

D-131-12  
(072596)

SUPREME COURT OF NEW JERSEY  
ADVISORY COMMITTEE ON  
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2010-054

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IN THE MATTER OF

MICHAEL A. DIAMOND,  
JUDGE OF THE MUNICIPAL COURT

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**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 Michael A. Diamond, Judge of the Municipal Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that Respondent be publicly reprimanded for these ethical infractions.

On October 7, 2010, the Committee issued a Formal Complaint in this matter, which accused Respondent of engaging in an impermissible *ex parte* conversation with the municipal prosecutor during which Respondent offered his opinion about the defendant's case, provided legal guidance to the municipal prosecutor and referred collectively to himself and the

municipal prosecutor as "we" when discussing the prosecution of the case, in violation of Canons 1, 2A and 3A(6) of the Code of Judicial Conduct. Respondent filed an Answer to the Complaint on November 22, 2010 in which he admitted certain factual allegations of the Formal Complaint, including the fact that he engaged in an *ex parte* conversation with the municipal prosecutor about a pending matter to which he claimed defendant's counsel consented, but denied expressing an opinion as to the efficacy of the defendant's case or referring collectively to the court and the prosecution as "we" and denied violating Canons 1, 2A and 3A(6) of the Code.

On March 12, 2013, Presenter and Respondent filed with the Committee a set of Stipulations in which Respondent again concedes, among other things, to participating in an *ex parte* conversation with the municipal prosecutor about a pending matter. Respondent likewise stipulates that during the *ex parte* conversation he advised the municipal prosecutor of the issues relevant to the admission of certain evidence in that matter.

The Committee conducted a Formal Hearing on March 20, 2013. Respondent appeared without counsel and offered testimony in his defense. Witnesses were called to testify by both the Respondent and the Presenter. Exhibits were also offered by both parties and admitted into evidence, as were the

Stipulations previously referenced. See P-1 through P-11; see also R-1 through R-5<sup>1</sup>, Stipulations filed March 12, 2013.

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**

This matter was initiated with the filing of an ethics grievance by Christopher L. Baxter, Esq. against Respondent wherein he accused Respondent of engaging in an impermissible *ex parte* conversation with the Winslow Township Municipal Prosecutor, Donna Sigel Platt, concerning the matter of State v. Eugene Foxworth (the "Foxworth matter"). The Foxworth matter was pending before Respondent in the Winslow Township Municipal Court wherein Mr. Baxter represented the defendant, Eugene Foxworth. P-1 through P-4. Mr. Baxter claimed that the *ex parte* conversation occurred without his knowledge or consent and concerned issues relevant to the viability of certain defenses raised in defendant's expert's report about which Respondent was familiar having been shown a copy by Prosecutor Platt. P-1; see also P-4 at ACJC 011. Mr. Baxter further contended that during

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<sup>1</sup> Respondent did not move exhibits R-6 and R-7 into evidence and as such neither were considered by this Committee.

this *ex parte* conversation, Respondent provided Prosecutor Platt with advisory opinions and advice concerning evidentiary issues, and was likewise advised by Prosecutor Platt of her "personal bias" against Mr. Baxter. Id. The *ex parte* conversation at issue is a matter of record having occurred in the courtroom, at sidebar, where it was recorded. P-2; see also Stipulations at Attachment "A"; Stipulations at ¶6.

The Committee conducted an investigation into these allegations, which included, inter alia, reviewing the transcript of the *ex parte* conversation and the relevant documentation generated as a consequence of that *ex parte* conversation, interviewing Mr. Baxter and Prosecutor Platt about the events at issue, and obtaining Respondent's written comments in respect of Mr. Baxter's allegations. This judicial ethics matter followed.

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, and for a period of twelve years, Respondent has served as a part-time judge in the Winslow Township Municipal Court, a position he continues to hold. Stipulations at ¶2. Respondent also serves as a part-time judge in the Municipal Courts of the Boroughs of Chesilhurst and Hi-Nella, and in the Voorhees

Township Municipal Court. Ibid. In addition, Respondent is the "conflicts" judge in eleven other municipalities in Camden County. 1T7-13-19.<sup>2</sup> In total, Respondent has served as a municipal court judge for twenty-four years. Ibid.

Christopher Baxter, Esq. has been a member of the Bar of the State of New Jersey and a practicing attorney since 1989. P-9 at 2T2-15-20<sup>3</sup>; 1T19-9-11. He is currently a partner with the law firm of Baxter & Kourlesis, PC in Moorestown, New Jersey where he specializes in criminal defense and the defense of those charged with drunk driving ("DWI"). P-9 at 2T2-15-17; 1T18-11-21. During his career and for a period of eleven years, Mr. Baxter served as the municipal prosecutor in various municipalities in Burlington County. P-9 at 2T2-24 to 2T3-4; 1T18-22 to 1T19-2. In addition, Mr. Baxter has been, and is currently, a public defender in multiple municipalities in Burlington County.

Donna Sigel Platt, Esq. has been a member of the Bar of the State of New Jersey and a practicing attorney since 1988. P-10

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<sup>2</sup> "1T" refers to the transcript of the Formal Hearing held on March 20, 2013.

<sup>3</sup> "2T" refers to the Transcript of Interview of Christopher Baxter, Esq. conducted on May 11, 2010, which is designated as P-9 in the record.

at 3T3-2-5<sup>4</sup>; 1T113-4-9; 1T142-21 to 1T143-1. Ms. Platt is currently a sole practitioner in the law firm of Donna Sigel Platt, PC in Stratford, New Jersey where she maintains a general practice with a primary focus on family law. P-10 at 3T2-22-24; 1T113-23 to 1T114-6. For approximately ten years, between 1990 and 2000, Ms. Platt worked for a private law firm where she served as a substitute municipal prosecutor in various municipalities in Gloucester County. P-10 at 3T3-14-21; 1T114-9-12. Beginning in 2003, Ms. Platt was appointed as the municipal prosecutor in Winslow Township, a position she continues to hold. P-10 at 3T4-1-18; 1T114-7-17. She has prosecuted matters before Respondent in the Winslow Township Municipal Court for the past ten years and in the municipal courts of the Boroughs of Chesilhurst and Hi-Nella for the past several years. P-10 at 3T3-22 to 3T4-18. In addition, she currently serves as the municipal prosecutor in Berlin Township and the Borough of Stratford. Ibid.

On August 19, 2009, Respondent presided over the matter of State v. Eugene Foxworth in the Winslow Township Municipal Court. Stipulations at ¶3. The Foxworth matter involved a single-car motor vehicle accident in which the defendant was

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<sup>4</sup> "3T" refers to the Transcript of Interview of Donna Platt, Esq. conducted on March 19, 2010, which is designated as P-10 in the record.

charged with driving while intoxicated and careless driving in violation of N.J.S.A. 39:4-50 and N.J.S.A. 39:4-97. Stipulations at ¶3; see also R-2. Ms. Platt was initially assigned to prosecute the Foxworth matter in the Winslow Township Municipal Court.<sup>5</sup> P-9 at 2T3-16 to 2T4-11; P-10 at 3T4-25 to 3T5-10; 1T19-12-23.

Prior to appearing before Respondent that day and consistent with the practice in the Winslow Township Municipal Court, Mr. Baxter met with Prosecutor Platt in a conference room adjacent to the courtroom to discuss the Foxworth matter. P-9 at 2T4-16-19; P-10 at 3T6-2-13; 1T29-12 to 1T30-12; 1T121-22 to 1T122-11. The conference room in which they met is approximately ten feet wide by twenty feet long and contains a rectangular table at the head of which Prosecutor Platt routinely meets with counsel for the various defendants scheduled on the court's calendar that day, as well as any *pro se* litigants. P-9 at 2T4-16-19; P-10 at 3T6-2-13; 1T30-13 to 1T33-19; 1T121-22 to 1T122-11. Present in the conference room at any given time are the attorneys appearing that day, a police liaison officer who meets with *pro se* defendants at the opposite end of the conference table, and

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<sup>5</sup> Respondent ultimately recused himself from the Foxworth matter in response to Mr. Baxter's formal motion for recusal and transferred the case to a conflicts judge at which time a different prosecutor was assigned to the case. P-5; see also R-3; R-4.

various *pro se* defendants. Ibid. Typically, the conference room is very crowded. 1T33-16 to 1T34-6; 1T122-1-7.

By all accounts, Mr. Baxter's and Prosecutor Platt's discussion concerned Mr. Baxter's anticipated defenses, some of which were referenced in defendant's expert's report. P-4 at ACJC 012, ACJC 017 to ACJC 018; P-9 at 2T4-20 to 2T9-6; P-10 at 3T6-16 to 3T7-23; 1T30-3-25; 1T122-11-20. They specifically discussed the issues concerning the chain of custody with regard to defendant's blood sample and its possible lack of refrigeration, the use of an expired blood kit to test defendant's blood, and defendant's blood alcohol level on the night of the accident. Ibid.

Shortly thereafter, Prosecutor Platt exited the conference room with defendant's expert's report and entered the courtroom where she engaged Respondent in an *ex parte* conversation, at sidebar, about the Foxworth matter, the substance of which was recorded. Stipulations at ¶¶5-6; see also P-2; P-9 at 2T10-2-9; P-10 at 3T17-17-24; Stipulations at Attachment "A." Prior to engaging in this *ex parte* conversation, Respondent did not directly secure Mr. Baxter's consent or confirm indirectly with Prosecutor Platt the existence of his consent. P-10 at 3T11-14 to 3T12-10; see also P-2. Likewise, Respondent did not inquire of Prosecutor Platt the reasons for Mr. Baxter's absence from



the sidebar conversation and did not require Mr. Baxter's presence at any point during that conversation. Ibid.

During this *ex parte* conversation, which lasted five minutes and was limited solely to the Foxworth matter, Respondent and Prosecutor Platt discussed chiefly the chain of custody issues raised by Mr. Baxter and the necessary witnesses Prosecutor Platt needed to produce to address those issues. P-2; see also 1T126-17-22. The focus of their conversation in this regard was on defendant's expert's report and included several instances in which both Respondent and Prosecutor Platt used the term "we" when referring to the prosecution's case. Respondent also used this occasion to advise Prosecutor Platt of the issues relevant to the admission of certain evidence. Stipulations at ¶7. Their conversation was, in pertinent part, as follows:

MS. PLATT: Right . . . we have one that's interesting, it's a blood. I just got an expert report (inaudible). This is not that other one that begins with a "G."

Obviously, what's raised were chain of custody issues -

THE COURT: They have to give you notice that they are going to do that.

MS. PLATT: Yes, and he did do that. Okay. He did send his letter in.

. . .

But, the point is, is that they're always difficult because you have to get the toxicologist in, you have to get, you know, yada, yada, yada.

. . .

THE COURT: This guy is wrong. Okay, this guy is wrong on his (inaudible).

MS. PLATT: I know with the kit. I already addressed that with him. I told him that we had that issue before. That you even had it - you had it like a year ago in Chesilhurst. I told him that, you know, you don't accept that. So he knows that. Because his kit, interestingly, is two years old. But, it doesn't matter so I do know that.

THE COURT: No, but, he's saying then it took five days there that was stored. Once you have blood, it doesn't matter, its (inaudible).

MS. PLATT: It doesn't matter, right. I actually don't . . . I honestly feel if push comes to shove that we'll be fine. You know, I really do. The question is, is that -

THE COURT: As long as we can produce the chain of custody stuff.

. . .

MS. PLATT: There's like four officers involved. So, we have to subpoena all of them. So, do you want to do that as a first step or do you want to -

THE COURT: I think it's the only way we can really put it on the record, especially if it's a high reading.

. . .

THE COURT: You'll have to tell him that he has to get his expert to come to Court and then we'll see what the chain is.

P-2 at 4T3-8 to 4T7-4;<sup>6</sup> see also Stipulations at ¶7.

Aside from discussing the chain of custody issues present in the Foxworth matter, Respondent and Prosecutor Platt also discussed briefly the use of an expired blood kit when drawing defendant's blood and defendant's blood alcohol level, which Prosecutor Platt described as "pretty high." P-2. On this occasion, Prosecutor Platt also described Mr. Baxter to Respondent as "a little challenging." P-2.

At the conclusion of their *ex parte* conversation, Prosecutor Platt exited the courtroom and advised Mr. Baxter of her *ex parte* conversation with Respondent. P-9 at 2T11-20 to 2T12-8; see also P-10 at 3T19-9-21; 1T36 to 1T42-6; 1T124-3-12. Specifically, Prosecutor Platt informed Mr. Baxter that she had spoken with Respondent about Mr. Baxter's expert report and his defenses. P-4 at ACJC 018, ¶8; see also P-10 at 3T19-22 to 3T20-12. She stated further that Respondent did not "agree with" Mr. Baxter concerning the relevance of the expired blood kit, did not find his chain of custody defense to be an issue, and indicated that the matter would need to be scheduled for trial. Ibid; see also P-10 at 3T19-22 to 3T20-12. Mr. Baxter was "taken aback" by Prosecutor Platt's disclosures and appeared to Prosecutor Platt to be "shocked" to learn of her *ex parte*

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<sup>6</sup> "4T" refers to the Transcript of Hearing in State v. Foxworth, dated August 19, 2009, which is designated as P-2 in the record.

discussion with Respondent about his client's case. 1T38-21 to 1T39-2; 1T124-13-19. He immediately indicated to Prosecutor Platt that he was unaware prior thereto of her intentions to speak with Respondent, *ex parte*, about his client's case, and expressed to her his disapproval of the *ex parte* conversation. 1T41-23 to 1T42-6; see also 1T37-6 to 1T39-6; 1T124-13-19; P-4 at ACJC 018, ¶9; P-10 at 3T20-13-16.

Minutes later, Mr. Baxter advised Prosecutor Platt of his intention to make an oral motion for Respondent's recusal as a result of Respondent's *ex parte* conversation with her. Mr. Baxter proceeded with the motion to recuse shortly thereafter, which Respondent ultimately denied. 1T43-6-13; see also P-10 at 3T21-20 to 3T22-23; Stipulations at ¶8; see also P-2 at 4T8-4 to 4T13-23. In denying that motion, Respondent assured Mr. Baxter that the *ex parte* conversation did not concern any substantive issues in the case and that he did not read Mr. Baxter's expert's report. Ibid. Respondent invited Mr. Baxter to listen to the recording of the *ex parte* conversation and indicated that he would entertain another motion for recusal if, after listening to the tape, Mr. Baxter believed that his client was prejudiced by the *ex parte* conversation. Ibid.

Prosecutor Platt was present in the courtroom when Mr. Baxter made his oral motion for Respondent's recusal and was given an opportunity to respond. P-2 at 4T9-1 to 4T11-8. At no

time, however, did she indicate in response to that motion that she had advised Mr. Baxter of her intent to speak with Respondent about the Foxworth matter prior to doing so or that she had secured Mr. Baxter's consent to engage in the *ex parte* conversation with Respondent. Ibid; see also 1T144-3-10. Similarly, in denying Mr. Baxter's motion for recusal, Respondent did not address, in any fashion, the issue of whether Prosecutor Platt had obtained Mr. Baxter's consent before engaging in the *ex parte* conversation or indicate that he had made any assumptions about Mr. Baxter's consent before participating in the *ex parte* conversation with Prosecutor Platt. P-2 at 4T11-9 to 4T13-20.

Several weeks thereafter, on October 5, 2009, after reviewing the transcript of the August 19, 2009 *ex parte* conversation between Prosecutor Platt and Respondent, Mr. Baxter filed a formal motion for Respondent's recusal from the Foxworth matter. Stipulations at ¶10; see also P-4. In his certification accompanying that motion, Mr. Baxter affirmed that he neither knew of, nor consented to, the *ex parte* conversation between Prosecutor Platt and Respondent and was not invited to participate in that conversation. P-4 at ACJC 018, ¶¶6-7. Prosecutor Platt was served with a copy of that motion though she did not take a position on it and did not appear at the oral argument to contest the motion. P-10 at 3T40-6-12; 1T145-1-22.

Respondent granted Mr. Baxter's motion for recusal, stating that it was "easier" for him to simply recuse himself. P-5 at 5T2-20-21.<sup>7</sup> At that time, Respondent again did not address with Mr. Baxter his claim that the *ex parte* conversation occurred without his knowledge or consent. P-5. Respondent ultimately transferred the Foxworth matter to the assigned "conflicts" judge before whom Mr. Foxworth pled guilty to an amended charge of reckless driving (N.J.S.A. 39:4-96). P-5; R-2; see also R-4. R-3.

Respondent telephoned Prosecutor Platt following the filing of Mr. Baxter's formal motion for recusal. 1T145-23 to 1T147-17. During that telephone conversation, Respondent advised Prosecutor Platt that he was recusing himself from the Foxworth matter despite his belief that Mr. Foxworth was not prejudiced by their *ex parte* conversation. Ibid; see also 1T206-21 to 1T207-18.

## 2. Respondent's Written Comments

Respondent was initially questioned by the Committee about his conduct in the Foxworth matter by letter dated December 9, 2009. P-7. In his letter of response, dated January 19, 2010, Respondent admitted engaging in an *ex parte* conversation with Prosecutor Platt, but claimed, for the *first time*, that he had "assumed it was with the consent of . . . [Mr. Baxter]." P-8 at

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<sup>7</sup> "5T" refers to the Transcript of Motion in State v. Foxworth, dated October 5, 2009, which is designated as P-5 in the record.

p.2. In this regard, Respondent indicated his understanding of Prosecutor Platt's "practice" in respect of such sidebar conversations with which he was apparently familiar given his frequent interaction with her in the three towns in which they both work, she as the municipal prosecutor and he as the municipal court judge. Id. at p.1. According to Respondent, it was Prosecutor Platt's practice to notify her adversary of her intent to speak with Respondent and invite the adversary to join her. Ibid. Respondent claimed that it was "not uncommon" for Prosecutor Platt to approach Respondent without her adversary inasmuch as "the conference room is usually crowded and the sidebars last a minute or two." Id.

Respondent denied, however, "coach[ing]" Prosecutor Platt on the law, contending instead that they were merely "discussing the practical implications of trying a DWI case with multiple witnesses and the Court's schedule", which he claimed is "daunting." Id. at p.2. Similarly, Respondent denied reviewing the "entire expert report" stating that his "major review" was of the "author's name as some municipal experts have no credibility." Ibid. In respect of the claim that he was not forthcoming with Mr. Baxter about the content of the *ex parte* conversation when denying Mr. Baxter's oral motion for recusal, Respondent denied any impropriety claiming generally that he

"honestly told Mr. Baxter [his] impression of the sidebar with Ms. Platt." Id.

### 3. Formal Hearing

The issues addressed at the hearing in this matter were twofold: (1) whether the *ex parte* conversation between Prosecutor Platt and Respondent, the occurrence of which is undisputed, occurred with the knowledge and consent of Mr. Baxter as Respondent contends in defense of these disciplinary charges; and (2) whether the substance of that *ex parte* conversation: (a) constituted Respondent's attempt to provide Prosecutor Platt with legal guidance on the prosecution of the Foxworth matter; (b) created the appearance of an affiliation between Respondent and the prosecution; and (c) represented Respondent's advisory opinion on the strength of defendant's case.

As to the first issue, the Committee heard testimony from several witnesses -- Mr. Baxter, Prosecutor Platt, Peter Bonfiglio, Esq., John Iannelli, Esq. and Respondent. We are further informed about this issue by the transcript of the *ex parte* conversation held on August 19, 2009, as well as the transcripts of Respondent's decisions on Mr. Baxter's two motions for recusal, the first of which occurred on August 19, 2009 and the second on October 5, 2009, the contents of which are discussed in detail above. P-2; P-4; P-5.



The testimony of Mr. Baxter and Prosecutor Platt evince a fundamental disagreement between the two over whether Mr. Baxter knew of and/or consented to the *ex parte* conversation at issue. For his part, Mr. Baxter testified consistently with his prior statements on this issue, the first of which was on the date of the *ex parte* conversation (i.e. August 19, 2009), that he neither knew of, nor consented to, that *ex parte* conversation and was never invited to participate in it. 1T37-3 to 1T39-6.

Similarly, although Prosecutor Platt did not discuss consent during Mr. Baxter's two motions for recusal, she testified consistently with her prior statement to the Committee's investigator on March 19, 2010 that Mr. Baxter consented to her *ex parte* conversation with Respondent. 1T122-8 to 1T124-2. According to Prosecutor Platt, Mr. Baxter consented specifically to her discussion with Respondent concerning the name of Mr. Baxter's expert, the purpose of which she claimed was to confirm that he was not the same expert Respondent had previously found incredible in an unrelated matter, and the viability of Mr. Baxter's defense concerning the Winslow Township Police Department's use of an expired blood kit when drawing Mr. Foxworth's blood. Ibid. The record, however, reveals that, prior to speaking with Respondent, Prosecutor Platt knew that the name of the expert Respondent believed to be incredible began with a "G" and was not the same as Mr. Baxter's

expert whose name is Thomas Brettell. P-2; see also P-3. Moreover, the record reflects that the actual focus of the *ex parte* discussion concerned the chain of custody issues raised in Mr. Baxter's expert's report and not the topics on which Prosecutor Platt claims she obtained Mr. Baxter's consent, i.e. the name of the expert and the expired blood kit issue. P-2.

Respondent offered the testimony of Peter Bonfiglio, Esq. and John Iannelli, Esq. to corroborate Prosecutor Platt's contention that Mr. Baxter consented to the *ex parte* conversation. Notably, neither of these individuals had any involvement in the Foxworth matter. Rather, each was in the Winslow Township Municipal Court that day on unrelated cases. 1T163-20 to 1T164-1; 1T179-3-18.

Mr. Bonfiglio is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1987. 1T162-12-15. Mr. Iannelli is also a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1993. Both Mr. Bonfiglio and Mr. Iannelli enjoy a familiarity with Respondent by virtue of their frequent appearances before him at various times over the past fifteen to twenty years, which appears to have been the impetus for their involvement in this matter. 1T162-21-22; 1T172-3-5; 1T181-17-21. Indeed, Mr. Bonfiglio, while in the company of other attorneys, has also, on occasion, socialized with Respondent on

"a couple of nights after night court." 1T172-5-10. As of the date of the Formal Hearing, both men continued to appear before Respondent. 1T162-21-22; 1T172-3-5; 1T181-17-21.

Mr. Bonfiglio testified that although he had no affiliation with the Foxworth matter, he recalled being present in the conference room located adjacent to the Winslow Township Municipal Court on August 19, 2009 when the subject conference between Prosecutor Platt and Mr. Baxter occurred. 1T163-20 to 1T164-1; see also 1T165-4-7. He claimed to have specifically remembered their conference these several years later because "shortly thereafter" the Committee's Formal Complaint in this matter was the subject of a newspaper article, which he had read. 1T165-17-20. While Mr. Bonfiglio did not provide the Committee with the date of that newspaper article or the name of the newspaper in which it appeared, the record reflects that the date on which the Formal Complaint was filed was October 7, 2010, more than a year *after* the events at issue.

Mr. Bonfiglio's memory of the conference between Mr. Baxter and Prosecutor Platt, however, was limited to Prosecutor Platt's portion of the conversation. 1T168-23 to 1T169-10. He could not recall what, if anything, Mr. Baxter said to Prosecutor Platt during their conference. Ibid. Specifically, Mr. Bonfiglio testified that Mr. Baxter approached Prosecutor Platt about an expert report at which time Mr. Bonfiglio overheard

Prosecutor Platt state either "do you mind if I put this before the judge" or "I'll talk to the judge about this" after which she exited the conference room alone. 1T166-10-15. He purportedly overheard this portion of their conversation while simultaneously engaging in a separate "conversation with the attorney [seated] next to [him]" at the conference table. 1T168-3-5.<sup>8</sup>

It is not uncommon, apparently, for Prosecutor Platt to initiate such conferences with Respondent outside the presence of opposing counsel. 1T166-16 to 1T167-16. Indeed, Mr. Bonfiglio testified that he is aware of several such instances involving other attorneys, and while he assumed Prosecutor Platt had their consent to do so, he could not state definitively if she had actually garnered that consent. 1T170-22 to 1T171-15. Mr. Bonfiglio further offered that he will often consent to such conferences between Prosecutor Platt and Respondent when the issue concerns scheduling or when he is seeking an advisory opinion from Respondent concerning a plea agreement. Ibid.

Conversely, Mr. Iannelli testified that although he was present in the conference room adjacent to the Winslow Township

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<sup>8</sup> Mr. Bonfiglio testified that he was seated next to Prosecutor Platt and Mr. Baxter was standing on the opposite side of her. 1T166-6-10. His testimony in this regard is inconsistent with that of Mr. Baxter, Prosecutor Platt and Mr. Iannelli, all of whom testified that Mr. Baxter was seated next to Prosecutor Platt during their conference. 1T30-3-12; 1T122-8-20; 1T127-23 to 1T128-9; 1T178-10-19.

Municipal Court on August 19, 2009 and recalled a conference on that date between Mr. Baxter and Prosecutor Platt, he was not listening to their conversation and could not recall its substance. 1T177-13-16; 1T179-3-18. He, however, did recall Prosecutor Platt entering the courtroom following her conversation with Mr. Baxter. 1T177-17-20. In addition, Mr. Iannelli, like Mr. Bonfiglio, testified that Prosecutor Platt has, in the past, sought his consent to conference some of his cases with Respondent. 1T180-2-16; 1T184-15 to 1T185-7. On that day, however, she did not do so as she had the independent authority to resolve Mr. Iannelli's matter (i.e. amend or downgrade the charges) without Respondent's involvement. Ibid. He opined that it "would be out of character for [Prosecutor Platt] to . . . get up [from a conference with an attorney] without saying what's going on." 1T180-14-16.

On the issue of consent, Respondent reiterated what he had previously stated to the Committee in his written comments, namely that he "assumed" Prosecutor Platt had Mr. Baxter's consent to conference the Foxworth case with Respondent outside of Mr. Baxter's presence. 1T198-22-25. Respondent, in fact, claimed he had an understanding with Prosecutor Platt that she would not conference a matter with him outside of her adversary's presence without that adversary's consent. 1T199-24 to 1T200-13. Given his assumption of consent, Respondent now

repudiates his prior acknowledgement that his conversation with Prosecutor Platt about the Foxworth matter was done *ex parte*, claiming that such conversations, when done with consent, are, according to the definition in the Black's Law Dictionary, not *ex parte*.<sup>9</sup> 1T8-6-22.

Respondent, nonetheless, conceded when testifying at the hearing that "in retrospect" he should have inquired of Prosecutor Platt as to Mr. Baxter's whereabouts prior to entertaining her request to conference the Foxworth matter outside of Mr. Baxter's presence. 1T201-5-7. Since the filing of this ethics matter, Respondent indicated he has altered his practice in respect of his sidebar conferences with Prosecutor Platt, which still occur but with much less frequency. 1T200-14-25. Respondent no longer assumes consent, but rather confirms the existence of that consent with Prosecutor Platt, on the record, at the beginning of each such conference. 1T200-17-25.

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<sup>9</sup> Black's Law Dictionary defines "*ex parte*" as follows:

On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.

In respect of the second issue, Respondent conceded to advising Prosecutor Platt of the issues relevant to the admission of certain evidence. Stipulations at ¶7. He, however, denied "coach[ing]" her stating that she is an experienced prosecutor who has prosecuted many DWI matters and did not need his tutelage to prosecute the Foxworth matter. 1T15-3-9. He further denied providing her with any advisory opinions on the strength of defendant's case and explained that his use of the word "we" during their conversation was simply the "jargon" he used to refer to the scheduling of the various witnesses for trial. 1T197-5-13.

Finally, Respondent reiterated his claim that he did not read Mr. Baxter's expert's report while discussing the Foxworth matter with Prosecutor Platt at sidebar. 1T196-1 to 1T197-2. Both he and Prosecutor Platt claim that the expert's report never left her hands and Respondent's review of that report was limited solely to the expert's name to determine if it was the same expert whom Respondent found incredible on a previous occasion. 1T129-12 to 1T130-9; 1T197-1-2.

When Respondent was challenged to explain his reference to the substance of the expert's opinion during his *ex parte* conversation with Prosecutor Platt, he claimed, for the first time, that he was speaking about a different case, unrelated to the Foxworth matter. 1T218-1 to 1T220-14. Respondent also

alleged that at the time he made the remark he was "speaking to [himself]," a claim that is belied by the record, which indicates that Prosecutor Platt responded directly to his remark about that portion of the expert's opinion during their *ex parte* conversation. 1T218-9-16; see also P-2 at 4T4-15 to 4T5-5. Though Respondent acknowledged the absence of any reference in the record to a different case when he made his comment about the expert's opinion, he, nonetheless, steadfastly maintained that such a reference was unrelated to the Foxworth matter. In support of this contention, Respondent argued that Mr. Baxter's expert's report speaks only of issues with the transport of blood, not its storage, and therefore could not have been the report to which he was referring. 1T220-2-14. Mr. Baxter's expert's report, however, specifically addresses the expert's opinion with regard to the storage of Mr. Foxworth's blood during the five days in which it was in transit. P-3 at p.2.<sup>10</sup>

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<sup>10</sup> Dr. Thomas A. Brettell's report states, in relevant part, as follows:

There is no documentation provided as to the time, date, or person who had custody of the blood samples and how they were transferred to Officer Paul Kovba who later delivered the blood vials to the New Jersey State Police South Regional Laboratory . . . five (5) days after the initial incident. There is also no information as to how the samples were stored and preserved. Therefore, there is a lack of a clear chain of custody for the blood samples and a clear lack of documentation of how the samples were preserved.



Respondent's position on this issue is also contradicted by Prosecutor Platt who testified, unequivocally, that her *ex parte* conversation with Respondent concerned only the Foxworth matter. 1T126-17-22.

**B. Analysis**

The Formal Complaint in this matter charged Respondent with engaging in an impermissible *ex parte* conversation with the municipal prosecutor during which Respondent offered his opinion about the defendant's case, provided legal guidance to the municipal prosecutor and referred collectively to himself and the municipal prosecutor as "we" when discussing the prosecution of the case, in violation of Canons 1, 2A and 3A(6) of the Code of Judicial Conduct. We find that these charges have been proven by clear and convincing evidence, and that Respondent's conduct violated the cited canons of the Code of Judicial Conduct.

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. 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 provides generally that judges should "perform the duties of judicial office impartially and diligently." In this regard, Canon 3A(6) prohibits a judge from either "initiat[ing] [ ]or consider[ing] *ex parte* or other communications concerning a pending or impending proceeding."

In the instant matter, Respondent concedes, both in his Answer to the Formal Complaint and in the Stipulations, that he engaged in an *ex parte* conversation with Prosecutor Platt about the Foxworth matter, but claims he did so assuming it was with Mr. Baxter's consent. Respondent asserts that the existence of such consent renders his conversation with Prosecutor Platt distinct from that which constitutes an *ex parte* conversation as defined by Black's Law Dictionary and therefore permissible. We disagree. Canon 3A(6) is clear in its mandate. It reads, in part:

A judge should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

Adherence to this canon is of the utmost importance to the integrity and impartiality of the Judiciary, and is not, nor should it be, dependent upon the presence or absence of the consent of the parties. See In re Yaccarino, 101 N.J. 342

(1985) (finding a judge's *ex parte*, in-chambers, discussions with the parties impermissible and a violation of Canons 1, 2A, 2B and 3A(4) despite the parties' and their counsels' consent to those *ex parte* discussions).<sup>11</sup>

The record before us evinces, clearly and convincingly, that Respondent created a situation in which the defendant and his counsel believed their standing before the court had been prejudiced by the court's own conduct, and that Prosecutor Platt was in a special position to influence Respondent's decisions. Indeed, the impression we are left with by the testimony of Prosecutor Platt and Respondent is that they share a degree of familiarity with each other. Consequently, they enjoy a measure of informality within the courtroom such that the necessary separation between their respective yet distinct functions has, at best, been blurred and, at worst, eroded. Respondent, in fact, had no compunction about calling Prosecutor Platt following his decision to recuse himself from the Foxworth matter to alert her of that decision. While we recognize that such familiarity is virtually unavoidable given their weekly professional interactions with each other, we cannot countenance Respondent's apparent predisposition to engage in multiple *ex parte* conversations with Prosecutor Platt about pending matters

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<sup>11</sup> Following the revisions to the Code of Judicial Conduct, effective January 1, 1988, the provisions of Canon 3A(4) are now reflected in Canon 3A(6).

under the guise of judicial efficiency and at the expense of judicial integrity and independence.

As a member of the Judiciary, Respondent is obligated to comport himself in a manner consistent with the canons of the Code of Judicial Conduct and the "procedural strictures" established by our Supreme Court to promote and "support the integrity and independence of the judicial system." In re Yaccarino, supra, 101 N.J. at 385; see also R. 1:18 ("It shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17.").

By participating in an *ex parte* conversation with Prosecutor Platt about the Foxworth matter, Respondent failed to conduct himself in conformity with those obligations. Such conduct and the perceptions it can create in the minds of the public are antithetical to the high standards of conduct required of jurists by the canons of the Code of Judicial Conduct and necessarily violate Canons 1, 2A and 3A(6). 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).

Our analysis in respect of the issue of consent, however, requires further discussion given the potential impact its presence or absence may have on the quantum of discipline to be imposed against Respondent. Certainly, while consent does not negate the impermissibility of a jurist's initiation of or participation in an *ex parte* conversation, our Supreme Court has held that it may serve to reduce or obviate the discipline imposed as a consequence of that conduct. See In re Yaccarino, supra, 101 N.J. at 391 (declining to impose discipline for a jurist's *ex parte* conversations with litigants since those conversations were encouraged and agreed to by all the parties, though the Court strongly disapproved of the conduct).

The presence or absence of consent in this matter is by no means self-evident. Rather, it is fiercely contested by the two individuals with knowledge of this issue - Mr. Baxter and Prosecutor Platt. Their testimony in this regard is diametrically opposed. The record, however, includes additional information pertinent to our consideration of the existence or absence of consent. Specifically, we note the absence of any

reference in the record to consent by Prosecutor Platt or Respondent in response to either of Mr. Baxter's motions for recusal, the first of which was initiated within minutes of the *ex parte* conversation. We are also mindful of Respondent's obvious failure on the record or elsewhere to confirm Mr. Baxter's knowledge of and consent to the *ex parte* conversation.

Though Respondent offered Mr. Bonfiglio and Mr. Iannelli as individuals with knowledge of Mr. Baxter's consent, neither was able to testify that they heard Mr. Baxter give his consent to Prosecutor Platt for her *ex parte* conversation with Respondent. Mr. Iannelli, in fact, could not recall any portion of Mr. Baxter's and Prosecutor Platt's conversation. He could only recall that following her conversation with Mr. Baxter, Prosecutor Platt entered the courtroom, the door to which is located in close proximity to the conference table. This fact, in and of itself, however, does not demonstrate consent on the part of Mr. Baxter to the *ex parte* conversation between Prosecutor Platt and Respondent. On balance, the record simply does not evince Mr. Baxter's consent to the *ex parte* conversation between Prosecutor Platt and Respondent with regard to the Foxworth matter.

Nonetheless, even assuming, *arguendo*, that Prosecutor Platt reasonably believed Mr. Baxter consented to her suggestion that she discuss with Respondent, *ex parte*, the name of Mr. Baxter's

expert and the issues relevant to the expired blood kit, the actual content of Prosecutor Platt's *ex parte* conversation with Respondent clearly exceeded those topics and consequently the scope of any such perceived acquiescence on the part of Mr. Baxter. The transcript of the *ex parte* conversation reveals that they, in fact, spoke primarily and at length about Mr. Baxter's chain of custody defense and the expert report on which the defendant intended to rely in asserting that defense. Noticeably absent from their discussion was any reference to the name of Mr. Baxter's expert, which Prosecutor Platt contended was one of the primary reasons she spoke with Respondent about the Foxworth matter that day.

For Respondent's part, he did nothing to assure himself that Mr. Baxter knew of or consented to the *ex parte* conversation in whatever form it may have taken. Even if Respondent had assumed consent on the part of Mr. Baxter, at the moment the conversation developed into a substantive discussion about defendant's expert's report and the viability of his chain of custody defense, Respondent should have stopped the discussion and required Mr. Baxter's participation. In failing to do so, Respondent tarnished his integrity and independence and that of the Judiciary, and impeded the proper administration of justice in violation of Canons 1 and 2A of the Code of Judicial Conduct.

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). By engaging in an *ex parte* conversation with Prosecutor Platt about the Foxworth matter resulting in two motions for his recusal, Respondent fell far short of these ethical precepts.

We next consider the content of Respondent's *ex parte* conversation with Prosecutor Platt, which we find constitutes an additional violation of Canons 1 and 2A of the Code of Judicial Conduct. As the transcript of the *ex parte* conversation between Prosecutor Platt and Respondent reveals, Respondent did not, as he contends, discuss only scheduling issues with Prosecutor Platt. Rather, he took that opportunity to critique Mr. Baxter's case, specifically his expert's opinion on the deficiencies in the State's evidence with regard to the chain of custody of the blood sample. He then appeared to align himself with the State as he directed Prosecutor Platt on the proofs necessary to confront a chain of custody defense, and even used the term "we" when doing so. Such conduct creates the real and unacceptable risk that members of the public who may become



aware of these types of conversations between Respondent and the municipal prosecutor will question Respondent's impartiality and integrity, as occurred in the Foxworth matter.

Respondent's contention that he was not "coaching" Prosecutor Platt, whom he contends does not need to be coached given her experience in prosecuting DWI cases, and his characterization of his use of the term "we" as merely "jargon" intended to relate to scheduling, are immaterial to our review of Respondent's conduct. Neither Prosecutor Platt's experience as a lawyer nor Respondent's intent when using the term "we" during his sidebar conversation with Prosecutor Platt are at issue; his conduct is. Members of the public would not know of Prosecutor Platt's experience in prosecuting DWI cases or appreciate Respondent's innocuous intent in using the term "we" when discussing with the prosecutor the proofs necessary to substantiate a DWI charge. All the public sees and hears is a judge appearing to counsel the prosecution in the absence and to the possible detriment of the defendant, conduct which, by its very nature, undermines the integrity and impartiality of the Judiciary in violation of Canons 1 and 2A of the Code of Judicial Conduct. Cf. In re Blackman, 124 N.J. 547, 551-552 (1991) (finding judge's subjective motives for attending a party hosted by a convicted criminal irrelevant; public cannot know of a judge's subjective motives and "may put a very different cast

on his or her behavior"); In re Newman 189 N.J. 477 (2006) (adopting ACJC Presentment in ACJC 2004-186 in which the Committee found a judge's "good intentions" irrelevant to the issue of conflicts).

We conclude, for the reasons stated above, that Respondent's *ex parte* conversation with Prosecutor Platt and the content of that conversation violated Canons 1, 2A and 3A(6) of the Code of Judicial Conduct.

## II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded for the conduct at issue in this matter. This recommendation takes into account Respondent's conduct in engaging in an *ex parte* conversation with the municipal prosecutor and the content of that conversation. The *ex parte* conversation was the byproduct of a culture in Respondent's courtroom, which he tolerated if not encouraged, whereby the municipal prosecutor was given significantly greater access to Respondent than defense counsel. Far from promoting the public's confidence in the integrity and impartiality of the Judiciary, such a culture undermines the fundamental principle of disinterested justice on which our judicial system is predicated.

Our recommendation also considers the discrepancies in Respondent's statements and testimony as it relates to his

review of defendant's expert's report. His position in this regard when juxtaposed with the transcript of his ex parte conversation with Prosecutor Platt suggests that Respondent was less than candid about the extent of his review of that report, which the record reveals went beyond a mere assessment of the expert's name.

We are mindful, however, of Respondent's assurance that he has implemented procedures in his various courts to ensure that this misconduct will not be repeated. Though we appreciate the fluidity with which our municipal courts must operate given the volume of cases processed through those courts daily, we caution Respondent against engaging in similar ex parte conversations in the future even with the adversary's consent. Such conversations are fraught with unintended consequences and should be avoided to the extent possible.


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

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

May 6, 2013

By:

  
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Alan B. Handler, Chair