed to the door, that she unlocked the door, and that she opened the door a crack. Next, Kibler recalled that Judge Casey pulled his pants up, walked to the door, locked it again, and told her, "let's talk." Further, Kibler related that Judge Casey began saying that people in the office "disliked" her and "wanted [her] fired," that he was the only reason that she still "had this job," and that she would continue to have a job "as long as he was in office." In addition, Kibler testified that Judge Casey began discussing how long it had been since he had sex, pulled out his penis one more time, and told her that if she did "it this one time, . . . I will never bother you again." Further, Kibler recalled that Judge Casey grabbed her hand, put her hand "on his penis," and "pushed [her] head down there," and Kibler described performing oral sex on Judge Casey. When explaining what happened afterwards, Kibler testified that she started crying, that Judge Casey told her "to compose [her]self before leaving," and that she went to the restroom and "threw up."

During her testimony, Kibler explained that after the first incident and during the period starting in December 2009 or 2010 and ending in August 2014, Judge Casey regularly exposed himself to her at the office, made similar statements about Kibler being able to keep her job if she did what he asked, and asked her to perform oral sex on him, including one time while he was wearing his judge's robe. Kibler also described how if she refused to submit to the requests, Judge Casey would be very hostile toward her, yell at her at work, call her "a horrible court manager,"

and tell her that she "didn't do anything right." Moreover, she testified that Judge Casey's demands increased over the years and that he began asking Kibler to have vaginal intercourse as well. When describing the number of sexual encounters, Kibler stated that there were twenty encounters in total, that two of them involved vaginal intercourse, and that the remainder involved oral sex. In addition, she related that the last sexual act occurred in 2013 when she told him that she would no longer have any sexual interactions with him but that Judge Casey continued to ask her to perform sexual acts, that she would decline the advances and leave the office, that Judge Casey tried to initiate a final encounter during work hours at the court in August 2014 by pulling out his penis and putting her hands on it, that she refused his advance and said "no more," that she "bolted out" of the office, and that Judge Casey tried to fire her just a few days later. Finally, Kibler testified that when Judge Casey stated that he was going to fire her, he never mentioned any issue with her making improper mileage reimbursement claims.

After Kibler filed her lawsuit, a newspaper ran a story about the allegations, and in response, the Commission began an investigation into the matter and later convened an informal hearing regarding the accusations against Judge Casey.[4] During that hearing, Judge Casey testified that he and Kibler would flirt with one another, that they were in a consensual sexual relationship, that he did receive oral sex from Kibler but did not have sexual intercourse with her, that it happened approximately ten times over several years, that Kibler usually initiated it, that the sexual activity occurred "[i]n the court offices," that it occurred "after hours" and "during business hours" "a couple of times," and that it ended in September 2013. In his testimony, Judge Casey denied that any sexual activity occurred while he was wearing his judge's robe and denied that he attempted to fire Kibler after she refused his sexual advances; on the contrary, Judge Casey

[4] The federal lawsuit was dismissed before the informal hearing after the parties entered into a settlement agreement.

asserted that he learned "that she was claiming mileage that in [his] opinion she was not entitled to" and that he placed her on administrative leave for that reason. In addition, Judge Casey testified that after Kibler was placed on administrative leave, a court audit revealed that 81 deposits had been mishandled, that Kibler was in charge of making the deposits, and that Kibler told the district attorney's office that she had been sexually assaulted after she learned about the results of the audit.

During his testimony, Judge Casey stated that he regretted getting involved with someone who he worked with and asserted that he would never put himself "in a position like this again." Further, he admitted that a relationship with court staff would be inappropriate even if it were consensual and that his actions "would affect people's view towards me and in that way their view towards the court," "did not serve the public perception of the judiciary well," and "could cause a poor reflection," and Judge Casey agreed that engaging in these acts at the court during court hours was "particularly inappropriate" and that an employee "subject to" "a person in a position of power . . . may not feel able to truly express their feelings" regarding requested sexual activity.

After the informal hearing, the Commission determined that Judge Casey's conduct violated Canon 3B(4) of the Texas Code of Judicial Conduct and section1-a(6)A of article V of the Texas Constitution and issued a public reprimand. Following that ruling, Judge Casey initiated a review of the Commission's decision. *See* Tex. Gov't Code § 33.034. The parties filed a joint stipulation regarding facts and regarding the record to be considered in this review, including the admission of the testimony summarized above. Those stipulations read as follows:

**A. Agreed Stipulations of Fact**

1. At all times relevant hereto, the Honorable Russell B. Casey was Justice of the Peace for Precinct 3, Place 1 in Hurst, Tarrant County, Texas.

2. Judge Casey was named in a federal lawsuit filed by his former chief clerk, Martha Kibler, who accused the judge of sexually harassing her from 2009 through 2014 (attached as Exhibit A, provided solely for the Court's reference).

3. Judge Casey denied many of the allegations (attached as Exhibit B, provided solely for the Court's reference).

4. Between 2009 and 2014, Judge Casey requested and received oral sex from Kibler approximately ten times, often in court offices.

5. In August 2014, Judge Casey sought to terminate Kibler's employment, citing inappropriate financial conduct revealed by a financial audit by the Tarrant County Auditor's office.

6. Judge Casey has consistently described his sexual relationship with Kibler as "consensual."

**B. Agreed Evidentiary Stipulations**

1. The testimony contained in the deposition transcripts of Judge Casey and Martha Kibler, along with all exhibits attached thereto (attached as Exhibits C and D, respectively), are admissible for all purposes.

2. The transcript of Judge Casey's appearance before the Commission (attached as Exhibit E) from December 8, 2016 is admissible for all purposes.

3. The 2014 Tarrant County Audit results (attached as Exhibit F) is admissible for all purposes.

4. Ten pictures of Judge Casey's office and door (attached as Exhibit G) are admissible for all purposes.

5. The July 30, 2014 Letter of Appointment from County Judge Glen Whitley (attached as Exhibit H) is admissible for all purposes.

After filing the joint stipulation, the parties filed a joint motion requesting the court of review to forgo the trial and to allow the parties to present the case on briefs.

## GOVERNING LAW

The Texas Constitution states that a judge is subject to discipline "for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice." Tex. Const. art. V, §1-a(6)(A). "Willful conduct requires a showing of intentional or grossly indifferent misuse of judicial office, involving more than an error of judgment or lack of diligence." *In re Sharp*, 480 S.W.3d 829, 833 (Tex. Spec. Ct. Rev. 2013). "A judge need not have specifically intended to violate the Code of Judicial Conduct; a willful violation occurs if the judge intended to engage in the conduct for which he or she is disciplined." *Id.* "After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education," or "institute formal proceedings . . . concerning a person holding" a judicial office. Tex. Const. art. V, § 1-a(8).

"Except as otherwise provided by this section, the procedure for the review of a sanction issued in an informal proceeding is governed to the extent practicable by the rules of law, evidence, and procedure that apply to the trial of civil actions generally." Tex. Gov't Code § 33.034(f). Accordingly, the Commission has "the burden to prove the charges against" Judge Casey "by a preponderance of the evidence." *In re Sharp*, 480 S.W.3d at 833; *see In re Hecht*, 213 S.W.3d 547, 560 (Tex. Spec. Ct. Rev. 2006). The review undertaken "of a sanction issued in an informal proceeding is by trial de novo." Tex. Gov't Code § 33.034(e)(2).

## DISCUSSION

### Scope of Stipulations

As an initial matter, we note that in his brief, Judge Casey primarily focuses on his argument that by entering into the stipulation of the six facts listed above, "[t]he parties agreed these stipulations encompass . . . the universe of pertinent facts and admissible evidence relative to the case." In other words, Judge Casey contends that this Court may not consider the transcripts and other exhibits listed above in the agreed stipulation of evidence and must make its ruling on whether he violated Canon 3B(4) and section 1-a(6)(A) of article V of the Texas Constitution by applying the governing law to the six statements listed in the stipulation of facts. For the reasons that follow, we disagree with Judge Casey's limited view of the stipulations.

When presenting this claim, Judge Casey refers to the Rule of Civil Procedure allowing parties to "submit matters in controversy to the court upon an agreed statement of facts," *see* Tex. R. Civ. P. 263, and to cases applying that rule as support for his argument that "[o]nce the parties stipulate to all the facts, the court may not make additional fact findings," *see State Bar of Tex. v. Faubion*, 821 S.W.2d 203, 205 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (providing that when case is "submitted to the court upon an agreed stipulation under Rule 263," "[t]he trial court and the reviewing court may not . . . find any facts not conforming to the agreed statement"); *Lambda Constr. Co. v. Chamberlin Waterproofing & Roofing Sys., Inc.*, 784 S.W.2d 122, 125 (Tex. App.—Austin 1990, writ denied) (noting "that appellants and appellee stipulated to all of the material facts of the case during a telephone hearing with the presiding judge"); *Sharyland Water Supply Corp. v. Hidalgo Cty. Appraisal Dist.*, 783 S.W.2d 297, 298 (Tex. App.—Corpus Christi 1989) (explaining that in cases "rendered on stipulated facts," "[t]he trial court and

reviewing courts are limited to such agreed facts"), *aff'd sub nom.*, *North Alamo Water Supply Corp. v. Willacy Cty. Appraisal Dist.*, 804 S.W.2d 894 (Tex. 1991).[5]

However, none of those cases seem to have involved a situation in which parties filed a stipulation of facts as well as a stipulation regarding evidence that will be introduced as part of the proceeding. Moreover, the appellate court in *Faubion* explained that the general rule prohibiting additional fact finding is subject to the exception in which the parties "provided otherwise in the agreed statement." 821 S.W.2d at 205. In this case, the language of the stipulation itself indicates that the parties intended for this Court to consider the six stipulated facts as well as the evidentiary stipulations, which the parties agreed were "admissible for all purposes." Accordingly, the language of the stipulation at issue here demonstrates that the parties agreed otherwise, and we will consider the stipulated and attached exhibits in resolving this case.

**Section 1-a(6)(A) of Article V of the Texas Constitution**

As discussed previously, the Commission alleged that Judge Casey's conduct violated section 1-a(6)(A) of article V of the Texas Constitution. Section 1-a(6)(A) provides, in relevant

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[5] In his brief, Judge Casey also points to additional cases when urging this Court not to consider the evidence submitted as part of this case; however, none of the cases suggest that agreed evidentiary stipulations may not be considered even though the parties agreed that they were admissible, and all of them are distinguishable from the present case. *See Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 384, 385 (Tex. App.—Fort Worth 2009, no pet.) (overruling issue regarding findings of fact because case was decided "on an agreed statement of facts," because appellate courts "disregard any findings of fact" filed in agreed cases, and therefore, because "the trial court's act of making findings of fact cannot be a ground for reversal on appeal"); *International Union, United Auto., Aerospace Agric. Implement Workers of Am.—UAW v. General Motors Corp.*, 104 S.W.3d 126, 129, 130 (Tex. App.—Fort Worth 2003, no pet.) (noting that trial court ruled on agreed statement of facts and that "[w]here the trial court rules without determining questions of fact, . . . requests for findings of fact and conclusions of law are neither appropriate nor effective for extending appellate deadlines" and concluding that request for findings of fact and conclusions of law did "not extend the thirty-day deadline for perfecting the appeal"); *Port Arthur Indep. Sch. Dist. v. Port Arthur Teachers Ass'n*, 990 S.W.2d 955, 958 (Tex. App.—Beaumont 1999, pet. denied) (dismissing suit "for want of jurisdiction" because case was decided "on facts agreed to by the parties" and, therefore, because "request for findings of fact and conclusions of law did not operate to extend the time for perfecting appeal"); *Reed v. Valley Fed. Sav. & Loan Co.*, 655 S.W.2d 259, 264 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (explaining that "the trial court and the reviewing court are limited to the agreed facts and cannot make any findings of fact which do not conform to the stipulated facts" and overruling issue asserting "that the trial court erred in not filing requested Findings of Fact and Conclusions of Law" because neither need be filed in stipulated case).

part, that a judge may be sanctioned for "willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice." Tex. Const. art. V, § 1-a(6)(A).

The stipulated facts and the testimony summarized above demonstrate that Judge Casey engaged in a sexual relationship with his subordinate employee, Kibler, over a period of time lasting several years; that on at least ten occasions during that time period, Kibler performed oral sex on Judge Casey after Judge Casey asked her to; that many of those sexual interactions occurred at the courthouse, which is public property; and that many of those interactions occurred during court hours with other employees present in an adjacent office. That evidence established repeated, long-standing, and intentional actions on the part of Judge Casey that amounted to "misuse[s] of" his "judicial office, involving more than an error of judgment or lack of diligence." *See In re Sharp*, 480 S.W.3d at 833. Moreover, the evidence established, as conceded in his own testimony, that Judge Casey's actions painted a negative image of the judiciary and on the administration of justice. When discussing the actions that happened at the courthouse during court hours, Judge Casey agreed that the conduct was "particularly inappropriate." Accordingly, we conclude that the Commission established by a preponderance of the evidence that Judge Casey violated section 1-a(6)(A) through willful conduct that was inconsistent with the proper performance of his duties and that cast public discredit on the judiciary. *See* Tex. Const. art. V, § 1-a(6)(A); *see also In re Canales*, 113 S.W.3d 56, 73-74 (Tex. Spec. Ct. Rev. 2003) (discussing allegations that judge "in his judicial capacity, and in his judicial chambers," made sexual advances on two women and concluding that "[t]he actions of a judicial officer in pursuing such advances, in chambers, as to another individual regardless of whether the victim is a public servant or the pregnant daughter of the court bailiff, is to be condemned").

**Canon 3B(4)**

In addition to arguing that Judge Casey's conduct violated the Texas Constitution, the Commission also alleged that his conduct violated Canon 3B(4), which provides as follows: "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control." Tex. Code Judicial Conduct Canon 3B(4).

As set out above, the stipulated evidence and testimony established a long-lasting sexual relationship between Judge Casey and his employee, Kibler, with whom Judge Casey regularly interacts with in an official capacity. According to Judge Casey's testimony, the relationship was consensual, but Judge Casey also stipulated that he asked Kibler to perform oral sex on him and that the sexual encounters occurred at the court office. Moreover, Kibler testified that Judge Casey initiated all of the sexual activity, that she did not want to engage in the activities, that she submitted because Judge Casey communicated that compliance was necessary for her continued employment, and that Judge Casey would treat her poorly and yell at her if she refused his advances. In resolving the conflicts in the evidence, we are aided by Judge Casey's admission that he lied about the existence of the sexual relationship when he was questioned by human resources, by Judge Casey's recognition during the informal hearing that an employee who is involved in a sexual relationship with her boss might not be able to fully state her feelings regarding her desire to engage in the requested sexual activity, and by the inconsistencies between Judge Casey's testimony in the federal lawsuit and in the informal hearing regarding whether he had sexual intercourse with Kibler.

For these reasons, we conclude that the Commission established by a preponderance of the evidence that Judge Casey violated Canon 3(B)(4) by failing to treat Kibler in a courteous and dignified manner.

**Sanction**

In addition to challenging the Commission's determinations that he violated Canon 3(B)(4) and section 1-a(6)(A), Judge Casey also asserts that the public reprimand imposed by the Commission was improper and that this Court should instead impose a private reprimand. *See* Tex. R. Rem'l/Ret. Judges 9(d).

"'The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice.'" *In re Barr*, 13 S.W.3d 525, 560 (Tex. Spec. Ct. Rev. 1998) (quoting *In re Kneifl*, 351 N.W.2d 693, 700 (Neb. 1984)). "'The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future.'" *Id.* (quoting *In re Kneifl*, 351 N.W.2d at 700).

When determining what sanction is appropriate, courts have often considered the following factors:

> (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

*In re Deming*, 736 P.2d 639, 659 (Wash. 1987); *see In re Rose*, 144 S.W.3d 661, 733 (Tex. Spec. Ct. Rev. 2004) (referring to factors identified in *Deming*). "'Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.'" *In re Rose*, 144 S.W.3d at 733 (quoting *In re Brown*, 626 N.W.2d 403, 405 (Mich. 2001)).

Although Judge Casey did admit that his behavior was inappropriate, that he regretted it, and that it would not ever occur again and although the record does not contain evidence showing that any similar formal complaints had been made regarding Judge Casey's conduct, we believe that the remainder of the factors listed above weigh in favor of, at a minimum, a public reprimand. The stipulated facts and the testimony established that the misconduct was not an isolated incident but was instead a pattern of conduct occurring over many of the years in which he has served as a judge. Furthermore, Kibler testified that there were twenty sexual interactions, and Judge Casey stipulated that "he requested and received oral sex from Kibler approximately ten times." Although the misconduct did not occur in the actual courtroom, the misconduct did occur in the courthouse offices and often during work hours. Moreover, Kibler testified that Judge Casey used his role as a judge and as her employer to receive sexual favors, and as set out above and as agreed to by Judge Casey, his actions undermined the respect that citizens have for the judiciary. "This pattern of behavior is fundamentally inconsistent with the high standards by which a judge must conduct himself." *See In re Sharp*, 480 S.W.3d at 841.

"Accordingly, to preserve the integrity and independence of the judiciary, to restore and reaffirm public confidence in the administration of justice, and in recognition that judges must respect and honor the judicial office as a public trust, we conclude that a public reprimand is appropriate." *See id.* at 842; *see also In re Canales*, 113 S.W.3d at 73, 74 (removing judge from office for "forcibly kissing and fondling two young women" because sanction "is appropriate to

protect the citizens of Texas and certainly is not excessive"). After considering the stipulated facts, the testimony, and the parties' briefing, we believe, consistent with the Commission's determination, that a public reprimand against Judge Casey is warranted "for his violations of the Code of Judicial Conduct and the Texas Constitution." *See In re Sharp*, 480 S.W.3d at 842.

## CONCLUSION

For the reasons discussed above, we find that Judge Casey willfully violated Canon 3(B)(4) of the Code of Judicial Conduct and section 1-a(6)(A) of article V of the Texas Constitution. For those violations, we affirm the determination by the Commission that Judge Casey be sanctioned and issue the following sanction: Public Reprimand.

**SPECIAL COURT OF REVIEW**