D-91-11
(070379)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2009-153

IN THE MATTER OF

ROBERT A. SOLOMON,
JUDGE OF THE MUNICIPAL COURT

PRESENTMENT

The Advisory Committee on Judicial Conduct ("Committee" or "ACJC") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's Findings demonstrate that the charges set forth in the Formal Complaint against Robert A. Solomon, Judge of the Municipal Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that Respondent be censured with the further condition that he be permanently disqualified from holding or securing future judicial office.

On October 8, 2010, the Committee issued a Formal Complaint in this matter, which accused Respondent of three ethical violations: (1) initiating and engaging in *ex parte* conversations with the Municipal Prosecutor about the matter of State v. Sheila Esposito, which was pending before Respondent

and involved his daughter's former speech teacher as the defendant, in violation of Canons 1, 2A and 3A(6) of the Code of Judicial Conduct; (2) using his judicial office to advance the private interests of the defendant in the Esposito matter by attempting to plea bargain the case with the municipal prosecutor, in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct; and (3) presiding over the Esposito matter despite a partiality for and conflict of interest with the defendant, in violation of Canons 1, 2A and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) of the New Jersey Court Rules. Respondent filed an Answer to the Complaint on October 26, 2010 in which he admitted certain factual allegations of the Formal Complaint and denied others.

The Committee conducted a Formal Hearing in this matter on December 1, 2011. Respondent appeared with counsel and offered testimony in his defense. Witnesses were called to testify by the Presenter. The Presenter and Respondent offered exhibits, which were admitted into evidence. See P-1 through P-9; see also R-1 through R-2. The Committee also accepted into evidence a set of Stipulations agreed to by the parties prior to the hearing. See Stipulations, filed on November 21, 2011. Both parties submitted post-hearing briefs, which were considered by the Committee.

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

I. FINDINGS

A. Factual and Procedural Background

1. Stipulated and Uncontested Facts

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1982. Stipulations at ¶1. At all times relevant to this matter, Respondent served as a part-time judge in the Borough of Norwood Municipal Court, a position he no longer holds. Id. at ¶2. At the request of the Honorable Roy F. McGeady, P.J.M.C., Respondent took a voluntary leave of absence from the bench on October 8, 2010, pending the outcome of this matter. T114-8 to T115-2.[1] Respondent's term on the bench subsequently expired on December 31, 2011. T114-18-19.

On February 10, 2009, Respondent presided over a trial in the Norwood Municipal Court in the matter of State v. Sheila Esposito, Summons No. 0241-C-012089. Stipulations at ¶3; see also P-7. Ms. Esposito, a teacher in the Norwood public school system, appeared in the municipal court, without an attorney, to

[1] "T" refers to the transcript of the Formal Hearing held on December 1, 2011.

answer for a speeding summons issued to her by Lieutenant Richard Sposa of the Norwood Police Department. Stipulations at ¶4. Respondent knew Ms. Esposito because she was his daughter's former elementary school speech teacher. Id. at ¶5. Respondent's daughter is now in middle school. Ibid.

Prior to the start of the Esposito trial, Respondent entered the private office of the Norwood Borough Prosecutor, Laura Nunnink, on two separate occasions, each time outside the presence of Ms. Esposito, to discuss the potential for a plea deal in the Esposito matter. T14-19 to T17-9; T18-21 to T19-20; T120-7-13; T120-20 to T121-7; T122-11-23; T126-25 to T128-5; see also P-2 at T4-20 to T5-12; T6-10 to T7-16; Answer at ¶¶6. 11.

Respondent first entered Prosecutor Nunnink's office before the start of the court session that evening. T14-19 to T15-13; T120-7-10; T121-18-20. On that occasion, Respondent questioned Prosecutor Nunnink about the status of the various cases on the calendar, including specifically the Esposito matter, and instructed her to attempt to resolve the Esposito matter with a plea deal. T122-15-23. Prosecutor Nunnink informed Respondent that she would have to speak with Lieutenant Sposa before she could offer any plea deal to Ms. Esposito. T14-19 to T15-13; see also Formal Complaint and Answer at ¶8. After leaving the Prosecutor's office, Respondent spoke with Norwood Mayor James Barsa who was also in the courthouse that evening conversing with

Ms. Esposito. T123-24 to T124-9; T21-17-18; see also P-3 at T19-24 to T20-11; P-5 at T11-22 to T13-7; T18-21 to T19-19.

Following her conversation with Respondent and after consultation with Lieutenant Sposa, Prosecutor Nunnink met with Ms. Esposito to discuss a potential plea deal. T17-13 to T18-11. She offered Ms. Esposito the plea deal to which Lieutenant Sposa had agreed, i.e. a reduction of the charge from speeding to unsafe driving, which would constitute a no-point violation for purposes of Ms. Esposito's license, but would result in a high fine. Ibid. If convicted of the speeding offense for which she was charged, Ms. Esposito would have been assessed points against her driver's license and would have incurred fines and court costs. P-8 at ACJC183; see also N.J.S.A. 39:4-98; N.J.A.C. 13:19-10.1; N.J.S.A. 39:4-104; N.J.S.A. 22A:3-4. In response, Ms. Esposito expressed dissatisfaction with this offer, stating that she knew Respondent and Mayor Barsa and that "someone" should have spoken to Prosecutor Nunnink about her case. T18-1-11; T131-10-20; see also P-2 at T5-13 to T6-8; P-6 at T12-25 to T13-3.

Shortly thereafter, Respondent entered Prosecutor Nunnink's office for a second time, where Lieutenant Sposa was seated with Ms. Nunnink. T19-2-6. By all accounts, on this occasion Prosecutor Nunnink said to Respondent: "You know, this isn't right." T19-2-6; T76-7-10; see also P-2 at T6-15-17; P-3 at T6-

5-6; P-8 at ACJC168. Prosecutor Nunnink testified at the formal hearing that she made this statement to Respondent because she felt he "was pressuring" her and the Lieutenant "to do a plea bargain" in the Esposito matter that they "weren't comfortable with." T20-20 to T21-2.[2] Prosecutor Nunnink informed Respondent that the Esposito matter could not be resolved with a plea, at which point Respondent discussed with Lieutenant Sposa, directly, the potential for a plea deal. T19-2-20; T21-3-5; T76-7-13; T127-21 to T128-11; see also Answer at ¶11. The Lieutenant told Respondent: "I've given - I'm supposed to enforce the speeding laws here, now because she's a teacher I'm - you're telling me to give her a break." T19-8-14. The Lieutenant explained that he was "willing to give [Ms. Esposito] the zero point [ticket]," but he was not willing to reduce the charge to an obstruction of traffic offense for which the fine was substantially smaller than that of an unsafe driving offense. Ibid.; see also T16-19 to T17-9; P-2 at T6-21-25.

When Respondent was satisfied that a plea deal could not be reached in the Esposito matter, he informed Prosecutor Nunnink

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[2] Respondent claimed at the Formal Hearing that Prosecutor Nunnink made this statement in response to his denial of her request to adjourn the matter rather than have a trial that evening. T133-12-14. The Committee gives no weight to this testimony as it conflicts with Respondent's written comments to this Committee, dated June 15, 2009, in which he claims that Prosecutor Nunnink indicated she was ready to proceed to trial. P-9.

that the case would be tried that evening. T19-7-14; T134-6-13. Prosecutor Nunnink immediately requested an adjournment of the trial to obtain the necessary certifications for the radar unit used by Lieutenant Sposa when stopping Ms. Esposito for speeding, which Respondent denied. T19-15 to T20-17; T45-25 to T46-2; T131-21 to T132-4; T132-20-23; see also P-2 at T7-2-16; P-3 at T16-23 to T17-3; P-8 at ACJC167; Complaint and Answer at ¶13. Although Prosecutor Nunnink was able to obtain a portion of the certifications for the radar unit prior to the start of the trial, which she subsequently admitted into evidence, she was unable to obtain the tuning fork certificates. T20-5-17; see also P-2 at T7-2-13.

The Esposito trial proceeded to conclusion that evening, at which Lieutenant Sposa and Ms. Esposito testified while the Mayor observed the proceedings from the courtroom's gallery. T21-9-13; see also P-7. Lieutenant Sposa testified that he was operating a radar gun from his stationary police car, which was parked on Summit Street in Norwood, New Jersey, when Ms. Esposito passed him in her vehicle at a speed of 38 miles per hour, as reflected by the radar gun, in a 25 mile per hour zone. P-7 at T7-10 to T8-9. Ms. Esposito testified that she was "pretty sure" her speed that day was 25 miles per hour "or right around that number." P-7 at T12-18-20. Respondent found both Lieutenant Sposa and Ms. Esposito credible, despite their

differing accounts, and found Ms. Esposito not guilty of speeding, at which point the Mayor left the courtroom. P-7 at T14-8 to T15-10; see also P-5 at T11-22 to T12-25.

Respondent has conceded a conflict of interest with Ms. Esposito by virtue of her position as his child's former elementary school speech teacher, which he further concedes required his immediate recusal from the Esposito matter. Stipulations at ¶6. Respondent has also conceded that his failure to recuse himself from that matter, despite his conflict of interest with Ms. Esposito, violated Canons 1, 2A and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) of the New Jersey Court Rules, for which he may be disciplined. Id. at ¶¶7-8; see also T115-10 to T116-7; T119-3-8.

2. The ACJC Hearing

Extensive testimony and evidence were presented and developed during the ACJC hearing concerning the events leading up to Respondent's acquittal of Ms. Esposito, which the Committee found relevant and pertinent to its consideration of this matter.

a. History of Respondent's Relationship with the Mayor and the Mayor's Relationship with Sheila Esposito

Respondent acknowledged at the Formal Hearing that he enjoyed a "very close" relationship with the Norwood Mayor,

James Barsa, whom Respondent characterized as a "good friend." T124-2-14; see also P-8 at ACJC167. Their close relationship began through a joint participation in the Norwood Republican Association, and developed into a business relationship when the Mayor, an insurance and financial services agent, began handling Respondent's health insurance needs. T124-10-14; see also P-5 at T4-2-23. Their friendship was "common knowledge" in Norwood. T22-13-17.

Ms. Esposito and Mayor Barsa were also familiar with each other through several mutual friends and because the Mayor's children attended the Norwood public school where Ms. Esposito taught speech. P-5 at T4-24 to T5-6. Although not his usual practice, the Mayor was present in Respondent's courtroom, seated next to Ms. Esposito, on the evening of the trial in the Esposito matter, where he remained until the trial concluded. T21-17-18; see also P-3 at T19-24 to T20-11; P-5 at T12-17-19; T18-21 to T19-10. Both Ms. Esposito and the Mayor admit discussing the Esposito matter while seated together in the courtroom, prior to the start of the trial, at which time Ms. Esposito asked the Mayor to intercede on her behalf to negotiate a reduced charge. P-5 at T12-20 to T13-4; see also P-6 at T15-7-23.

b. History of Respondent's Relationship with Prosecutor Nunnink

Prosecutor Nunnink served as the Norwood Municipal Prosecutor between 2008 and 2010 when she became the alternate prosecutor in Norwood. T12-2-24. During her service as the Norwood prosecutor, Ms. Nunnink conducted approximately fifteen trials before Respondent. T13-4-14. Prosecutor Nunnink described her rapport with Respondent as "good" and their relationship as "a nice professional relationship . . . even . . . a friendship." T13-15-22. Indeed, Respondent cited to his ongoing professional relationship with Prosecutor Nunnink as the reason for his purported intentional failure to place on the record during the Esposito trial all of his reasons for finding Ms. Esposito not guilty. T156-17-2.

c. Lieutenant Sposa's History and Interaction with Respondent While in the Norwood Municipal Court

Lieutenant Richard Sposa has served as a Norwood police officer in excess of 39 years and attained the rank of lieutenant in or around the year 2000. T74-3-9. Norwood Chief of Police Jeffrey Krapels has worked with Lieutenant Sposa for more than 30 of those 39 years and stated, under oath, that Lieutenant Sposa has an unsullied reputation for honesty. P-4 at T12-5-9. During Respondent's tenure as the Norwood Municipal

Court judge, Lieutenant Sposa testified before him on approximately five to ten occasions and has never had any issues with Respondent. P-3 at T10-24 to T11-1; T11-15-18. Notably, Respondent cited to his ongoing professional interactions with the Lieutenant as yet another reason for his purported intentional failure to place on the record all of his reasons for finding Ms. Esposito not guilty. T156-17-2.

d. Prosecutor's Testimony at the ACJC Hearing

Prosecutor Nunnink was the first witness to testify at the Formal Hearing. Her testimony corresponded with her statement to the Honorable Roy F. McGeady, P.J.M.C. on March 3, 2009, and with her statement, under oath, to the Committee on April 23, 2009. See P-2; see also P-8 at ACJC167. On direct examination, Prosecutor Nunnink testified that shortly before the court session began on February 10, 2009 Respondent entered her private office in the courthouse and "specifically mentioned the case of Sheila Esposito." T14-19 to T15-13. Respondent told Prosecutor Nunnink that Ms. Esposito was a teacher in Norwood and his daughter's former speech teacher and requested that Prosecutor Nunnink "reduce the speeding charge to what's called a 4-67, it's obstruction of traffic. . . ." Ibid. In response, Prosecutor Nunnink advised Respondent that she would have to speak with Lieutenant Sposa about such a plea deal. Ibid.

Prosecutor Nunnink testified that when she became a prosecutor she was advised against using the obstruction of traffic charge in plea deals and to offer instead a charge of unsafe operation, which carries a higher fine than the obstruction of traffic offense. T16-22 to T17-5. Consequently, she "rarely" used the obstruction of traffic charge in her plea deals. T17-7-9. On cross-examination, Respondent made much of the fact that during a court session approximately four weeks earlier Prosecutor Nunnink had pled a speeding charge down to an obstruction of traffic offense, to which Lieutenant Sposa had agreed. T35-16 to T39-25; see also R-1. We find the Prosecutor's testimony in this regard consistent with her statement that she "rarely" uses the obstruction of traffic charge in her plea negotiations.

Prosecutor Nunnink also testified on cross-examination that in this instance she felt pressured to present Respondent's proposed plea of obstruction of traffic to Lieutenant Sposa, stating:

> [Y]ou have to understand my relationship with the judge [sic] I considered him my superior in that situation. So, it was a very, very uncomfortable - that's why initially I didn't say, what are you doing? It's just he's the judge, I'm the prosecutor, so I didn't do that. I figured it would end, we would offer her a deal, it would go - it would end. It wouldn't become what it has now become."

T57-9-16.

e. Lieutenant Sposa's Testimony at the ACJC Hearing

Lieutenant Sposa also testified at the Formal Hearing. His testimony corresponded with his statement to the Honorable Roy F. McGeady, P.J.M.C. on March 5, 2009, and with his statement, under oath, to the Committee on April 28, 2009. See P-3; see also P-8 at ACJC168. On direct examination, Lieutenant Sposa testified that Respondent entered the Prosecutor's office while the Lieutenant and the Prosecutor were discussing the Esposito matter. The Prosecutor immediately remarked to Respondent: "Judge, what you're doing is not right." T76-7-9. Lieutenant Sposa did not know what the Prosecutor was referring to when she made this statement to Respondent, but he "knew something wasn't right." T79-3-10. In this regard, the Lieutenant recalled thinking "that the judge shouldn't be in the room with us discussing the case." T79-24-25.

f. Respondent's Testimony at the ACJC Hearing

Respondent was the last witness to testify at the Formal Hearing. Respondent denied engaging in any *ex parte* conversations with Prosecutor Nunnink about the Esposito matter and also denied any attempt to plea bargain the matter. T148-9 to T149-2. Respondent, however, admitted entering the Prosecutor's office on two separate occasions, prior to the Esposito trial, but claims he did so initially as a matter of

"routine" to determine the number of cases for which a plea would be entered and the number of cases for which a trial would be necessary. T120-20 to T121-7. On the second occasion, Respondent claims he entered Prosecutor Nunnink's office to "find out the status of the two remaining cases," one of which was the Esposito matter. T126-13 to T127-2. Respondent admitted that during the second *ex parte* conversation, he engaged Prosecutor Nunnink and Lieutenant Sposa in a discussion about whether a plea deal had been reached in the Esposito matter. T127-21 to T128-11.

Although not a part of the Formal Complaint in this matter, Respondent also admitted to intentionally excluding from the record in the Esposito trial a portion of his reasons for finding Ms. Esposito not guilty out of a concern for the feelings of the Prosecutor and the Lieutenant:

> [W]hile I was aware that the State didn't meet its burden by not offering the radar certification into evidence I had a prosecutor and I had a police lieutenant before me who I was going to be seeing twice a month for a very long time, and in my mind I wanted to try and soothe over as easily as I possibly could their feelings and not try to make the prosecutor seem inept and not to show that the lieutenant didn't bring with him everything that he was supposed to bring.
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> So I couched my decision based on credibility of the witnesses. I felt that that was the easiest way to soothe over the feelings of all of the parties involved in the case and to that end I found Lieutenant Sposa to be a credible witness and although he was credible and although I know

> that he believed that his radar was accurate in terms of the reading that it made of Ms. Esposito's car that . . . is not enough to prove her guilty.

T146-5-22. Respondent acknowledged on cross-examination that he would, as a matter of practice, routinely exclude from his judicial decisions all of his reasons for them out of similar concerns. T158-10-21.

B. Analysis

The Formal Complaint in this matter charged Respondent with three separate ethical violations: (1) engaging in two *ex parte* conversations with the Municipal Prosecutor about a pending matter involving his daughter's former elementary school speech teacher as the defendant, in violation of Canons 1, 2A and 3A(6) of the Code of Judicial Conduct; (2) abusing his judicial office by attempting to plea bargain the matter with the Municipal Prosecutor for the benefit of the defendant, in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct; and (3) engaging in a conflict of interest by presiding over a matter in which he had demonstrated a partiality for one of the parties, in violation of Canons 1, 2A and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) of the New Jersey Court Rules. We find that the Complaint's charges have been proven by clear and convincing evidence, and that Respondent's conduct violated the cited canons and Rules of Court.

Canon 1 of the Code of Judicial Conduct requires judges to maintain high standards of conduct so that the integrity and independence of the Judiciary are preserved. Canon 2A directs that judges conduct themselves in a manner that promotes public confidence in the integrity and impartiality of the Judiciary. Accordingly, Canon 2B prohibits a judge from lending the prestige of the judicial office to advance private interests. The commentary to Canon 2 provides that judges "must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny."

Canon 3 of the Code of Judicial Conduct generally provides that judges should "perform the duties of judicial office impartially and diligently." In this regard, Canon 3A(6) of the Code of Judicial Conduct maintains, in pertinent part, that judges "shall neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Canon 3C(1)(a) states that a judge should disqualify himself or herself from a proceeding in which the judge's impartiality might reasonably be questioned, including, but not limited to cases in which the judge "has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding."

Rule 1:12-1(e) of the New Jersey Court Rules provides that a judge is disqualified from presiding over any matter in which

the judge "is interested in the event of the action." Similarly, the catch-all provision in Rule 1:12-1(f) mandates a judge's disqualification from any action in which there is any "reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

We first acknowledge Respondent's admission of a conflict of interest with the defendant in the Esposito matter, which necessitated his immediate recusal from that matter, and that his failure to recuse himself in the face of that conflict amounted to a violation of Canons 1, 2A and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) of the New Jersey Court Rules. See Stipulations at ¶¶6-8; see also T115-10 to T116-7; T119-3-8. Accordingly, we find that Respondent has violated Canons 1, 2A and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) by presiding over the Esposito matter despite his admitted conflict of interest with the defendant, Sheila Esposito, for which public discipline is warranted.

We next address Respondent's denial of the charge that he initiated and engaged in two *ex parte* conversations with the Municipal Prosecutor during which he attempted to plea bargain the Esposito matter with the Prosecutor, in violation of Canons 1, 2A, 2B and 3A(6) of the Code of Judicial Conduct. On this

issue, we find that the evidence in the record, most notably the testimony of the witnesses at the Formal Hearing, establishes, clearly and convincingly, that Respondent initiated and engaged Prosecutor Nunnink and, in one instance, Lieutenant Sposa in two *ex parte* conversations about the Esposito matter during which he attempted to negotiate a favorable plea deal for Ms. Esposito in violation of the Code of Judicial Conduct. We base these findings on several factors.

First, we were struck by the overall consistency with which Prosecutor Nunnink and Lieutenant Sposa testified both during the Formal Hearing and when previously interviewed by Judge McGeady during his investigation into this matter and thereafter by the Committee's investigators during the Committee's investigation into this matter. Such consistency and the overall demeanor with which they testified, especially when dealing with what the Prosecutor described to us as a "very uncomfortable" situation, was compelling and lent great weight to the veracity of their testimony. See In re Williams, 169 N.J. 264, 273 n.4 (2001) (citing In re Seaman, 133 N.J. 67, 84 (1993)) (noting that in judicial disciplinary proceedings even uncorroborated evidence can satisfy the standard of clear-and-convincing). Specifically, over the course of almost three years, beginning on March 3, 2009, less than a month after the Esposito trial had concluded, and ending with the Formal Hearing

on December 1, 2011, Prosecutor Nunnink repeatedly affirmed that on the evening of the Esposito trial Respondent entered her private office on two separate occasions, outside of Ms. Esposito's presence, and attempted to elicit her agreement to a favorable plea deal for Ms. Esposito.

Similarly, Lieutenant Sposa continually corroborated that on the second occasion of Respondent's visit to the Prosecutor's office, wherein the Lieutenant was then seated, Prosecutor Nunnink immediately stated to Respondent: "Judge, what you're doing is not right." Lieutenant Sposa testified that he interpreted this statement as a reference to the impropriety of the Judge's presence in the Prosecutor's office and his discussions with them about the Esposito matter. Indeed, when asked at the Formal Hearing, Prosecutor Nunnink stated that she made this statement to Respondent because she believed Respondent was pressuring her and the Lieutenant to agree to a plea bargain with which they disagreed.

Second, by all accounts, Prosecutor Nunnink and Respondent enjoyed a professional relationship, as did Lieutenant Sposa and Respondent. Prosecutor Nunnink even described her relationship with Respondent as "friendly." Likewise, Respondent testified that it was his friendship with Prosecutor Nunnink that compelled him to purportedly omit from the record some of his reasons for finding Ms. Esposito not guilty so as not to

"embarrass" her or Lieutenant Sposa. Given their friendly relationship, we can find no motive on the part of Prosecutor Nunnink or Lieutenant Sposa to fabricate their testimony in this matter.

Finally, we found Respondent's testimony at the Formal Hearing incredible given its inconsistency with his prior written comments. Specifically, in his written comments, Respondent denied that Prosecutor Nunnink objected, in any way, to his conduct in respect of the Esposito matter and that when Respondent told Prosecutor Nunnink the matter would go to trial that evening he claimed she indicated a readiness to proceed. Conversely, at the Formal Hearing, Respondent stated, for the first time, that Prosecutor Nunnink had requested an adjournment of the trial date that evening and chastised him for denying that request. Similarly, Respondent's written comments lacked *any* reference to his apparent intentional exclusion from the record of all of his reasons for finding Ms. Esposito not guilty out of a purported concern for the feelings of Prosecutor Nunnink and Lieutenant Sposa. Conversely, Respondent's conduct in this regard played a prominent role in his testimony at the Formal Hearing, which he advanced in defense of these disciplinary charges.

We must also note that Respondent's admittedly close relationship with the Mayor, which prompted him to acknowledge

the Mayor's presence in the courthouse that evening, and the Mayor's actual presence in the courtroom, both prior to and during the Esposito trial, seated next to Ms. Esposito, even though he was neither a party nor a witness in that proceeding, coupled with the Mayor's conversations with Ms. Esposito about a resolution of the Esposito matter pre-trial, raise additional concerns about the legitimacy of the proceedings before Respondent that evening.

For all of these reasons, we find that Respondent engaged in two *ex parte* conversations with Prosecutor Nunnink and Lieutenant Sposa about a plea deal while presiding over the Esposito matter in violation of Canon 3A(6) of the Code of Judicial Conduct, which prohibits a judge from initiating or considering any *ex parte* communications concerning a pending case. Cf. In re Piscal, 177 N.J. 525 (2003) (adopting ACJC Presentment in ACJC 2000-230 in which the Committee found that Respondent's *ex parte* conversations with the fiancé of the plaintiff, whom he believed to be a Freeholder in Ocean County, and the judicial actions he took in response to those conversations violated Canons 1, 2A, 2B and 3A(6) of the Code of Judicial Conduct); see also In re Delehey, 200 N.J. 278 (2009) (adopting ACJC Presentment in ACJC 2008-056 in which the Committee found that Respondent's *ex parte* conversation with the

brother of the defendant regarding the defendant's case violated Canon 3A(6) of the Code of Judicial Conduct).

We further find the content of Respondent's *ex parte* conversations with Prosecutor Nunnink and Lieutenant Sposa to represent a significant violation of Canons 1, 2A and 2B of the Code of Judicial Conduct and an affront to all notions of fundamental fairness and judicial independence and integrity. Respondent used his unfettered access to Prosecutor Nunnink and Lieutenant Sposa to attempt to broker a favorable plea deal for Ms. Esposito, with whom he now admits a conflict of interest. Whatever his motivations, Respondent's *ex parte* discussions with Prosecutor Nunnink and Lieutenant Sposa clearly conveyed the impression that Ms. Esposito was in a special position of influence. Indeed, Ms. Esposito explicitly told Prosecutor Nunnink that "someone" should have spoken to her about the Esposito matter. Judges are expected to guard against such impressions, not foster them. See In re Citta, 201 N.J. 413 (2010) (adopting ACJC Presentment in ACJC 2008-180 and 2008-256) ("A judge's conduct and remarks should not exhibit or foster the impression of bias that undermines impartiality, objectivity and fairness in the discharge of judicial responsibilities." (citations omitted)).

Such conduct represents a complete departure from the proper administration of justice and severely damages the

integrity and impartiality of the Judiciary. "The polestar of our Canons of Judicial Conduct is to maintain judicial integrity and the public's confidence in that integrity." In re Samay, 166 N.J. 25, 43 (2001) (citations omitted); see also Canon 1 and Canon 3 of the Code of Judicial Conduct. For their part, Judges are expected to conduct all court proceedings in a manner that "will maintain public confidence in the integrity and impartiality of the judiciary." In re Sadofski, 98 N.J. 434, 441 (1985). Adherence to this principle is of particular importance in the municipal courts where the greatest numbers of people are exposed to the judicial system. In re Santini, 126 N.J. 291, 298 (1991); see also In re Murray, 92 N.J. 567, 571 (1983). Although judges are invested with great power, that power is "bestowed upon a judge on the condition that the judge not abuse or misuse it to further a personal objective such as a vendetta or to help a friend." In re Samay, supra, 166 N.J. at 43.

By engaging in *ex parte* conversations with the Municipal Prosecutor and the Lieutenant about a potential plea deal in the Esposito matter, Respondent misused his judicial power to advance Ms. Esposito's interest over the interests of justice and exacerbated the impropriety by then presiding over the Esposito trial despite his clear partiality for and conflict of interest with Ms. Esposito. His conduct corrupted the entire

judicial process in direct violation of Canons 1, 2A and 2B of the Code of Judicial Conduct, and constituted a gross abuse of his judicial powers. The impact of such conduct on the public's confidence in an impartial and fair judiciary is reflected in the anonymous complaint received by the Honorable Peter E. Doyne, A.J.S.C. in respect of the conduct at issue here. P-1. In that letter, a "concerned taxpayer" describes Respondent's conduct as "a slap in the face to the Court and the residents of this town," and states further that it is this type of conduct that causes "citizens [to] have such little faith in the government." P-1.

Having concluded that Respondent violated the canons of the Code of Judicial Conduct, the sole issue remaining is the appropriate quantum of discipline. In this regard, the consideration of aggravating and mitigating factors, if any, is relevant. The aggravating factors to be considered when determining the gravity of the misconduct and the appropriate quantum of discipline include the extent to which the misconduct demonstrates a lack of integrity and probity, a lack of independence or impartiality, misuse of judicial authority, and whether the conduct has been repeated or has harmed others. In re Seaman, 133 N.J. 67, 98-99(1993) (citations omitted).

Factors considered in mitigation include the length and quality of the judge's tenure in office, the judge's sincere

commitment to overcoming the fault, the judge's remorse and attempts at apology or reparations to the victim, and whether the inappropriate behavior is susceptible to modification. In re Subryan, 187 N.J. 139, 154 (2006) (citations omitted).

Here there exist significant aggravating factors. First, the misconduct at issue - presiding over a matter in which a conflict of interest existed, misusing the judicial office by engaging in *ex parte* conversations with the Municipal Prosecutor about that same matter and attempting to plea bargain the matter for the defendant's benefit, thereby evincing a partiality for the defendant - demonstrates a significant lack of integrity and probity, a lack of independence and impartiality and an inability on Respondent's part to conform his conduct to the high standards of conduct expected of judges under the Code of Judicial Conduct. Such conduct inevitably harms the integrity of the judicial process, undermines public confidence in the justice system and seriously prejudices the proper administration of justice.

Second, although Respondent apologized at the Formal Hearing for engaging in a conflict of interest, he nonetheless felt it appropriate to denigrate the professional capabilities of the Municipal Prosecutor and assign blame to her for his failures as a jurist. By way of example, Respondent accused Prosecutor Nunnink of trying to "trick" him into convicting Ms.

Esposito by putting forth her case without the tuning fork certifications for the radar unit used by Lieutenant Sposa when citing Ms. Esposito for speeding. See Respondent's Brief at p. 3. The record, however, does not support this outlandish assertion and for a jurist to make such a spurious allegation without an adequate basis is irresponsible and highly inappropriate. Similarly, although Respondent concedes that Prosecutor Nunnink sought an adjournment of the trial that evening, off the record, which Respondent denied, he nonetheless accuses her of "negligence" for not again seeking an adjournment on the record. Ibid. To make matters worse, Respondent tries to lay the blame for his own failure to recuse himself from the Esposito matter on Prosecutor Nunnink, whom he chides for not seeking his recusal on the record. Id. at p. 4. Respondent cannot avoid his obligations under the canons of the Code of Judicial Conduct by placing those responsibilities on the parties appearing before him. His efforts to do so in this case suggest both a lack of appreciation for his judicial obligations under the Code of Judicial Conduct and an inability to conform his conduct to the high standards of conduct expected of judges.

Moreover, as part of his defense, Respondent admitted allowing his professional relationship with Prosecutor Nunnink and Lieutenant Sposa to influence his judicial conduct. Respondent testified on cross-examination that he intentionally

omitted from the record in the Esposito trial some of his reasons for finding Ms. Esposito not guilty out of a concern for the Prosecutor's and the Lieutenant's feelings. T146-5-22. Remarkably, Respondent also conceded that he would *routinely* omit from his opinions portions of his reasoning out of similar concerns. T158-10-21. In this manner, Respondent believed he had fulfilled his judicial obligations, which he construed as requiring only that he "come to the correct final decision," not that he place "every single basis" for that decision on the record. T158-24 to T159-1. This judicial philosophy and the conduct to which it relates is contrary to the high standards of conduct expected of judges under the Code of Judicial Conduct and constitutes a blatant violation of Canon 2B of the Code of Judicial Conduct, which prohibits a judge from allowing "family, social, political, or other relationships to influence judicial conduct or judgment."

Respondent's admitted propensity to be influenced by his own sympathies and professional relationships when rendering his judicial decisions raises grave concerns about his judgment and neutrality, both of which are essential ingredients in the proper exercise of judicial obligations. Without question, such conduct violates Canon 2B's proscription against allowing outside relationships to influence judicial conduct, and impairs the integrity and impartiality of the Judiciary, in violation of

Canons 1 and 2A of the Code of Judicial Conduct. Accordingly, we amend the Formal Complaint to include a violation of that portion of Canon 2B that prohibits a judge from allowing "family, social, political, or other relationships to influence judicial conduct or judgment," pursuant to Rule 2:15-14(h).

Finally, although it was discussed at some length during the hearing, we find it unnecessary to consider the propriety of Respondent's decision during the Esposito trial to admit into evidence the radar readings from Lieutenant Sposa's radar gun without the accompanying tuning fork certificates. Whether Respondent's decision in this regard was a proper exercise of his discretion or an abuse of that discretion and whether his initial decision to compel the trial despite the Prosecutor's request for an adjournment to retrieve those certificates was an abuse of discretion are primarily legal issues that are tangential to the central question in this matter of whether Respondent's conduct when interacting with the Municipal Prosecutor and Lieutenant Sposa prior to the Esposito trial was in conformity with the Code of Judicial Conduct.

II. RECOMMENDATION

The Committee finds by clear and convincing evidence that Respondent has engaged in serious ethical misconduct, which would ordinarily warrant a recommendation for removal. Because Respondent no longer holds judicial office, the Committee

recommends that in lieu of removal Respondent be censured with the further condition that he be permanently disqualified from holding or securing future judicial office. See In re McElroy, 196 N.J. 457 (2008) (adopting ACJC Presentment in ACJC 2007-243, in which the Committee found that Respondent violated the Code of Judicial Conduct for which he was censured and permanently barred from judicial office); see also In re Sasso, 199 N.J. 119 (2009) (adopting ACJC Presentment in ACJC 2007-162, in which the Committee found that Respondent violated the Code of Judicial Conduct for which he was permanently disqualified from holding or securing future judicial office).

This recommendation takes into account the egregiousness of Respondent's conduct in presiding over and conducting a trial in a matter in which he had a clear conflict of interest and evident partiality and in engaging in two *ex parte* conversations with the Prosecutor and, in one instance, with a witness in the municipal court matter, in an effort to negotiate a favorable plea deal for the defendant, with whom he admits and acknowledges a conflict of interest. Such conduct greatly contravened Respondent's obligations to perform the duties of his judicial office impartially and fairly.

Our recommendation also considers Respondent's conduct in handling this judicial disciplinary matter, which we found to be an aggravating factor. Throughout these proceedings, Respondent

mislaid the blame for his judicial misconduct on the Municipal Prosecutor and cast aspersions on her professional competence. Additionally, he expressed a judicial philosophy directly at odds with the canons of the Code of Judicial Conduct and, in so doing, demonstrated a misunderstanding of his responsibilities as a jurist and an inability to conform his conduct to the high standards of conduct expected of judges.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

March 14, 2012

By: Alan B. Handler
Alan B. Handler, Chair