D-21-13
(073471)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO: ACJC 2011-361

IN THE MATTER OF JOSEPH V. ISABELLA, JUDGE OF THE SUPERIOR COURT	**PRESENTMENT**

The Advisory Committee on Judicial Conduct (the "Committee") 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 Count I of the Formal Complaint against Joseph V. Isabella, Judge of the Superior Court ("Respondent"), have been proven by clear and convincing evidence. The Committee's Findings also demonstrate that the charges set forth in Count II of the Formal Complaint have not been proven by clear and convincing evidence. The Committee recommends that Respondent be publicly admonished for his conduct as delineated in Count I, and that the charges set forth in Count II be dismissed without the imposition of discipline.

I. PROCEDURAL HISTORY

This matter was initiated with the filing of an ethics grievance against Respondent by A.L., who accused Respondent of judicial misconduct in several material respects, all of which concerned Respondent's relationship with A.L.'s former girlfriend, T.M. (now Mrs. Isabella), and their two children.[1] P-8. The Committee determined after conducting a preliminary investigation into A.L.'s grievance that two of his allegations were of sufficient merit to constitute probable cause for the issuance of a Formal Complaint against Respondent.

The first of those two allegations concerned Respondent's impermissible use of his judicial letterhead to correspond with Frank Pomaco, Esq., counsel to the Nutley Board of Education, about a personal matter involving A.L. and T.M.'s special-needs child. P-8; P-9. In so doing, A.L. claimed that Respondent misused his judicial office to induce the Nutley Board of Education to allocate public funds to pay a portion of his

[1] To preserve the privacy interests of the woman with whom Respondent was romantically involved during the events at issue in this judicial disciplinary matter, who is now Respondent's wife, and more specifically those of her and A.L.'s minor children, the Committee referred to her in the Formal Complaint by her initials (i.e. "T.M.") and to A.L. simply as "the father of her children." We continue this practice in our Presentment to the Court and include A.L.'s initials despite T.M.'s disclosure of her identity and that of A.L. during the Formal Hearing.

child's tuition at a camp program situated in Pennsylvania. P-1; P-8; P-9.

In his second allegation, A.L. accused Respondent of engaging in the practice of law while serving as a Superior Court judge by surreptitiously assisting T.M. in her lawsuit against A.L. and his former attorney, Howard L. Egenberg, Esq., which was filed in the Essex County Superior Court (the "Essex County Lawsuit"). That assistance, according to A.L., included Respondent's participation in formulating T.M.'s responses to interrogatories, providing her with legal counsel, and assisting her in the mediation of the Essex County Lawsuit before retired Superior Court Judge Richard Camp. P-2 thru P-9.

The Committee conducted an investigation into these allegations and, as part of that investigation, interviewed five (5) individuals: Frank Pomaco, Esq., Nutley School District Superintendent Joseph Zarra, Nutley School District Director of Special Services Paul Palozzola, Nutley School District Case Manager April Vitiello, and Keith McKenna, Esq. P-11 through P-15. In addition, the Committee collected documentation relevant to A.L.'s allegations and requested and obtained from Respondent his written comments with regard to those allegations. P-1 thru P-7; P-10.

On May 30, 2012, the Committee issued a two-count Formal Complaint against Respondent. In Count I, Respondent was accused

of creating "the appearance that he was attempting to use the power and prestige of his judicial office to influence or advance the private interests of T.M.," in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct, by communicating with two members of the Nutley School District initially on his judicial stationery and subsequently by telephone about T.M.'s personal familial matter. In Count II, Respondent was accused of "creating the appearance that he was inserting himself improperly into a contested legal matter in which he was not a party" and of "utilizing his legal acumen as a lawyer and judge" for T.M.'s personal benefit in violation of Canons 1 and 2A, and Rule 1:15-1(a) of the New Jersey Court Rules. Respondent filed an Answer to the Complaint on June 22, 2012 in which he admitted the essential factual allegations of both counts, with some clarification, and admitted violating Canons 1, 2A and 2B of the Code of Judicial Conduct as alleged in Count I, but denied any intent to do so, and denied violating the cited Canons of the Code of Judicial Conduct and Court Rule in respect of Count II.

On June 18, 2013, Presenter and Respondent filed with the Committee a set of Stipulations in which Respondent again admitted his conduct as alleged in Count I and conceded its impropriety vis-à-vis his use of judicial stationery in a purely private matter. In addition, Respondent stipulated to his conduct as alleged in Count II, but denied its impropriety.

The Committee convened a Formal Hearing on June 19, 2013 at which Respondent appeared, with counsel, and offered testimony both in mitigation and defense of the asserted disciplinary charges. In addition, the Presenter called T.M. as a witness with regard to Respondent's conduct in assisting her in the Essex County Lawsuit as alleged in Count II of the Formal Complaint. Exhibits were offered by the Presenter and admitted into evidence, as were the Stipulations previously referenced. See P-1 through P-15; see also Stipulations filed June 18, 2013. 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.

II. FINDINGS

A. 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 1983. Stipulations at ¶1. At all times relevant to this matter, Respondent was a Judge of the Superior Court of New Jersey, assigned initially to the Family Division in the Essex Vicinage, a position he held for two years between September 1, 2007 and

September 1, 2009.[2] Id. at ¶2; 5. Effective September 1, 2009, Respondent was reassigned to the Criminal Division in the Hudson Vicinage, a position he continues to hold. Id. at ¶6.

The facts pertinent to this judicial disciplinary matter are uncontested and the subject of a Stipulation, as is Respondent's violation of Canons 1, 2A and 2B as alleged in Count I of the Formal Complaint. Specifically, as to Count I, Respondent admits and the evidence demonstrates, clearly and convincingly, that in or around 2008, Respondent communicated on his judicial stationery with Frank Pomaco, Esq., counsel to the Nutley Board of Education, in an effort to assist his then girlfriend, T.M., with a personal matter involving her special-needs child, and in so doing appeared to lend the prestige of his judicial office to advance T.M.'s private interests in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct. Stipulations at ¶28. Notably, while Respondent also acknowledges making two telephone calls on T.M.'s behalf -- one to Mr. Pomaco and one to Joseph Zarra, the then Superintendent of the Nutley School District - concerning T.M.'s child, he does not concede the impropriety of those telephone calls under the Code of Judicial Conduct. Id. at ¶¶19; 24.

[2] Respondent was appointed as a Judge of the Superior Court in November 2000 at which time he was assigned to the Criminal Division in the Essex Vicinage where he served until 2007. Stipulations at ¶4.

The facts and circumstances of Respondent's misconduct, as it relates to Count I, are as follows. At the time of his admitted ethical breach, Respondent and T.M. had been in a romantic relationship for approximately two years, having dated since September 2006.[3] Stipulations at ¶8. During their courtship, Respondent and T.M. maintained separate households in Nutley, New Jersey, where Respondent is a longtime resident. Id. at ¶¶7, 11. Prior to meeting Respondent, T.M. was in a relationship with A.L., with whom she had two children, a son and a daughter. Id. at ¶9.

In 2008, T.M.'s children, one of whom is a special-needs student, attended elementary school in the Nutley School District (the "District"). Id. at ¶¶13, 14. The District's educational plan for T.M.'s special-needs child included his attendance at a summer program provided by the District. Id. at ¶15. During the course of that school year, T.M. expressed to the District her desire to have her special-needs child attend a camp in Pennsylvania (the "Camp"), the cost of which was several thousand dollars, in lieu of attending the District's summer program. Stipulations at ¶16. T.M. sought and was denied approval from Nutley School District's Director of Special Services, Paul Palozzola, for her child to attend the Camp and for tuition

[3] Respondent and T.M. eventually married in October 2011. Stipulations at ¶12.

assistance. Id. at ¶¶17, 18. Thereafter, on April 4, 2008, T.M. requested Mr. Palozzola reconsider his decision to deny her request for placement of her child in the Camp. P-9 at ACJC 081.

Sometime thereafter, Respondent called Frank Pomaco, Esq., counsel to the Nutley Board of Education, on behalf of T.M. to discuss the District's denial of T.M.'s request and to inquire about the procedure to appeal the District's decision. Id. at ¶19; see also 1T64-20 to 1T65-20[4]; P-11 at 2T7-4-5, 2T8-25 to 2T10-10.[5] By all accounts, Respondent and Mr. Pomaco are "close friends" and former law partners, having practiced law together for fourteen (14) years prior to Respondent's judicial appointment. Stipulations at ¶20, see also P-11 at 2T3-13 to 2T5-2. In addition to their former business relationship and longstanding friendship, Respondent considers Mr. Pomaco his personal counsel. Stipulations at ¶20. Mr. Pomaco, however, understood that Respondent was calling him on this occasion both in his capacity as counsel to the Nutley Board of Education and as a friend. P-11 at 2T8-25 to 2T9-3.

During their telephone discussion, Mr. Pomaco advised Respondent of the District's aversion to litigating special

[4] "1T" refers to the transcript of the Formal Hearing held on June 19, 2013.

[5] "2T" refers to the Transcript of Interview of Frank Pomaco, Esq. conducted on November 15, 2011, which is designated as P-11 in the record.

education matters and its preference to accommodate, when possible, requests for special services outside of those provided within the District. P-11 at 2T12-1-18, 2T15-2-6; see also 1T64-20 to 1T65-13. Mr. Pomaco encouraged Respondent to call Joseph Zarra, the then Superintendent of the Nutley School District, to request the District reconsider its previous denial of T.M.'s request. Ibid. Respondent's telephone call to Mr. Pomaco and their subsequent discussion was apparently typical of the types of calls Mr. Pomaco received from attorneys representing students in various school board matters. P-11 at 2T15-25 to 2T16-6. Mr. Pomaco never discussed T.M.'s child with T.M. directly. P-11 at 2T18-13-17.

At some point either immediately before or shortly after their telephone discussion, Respondent sent a facsimile to Mr. Pomaco on his judicial stationery. This document contained a handwritten note from Respondent to Mr. Pomaco setting forth the facts of T.M.'s situation. It also attached a pediatric developmental assessment of T.M.'s child.[6] Stipulations at ¶21; see also 1T66-12-18. The first page of the handwritten note was written on judicial stationery. It reads as follows: "Frank

[6] Respondent's testimony differs slightly from the Stipulations in respect of the order in which his interaction with Mr. Pomaco occurred (i.e. whether he faxed the documents before or after speaking with Mr. Pomaco). For his part, Mr. Pomaco could not recall if he received Respondent's facsimile before or after they spoke. P-11 at 2T14-2-25. This discrepancy, however, is immaterial to the issues under consideration by the Committee.

Pomaco 973-759-6968 Tks Joe 6 pages." P-1. The second page reads as follows:

> Enclosed is the developmental pediatric study for [A.L]. Please note last paragraph. Additionally the kid was just evaluated last month by Nutley and as a result of behavioral issues he was moved from regular class to autistic class for reading. I think their own evaluation can be used against them. Camp is $8,000. ½ would be great. In light of the fact he'll be going for next 8-9 years while still in Nutley system obviously she's got nothing to lose by litigating. Let me know what you think. Thanks for all your help. Joe

Ibid.

Mr. Pomaco subsequently advised Mr. Zarra of Respondent's intention to call him concerning a special-needs child, though he did not forward to Mr. Zarra the facsimile he had received from Respondent. P-12 at 3T25-1-13.[7] Indeed, Mr. Pomaco did not share Respondent's facsimile with any members of Nutley's Board of Education, nor did he discuss T.M.'s child with any board members. P-11 at 2T21-10-21.

In accordance with Mr. Pomaco's instructions, Respondent called Superintendent Zarra to discuss T.M.'s child's situation. Stipulations at ¶24. Respondent and Mr. Zarra are very familiar with each other, having interacted on multiple occasions during

[7] "3T" refers to the Transcript of Interview of Joseph Zarra conducted on November 30, 2011, which is designated as P-12 in the record.

their mutual involvement in the same community activities, all of which preceded Respondent's judicial appointment. Id. at ¶25. In addition, Respondent knew Mr. Zarra from his years as the principal at Nutley High School where Respondent's children had attended school. Ibid. Mr. Zarra was, in fact, present at Respondent's swearing in as a Judge of the Superior Court on November 29, 2000. P-10.

During their telephone discussion, Respondent informed Mr. Zarra of T.M.'s desire to place her special-needs child in a "summer program" and sought Mr. Zarra's guidance on the process necessary to obtain the District's approval and tuition assistance for that placement. P-12 at 3T15-1 to 3T16-1. In response, Mr. Zarra offered to communicate with Nutley's Director of Special Services, Paul Palozzola, about the child's placement. Id. at 3T16-1-4; see also Stipulations at ¶26. Respondent, however, never alerted Mr. Zarra to the fact that Mr. Palozzola had previously denied T.M.'s request. Id. at 3T38-25 to 3T39-10. Indeed, at the time of his discussion with Respondent, Mr. Zarra was not privy to Respondent's facsimile to Mr. Pomaco or its contents and was not in possession of the District's file on the child. Id. at 3T25-14 to 3T26-7, 3T26-11 to 3T27-6.

As Superintendent, Mr. Zarra was generally not involved in the placement of students, either those with special-needs or otherwise. Id. at 3T33-19 to 3T34-11. Nonetheless, Mr. Zarra

would frequently receive similar telephone calls from various individuals seeking his assistance with students in the District, all of which he handled in a similar fashion; i.e. by communicating the caller's concern to either the relevant principal or Nutley's Director of Special Services whose function it is to address such situations. Id. at 3T16-14 to 3T17-7.

Mr. Zarra communicated, by telephone, with Mr. Palozzola about the placement of T.M.'s child and was assured by Mr. Palozzola that the child could be placed in the Camp T.M. had previously requested. Id. at 3T16-1-13. Mr. Zarra subsequently informed Respondent that the District would approve T.M.'s child's placement in the Camp, which it eventually did together with tuition assistance to off-set the cost of the Camp. Id. at 3T18-22 to 3T19-2; see also Stipulations at ¶27.

Mr. Palozzola was not familiar with Respondent, had never communicated with him concerning T.M.'s child, and had never received any documentation from Respondent about T.M.'s child. P-13 at 4T5-18 to 4T6-3; 4T11-21 to 4T12-3.[8] Nevertheless, he had heard rumors during this time period that T.M. was involved romantically with "a judge." P-13 at 4T18-20-21. The same is true of the child's case manager, April Vitiello, who oversaw the

[8] "4T" refers to the Transcript of Interview of Paul Palozzola conducted on December 16, 2011, which is designated as P-13 in the record.

development and implementation of the child's individualized educational plan given his classification as a special-needs student and his receipt of related services from the District. P-14 at 5T3-3-7; 5T3-16 to 5T4-20; 5T5-18 to 5T7-8.[9]

With regard to Count II of the Formal Complaint, Respondent admits and the evidence demonstrates, clearly and convincingly, that he assisted T.M. in answering interrogatories and responding to the request of a mediator for financial information related to her childcare expenses, both of which occurred in connection with the Essex County Lawsuit. Stipulations at ¶¶29-41. Respondent denies, however, that his conduct in this regard constituted the unauthorized practice of law in violation of Rule 1:15-1(a) or a violation of Canons 1 and 2A of the Code of Judicial Conduct.

The facts and circumstances giving rise to the allegations in Count II are as follows. In 2008, T.M. advised Respondent of unresolved legal issues between her and A.L. concerning child support and household maintenance. Stipulations at ¶29. Respondent recommended T.M. seek the advice of counsel and referred her to Keith McKenna, Esq. with whom he was acquainted.

[9] "5T" refers to the Transcript of Interview of April Vitiello conducted on December 23, 2011, which is designated as P-14 in the record.

Id. at ¶30; see also P-15 at 6T5-3 to 6T7-13.[10] In August 2008, T.M. retained Mr. McKenna's services and, with his assistance, filed the Essex County Lawsuit in November 2008. Stipulations at ¶31; see also P-2. The lawsuit and Mr. McKenna's representation of T.M. in that lawsuit spanned two-years during which time Mr. McKenna met with T.M. at least once a month. P-15 at 6T16-22 to 6T17-3. Respondent did not participate in those meetings. Id. at 6T4-21.

During the course of the Essex County Lawsuit, Mr. McKenna was served with interrogatories on behalf of T.M., which he subsequently mailed to her for her response. Stipulations at ¶¶32 - 33; see also P-3. Respondent assisted T.M. in answering those interrogatories, the draft of which was written by Respondent. Stipulations at ¶34; see also P-4. In several instances, those draft answers did not contain an actual answer, but rather the notation, "McKenna to answer," referring to T.M.'s counsel, Keith McKenna, Esq. P-4. T.M. conveyed those answers to Mr. McKenna, which were then incorporated into T.M.'s interrogatory answers and served in the Essex County Lawsuit. Stipulations at ¶35; see also P-5. Mr. McKenna never saw Respondent's handwritten answers to those interrogatories. Id. at 6T26-22 to 6T27-9. Indeed, Respondent evidently did not

[10] "6T" refers to the Transcript of Interview of Keith McKenna, Esq. conducted on January 19, 2012, which is designated as P-15 in the record.

interact with Mr. McKenna or his staff in any capacity concerning the Essex County Lawsuit. P-15 at 6T31-17-24; 6T32-18-25.

Thereafter, the parties consented to a referral of the Essex County Lawsuit to private mediation. Stipulations at ¶36. During the course of that mediation, the mediator addressed with the parties their issues related to child support and requested from T.M. certain financial information concerning her childcare expenses. Id. at ¶¶37-38. Respondent assisted T.M. in preparing a list of those expenses, which included transcribing them for her. Id. at ¶39; see also P-7. T.M. then rewrote those expenses and forwarded them to the mediator. Id. at ¶40; see also P-6. During their exchange over the childcare expenses, T.M. questioned Respondent about the procedure for enforcement of child support in the event she and A.L. could agree on the terms of that support. Stipulations at ¶41. In responding to her questions, Respondent wrote down for T.M. the procedures typically utilized by litigants seeking to enforce a child support agreement. P-7 at ACJC051.

B. Written Comments

The Committee initially questioned Respondent about his conduct in this matter by letter dated April 2, 2012. His letter of response, dated April 9, 2012, largely corresponds with the Stipulations of record in this matter.

Respondent admitted using his judicial letterhead when sending a facsimile to Mr. Pomaco concerning T.M.'s request to the Nutley Board of Education for approval and tuition assistance in respect of her child's attendance at a special camp, and to its impropriety, though he maintained his ethical breach in this regard was unintentional. P-10. Respondent characterized his facsimile to Mr. Pomaco as "a personal note to a close personal friend" and asserted that his "judicial position had absolutely nothing to do with . . . [the child's] summer camp experience" and did not "impact . . . or influence . . . Frank Pomaco or Joe Zarra." Id.

While Respondent also admitted calling Mr. Pomaco and Superintendent Zarra for advice about the possibility of receiving tuition assistance for T.M.'s child, he denied that those telephone calls were improper. Id. Respondent's recitation of his conversation with Mr. Zarra, however, differs from that to which he Stipulated. Respondent claimed in his written comments that Mr. Zarra advised him to speak with Mr. Palozzola about T.M.'s situation. The Stipulations and Mr. Zarra's statement, under oath, to the Committee, however, evince that Mr. Zarra contacted Mr. Palozzola on Respondent's behalf. P-12 at 3T16-1-4; see also Stipulations at ¶26.

In addressing the second allegation, Respondent's position is again consistent with that to which he stipulated in these

proceedings. Specifically, Respondent categorically denied engaging in the practice of law while serving as a Superior Court judge. While he acknowledged assisting T.M. in answering interrogatories, that assistance he contended was limited to writing down the "factual answers she provided." Respondent insisted that he left for Mr. McKenna any interrogatories that required a legal conclusion. P-4.

Similarly, Respondent acknowledged assisting T.M. with preparing factual information to be disseminated to the mediator, but insisted that he instructed her to rely on Mr. McKenna for any legal advice. Respondent conceded that Mr. McKenna would, "on occasion," communicate with Respondent when he believed T.M. "did not comprehend something" so that Respondent could explain it to her, a fact which is not corroborated by Mr. McKenna. P-10 at ACJC 088; see also P-15. Nonetheless, Respondent denied that these conversations between him and T.M., at Mr. McKenna's initiation, constituted the practice of law. P-10 at ACJC 088.

C. Formal Hearing

Given Respondent's acknowledgement of wrongdoing as charged in Count I of the Formal Complaint and his denial of wrongdoing as charged in Count II, the issues addressed at the hearing were twofold: (1) whether and to what extent the circumstances surrounding Respondent's misuse of his judicial stationery may

have mitigated or aggravated his misconduct for purposes of judicial discipline; and (2) whether Respondent's assistance to T.M. during the Essex County Lawsuit constituted the practice of law in violation of Rule 1:15-1(a) and Canons 1 and 2A of the Code of Judicial Conduct, and, if so, the appropriate quantum of discipline for that ethical infraction.

As to the first issue, Respondent again conceded his misconduct in impermissibly using his judicial stationery to correspond with counsel to the Nutley Board of Education, reiterated that it was unintentional and explained the circumstances of that misconduct, all of which corresponded substantially with the Stipulations of record in this matter. We are further informed about this issue by our review of the content of the facsimile Respondent sent to Mr. Pomaco on his judicial stationery concerning T.M.'s special-needs child.

On the practice of law issue, Respondent and T.M. testified, at length, with regard to the circumstances of Respondent's assistance to T.M. We are further informed about this issue by our review of the subject interrogatories and Respondent's handwritten responses thereto, as well as Respondent's handwritten notations concerning T.M.'s childcare expenses and the issues related to the enforcement of A.L.'s obligations in respect of those expenses. P3 thru P7.

T.M. testified that she has been a registered nurse for twenty-five years and is wholly unfamiliar with the legal system and the procedures attendant to litigation, the Essex County Lawsuit being her first and only foray into litigation or the legal system generally. 1T29-1-3; 1T15-4-6; 1T16-7-14. T.M. filed suit, with the assistance of counsel, as a result of A.L.'s insistence that she relinquish her ownership interest in the home she owned jointly with him and in which she was raising their two children (the "Nutley home"). 1T29-6 to 1T31-1; see also P-2. T.M. and A.L. were never married and never resided together in the Nutley home. 1T29-9-12. Though the Essex County Lawsuit concerned primarily the dissolution of T.M.'s interest in the Nutley home, it also touched tangentially on A.L.'s child support obligations, which he had purportedly failed to pay. 1T13-6-10; 1T21-22 to 1T22-1; see also P-2.

T.M. initially sought the assistance of counsel at the suggestion of Respondent, who referred her to Mr. McKenna. 1T13-11 to 1T14-6; 1T30-25 to 1T31-4. By all accounts, Respondent neither met personally with nor participated by telephone in any meetings or discussions between Mr. McKenna and T.M. concerning the Essex County Lawsuit. 1T31-8-14.

When T.M. was first served with interrogatories, which she received by mail from Mr. McKenna, she delayed in answering them, finding the task too daunting. 1T17-3-21; see also P-3.

Respondent eventually sat with T.M. in her Nutley home and, in an effort to relieve her anxiety, wrote down T.M.'s verbal responses to the interrogatories. 1T17-22 to 1T19-5; see also P-4. When T.M. did not understand an interrogatory or did not know how to respond to it, Respondent would write, "McKenna to answer." 1T33-22 to 1T34-11. Those answers were eventually conveyed to Mr. McKenna, though it remains unclear in what format given Mr. McKenna's denial of having ever seen Respondent's handwritten answers to those interrogatories. P-15 at 6T26-22 to 6T27-9. Nevertheless, those answers were incorporated, although not verbatim, into T.M.'s formal responses to the interrogatories. 1T21-10-21; see also P-5. T.M. did not share Respondent's handwritten answers with A.L. 1T40-24 to 1T41-6.

In respect of the mediation, T.M. testified that she and A.L. participated with the assistance of their respective counsel. 1T22-18-23. One of the issues addressed at the mediation was A.L.'s child support obligations. 1T22-24 to 1T23-1. In confronting that issue, the mediator requested T.M. provide him with a list of her child care expenses, which she did. 1T23-9-16. Prior to doing so, however, T.M. sought Respondent's assistance in identifying the types of child care expenses for which A.L. would be obligated, at least in part, to pay. 1T23-21 to 1T24-13. T.M. described this process as a

collaborative effort with Respondent identifying some of the ordinary expenses included in a child support award and T.M. inquiring about the applicability of several related expenses. 1T24-14 to 1T25-2. Respondent, again in an effort to alleviate T.M.'s anxiety, handwrote T.M.'s child care expenses on a piece of paper, which T.M. subsequently transcribed onto a separate sheet of paper and faxed to the mediator. 1T25-3 to 1T26-11; see also P-6; P-7. T.M. did not share Respondent's handwritten notes with the mediator, Mr. McKenna or A.L. 1T36-7-9; 1T40-24 to 1T41-9.

Included in their discussion about child care expenses was a tutorial by Respondent, at T.M.'s behest, concerning the mechanics of enforcing a child support agreement in the event one was reached during the mediation. 1T26-12 to 1T27-11; see also P-7 at ACJC051. As he had done previously, Respondent handwrote his tutorial for T.M.'s benefit. Ibid. In addition, Respondent discussed with T.M., at her request, the issues she anticipated with regard to visitation, which he also handwrote for her benefit. 1T27-12 to 1T28-16; see also P-7 at ACJC 052-053. Respondent, as he explained during the Formal Hearing, has a "habit" of simultaneously writing down that which he is "teaching or explaining" to an individual, which he believes allows that individual to "appreciate" better his explanation. 1T61-16 to 1T62-3. T.M. did not share Respondent's handwritten

explanations with her counsel, the mediator or A.L. 1T38-24 to 1T39-1; 1T62-4-12. Indeed, the enforcement of child support obligations and visitation schedules were not topics discussed at the mediation. 1T62-19 to 1T63-18.

Respondent, who testified after T.M., reiterated much of T.M.'s testimony. He maintained throughout his testimony that his assistance to T.M., which he offered merely to assuage her anxiety over the Essex County Lawsuit, was limited in nature, confined solely to issues of fact, and, as such, did not constitute the practice of law.

III. Analysis

The burden of proof in judicial disciplinary matters is clear-and-convincing. Rule 2:15-15(a). 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 fact finder to come to a clear conviction, without hesitancy, of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (citations and internal quotations omitted).

In this judicial disciplinary matter, Respondent has been charged with two ethical infractions, only the second of which he contests: (1) creating the appearance that he was attempting to use the power and prestige of his judicial office for the

personal benefit of T.M. in violation of Canons 1, 2A and 2B of the Code of Judicial Conduct; and (2) creating the appearance that he was inserting himself, improperly, into T.M.'s legal matter and utilizing his skills as a lawyer and judge for her personal benefit in violation of Canons 1 and 2A of the Code of Judicial Conduct and Rule 1:15-1(a) of the New Jersey Court Rules.

We find, based on our review of the evidence in the record and Respondent's acknowledgement of wrongdoing, that the conduct relating to Respondent's misuse of his judicial office in a purely private matter, as delineated in Count I of the Formal Complaint, has been proven by clear and convincing evidence, and that such conduct violates Canons 1, 2A and 2B of the Code of Judicial Conduct. We further find that although the factual allegations set forth in Count II of the Formal Complaint are uncontested, such conduct does not constitute a violation of the cited Canons or Court Rule.

Canon 1 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. Canon 2B prohibits a judge from lending the prestige of the judicial office to advance private interests. In this regard, 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." This Commentary emphasizes the special role that judges play in our society and the significance of their public comportment. "[J]udges have a special responsibility because they are 'the subject of constant public scrutiny;' everything judges do can reflect on their judicial office. When judges engage in private conduct that is irresponsible or improper, or can be perceived as involving poor judgment or dubious values, '[p]ublic confidence in the judiciary is eroded.'" In re Blackman, 124 N.J. 547, 551 (1991).

Our analysis, as it relates to Respondent's impermissible use of his judicial stationery in a purely private matter, is necessarily informed by his acknowledgment of wrongdoing as charged in the Formal Complaint, and his admission that such conduct constitutes a violation of Canons 1, 2A and 2B of the Code of Judicial Conduct. We agree. Respondent's use of his judicial stationery when corresponding with Mr. Pomaco about the District's refusal to approve and partially fund T.M.'s child's attendance at an out-of-state camp created the appearance that he was lending the prestige of his judicial office to influence the District's decision in T.M.'s favor. Such conduct violates the clear proscriptions contained in Canon 2B of the Code, engenders an appearance of impropriety, and impugns the

integrity and impartiality of the Judiciary in violation of Canons 1 and 2A.

The law proscribing such conduct is well settled. Our Supreme Court has consistently held that a jurist's use of judicial stationery or reference to his or her judicial office to advance a matter that is wholly private in nature and unrelated to his or her official duties, is improper and violates Canons 1, 2A and 2B of the Code of Judicial Conduct. See In re Rivera-Soto, 192 N.J. 109 (2007) (censuring the Justice for engaging in a course of conduct that created the risk that the prestige and power of his office might influence and advance his son's private interests); In re McElroy, 179 N.J. 418 (2004) (reprimanding a municipal court judge for giving a friend who was a defendant in a traffic case a message on his business card to hand to the municipal prosecutor requesting a downgrade); In re Sonstein, 175 N.J. 498 (2003) (censuring municipal court judge for writing letter on judicial letterhead to another municipal court judge about his parking matter pending before that judge); In re Murray, 92 N.J. 567 (1983) (reprimanding a municipal court judge for sending a letter on behalf of a client to another municipal judge in which he identified his judicial office); In re Anastasi, 76 N.J. 510 (1978) (reprimanding a municipal court judge for sending a

letter on behalf of a former client to the New Jersey Racing Commission on his official stationery).

We further find that Respondent's two telephone calls - one to Mr. Pomaco and one to Superintendent Zarra - made on T.M's behalf were similarly improper and in violation of Canons 1, 2A and 2B of the Code. In making those telephone calls, Respondent created the risk that his judicial position and stature, the existence of which was clearly known to both Mr. Pomaco and Superintendent Zarra, would be a factor in the District's decision to approve T.M.'s request concerning her special-needs child. Indeed, Superintendent Zarra had direct influence over the District's decision to approve or deny T.M.'s request given his position as Superintendent and more specifically as Mr. Palozzola's supervisor. This conduct, laden as it is with such risks, constitutes an additional violation of the proscriptions contained in Canon 2B, and engenders an appearance of impropriety the effect of which impugns the integrity and impartiality of the Judiciary in violation of Canons 1 and 2A of the Code. Cf. In re Rivera-Soto, supra, 192 N.J. 109.

The fact that Respondent and Mr. Pomaco share a friendly relationship, and that Superintendent Zarra is acquainted with Respondent through their mutual community activities, does not obviate the risk created and the appearance of impropriety engendered by those telephone calls. Such conversations, though

seemingly casual, were not simply between friends, but involved discussions with persons in positions of authority within the District who enjoyed substantial influence over the District's decision with regard to the placement of T.M.'s son in the Camp.

Similarly, the fact that both Mr. Pomaco and Superintendent Zarra have had similar telephone calls with other attorneys and members of the community does not allay the risk created or alleviate the appearance of impropriety engendered by those calls. Respondent is not simply an attorney or community member, but a Superior Court judge obligated to avoid even the appearance of impropriety. By making those telephone calls and inserting himself into T.M.'s discussions with the District, Respondent created the likelihood that his judicial office would influence or color the District's decision, a circumstance which is wholly incompatible with the high standards of conduct demanded of judges under the Code of Judicial Conduct.

Though Respondent admits his ethical transgression as it relates to his misuse of judicial stationery, he contends that this infraction is not deserving of judicial discipline because it was unintentional. In characterizing his misconduct, Respondent states it was "wrought of convenience and thoughtlessness." Rb4.[11] We do not doubt Respondent's sincerity

[11] Consistent with Rule 2:6-8, references to the Presenter's and Respondent's post-hearing briefs will be designated as "Pb" and

and are satisfied that he acted with no improper motive. Respondent's lack of intent or improper motive, however, does not excuse his misconduct. In re Blackman, supra, 124 N.J. at 552 (finding a Respondent's lack of intent irrelevant in judicial disciplinary matters). Similarly, the fact that this violation may have been the product of "convenience and thoughtlessness" is immaterial. Whatever his intentions or motivations, Respondent's conduct in using his judicial stationery and personal contacts within the District to T.M.'s advantage created the potential that his judicial office would influence the District's decision. Though there is no indication that any influence was actually exerted, the mere fact that such a potential exists constitutes a misuse of the judicial office in violation of the Code of Judicial Conduct. Cf. In re Rivera-Soto, supra, 192 N.J. 109.

We are cognizant of the very personal circumstances that prompted Respondent to intervene in the District's decision for the benefit of T.M.'s special-needs child. We acknowledge Respondent's sincerity in attempting to do for T.M.'s child that which he would have done for his own child. These considerations, however, neither mitigate nor excuse Respondent's misconduct. Cf. In re Yaccarino, 101 N.J. 342, 362

"Rb" respectively. The number following this designation signifies the page at which the information may be found.

(1985) (warning that "judges must always be conscious that they not blur the line between parent and judge" even in those circumstances in which they are responding to "a felt unjust abuse of their child[]."). While judges are entitled to engage with third parties in their private lives concerning personal issues involving either themselves or their loved-ones, they must be scrupulous in avoiding both the actual and apparent use of their judicial office to advance or influence the outcome of those personal issues. Respondent, in communicating on his judicial stationery with influential members of the District with whom he was familiar for T.M.'s personal benefit, took action that underscored his judicial office. While his conduct in this regard may have been inadvertent, we must evaluate it objectively. Members of the public, unaware of Respondent's subjective motives, may perceive his use of judicial stationery and his subsequent telephone calls to District officials as his attempt to trade on his judicial office for T.M.'s personal benefit. Such perceptions could provoke legitimate concern about Respondent's integrity and by extension that of the Judiciary, a circumstance which the Judiciary must guard against assiduously regardless of a judge's benign intent. See In re Blackman, supra, 124 N.J. at 551 (finding that improper judicial conduct includes creating or acquiescing in any appearance of impropriety).

We turn next to the allegation that Respondent created the appearance that he inserted himself into T.M.'s legal matter and utilized his skills as a lawyer and judge for her personal benefit in violation of Rule 1:15-1(a) of the New Jersey Court Rules and Canons 1 and 2A of the Code of Judicial Conduct. The facts underlying these charges are uncontroverted. Respondent, however, denies that those facts constitute a violation of either the Rule or the cited Canons of the Code of Judicial Conduct. We agree and find, based on our review of the record, that Respondent's conduct as alleged in Count II of the Formal Complaint does not constitute a violation of Rule 1:15-1(a) or Canons 1 and 2A of the Code.

Rule 1:15-1 places limitations on the practice of law by attorneys serving as surrogates or judges, including both full and part-time judges. As it relates to full-time judges, the Rule prohibits generally the practice of law, but does not define, with specificity, the conduct intended to fall within that proscription. We are guided in our analysis of this issue, however, by the common law definition of the "practice of law." As defined by our Supreme Court, "one is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required." In re Jackman, 165 N.J. 580, 586-87 (2000). Respondent's conduct in assisting T.M. in the Essex County Lawsuit falls far short of this definition.

By all accounts, Respondent's assistance to T.M. vis-à-vis her interrogatory answers was that of a scrivener. His function in this regard did not require him to utilize his legal knowledge, training, skill or ability, but rather simply demanded his time. He specifically left for T.M.'s counsel those interrogatories that required legal skill or knowledge to answer. The same can be said for Respondent's conduct in transcribing for T.M. her child care expenses and discussing with her the practical issues associated with a possible visitation schedule, e.g. determining where the children would spend their holidays. While Respondent touched on his legal knowledge and training when explaining to T.M. the procedures for enforcing a child support agreement, that discussion was more academic than it was the practice of law and, in isolation, does not constitute a violation of Rule 1:15-1(a).

Although rules governing judicial conduct are broadly construed "in keeping with their purpose of maintaining public confidence in the judicial system," Respondent's conduct in assisting T.M. in the Essex County Lawsuit, limited as it was in both scope and duration, cannot reasonably be defined as the practice of law. In re Blackman, supra, 124 N.J. at 554. To adopt such a broad interpretation of Rule 1:15-1(a) would serve no other purpose than to unnecessarily restrict jurists'

everyday discourse, a circumstance that we believe is neither appropriate nor desired.

We find, in addition, that Respondent did not create the appearance that he was inserting himself, improperly, into T.M.'s legal matter in violation of Canons 1 and 2A of the Code of Judicial Conduct. To the contrary, Respondent's interactions with T.M. were conducted exclusively in the privacy of T.M.'s home. Respondent was not involved in any capacity with regard to Mr. McKenna's legal representation of T.M., did not participate in the mediation, and did not communicate with the mediator on T.M.'s behalf. Notably, but for A.L.'s discovery and review of T.M.'s personal litigation materials, Respondent's interactions with T.M. concerning the Essex County Lawsuit would have remained a private affair.

For these reasons, we find that the charges set forth in Count II of the Formal Complaint have not been proven by clear and convincing evidence. As such, Count II should be dismissed in its entirety.

Having concluded that Respondent violated Canons 1, 2A and 2B of the Code of Judicial Conduct as charged in Count I of the Formal Complaint, the sole issue remaining for our consideration is the appropriate quantum of discipline. In our consideration of this issue, we are mindful of the primary purpose of our system of judicial discipline, namely to preserve the public's

confidence in the integrity and independence of the judiciary, not to punish a judge. In re Seaman, supra, 133 N.J. at 96 (1993) (citing In re Coruzzi, 95 N.J. 557, 579 (1984)); In re Williams, 169 N.J. 264, 275 (2001).

In the instant matter, Respondent's use of his judicial stationery in a personal matter concerning T.M.'s child, and his related telephone discussions with District officials on T.M.'s behalf, though clearly improper and a violation of the Code of Judicial Conduct, was limited in scope, apparently inadvertent, and involved individuals who were familiar with Respondent and aware of his judicial status. In this context, Respondent's conduct differs from those judges who overtly invoked their judicial office for personal gain by utilizing their judicial stationary, business cards or other indices of their judicial office with individuals who were otherwise unfamiliar with their judicial status. Cf. In re Rivera-Soto, supra, 192 N.J. 109; In re McElroy, supra, 179 N.J. 418; In re Sonstein, supra, 175 N.J. 498; In re Murray, supra, 92 N.J. 567; In re Anastasi, supra, 76 N.J. 510. Though these considerations neither excuse nor absolve the impropriety of such conduct, we consider them pertinent to our evaluation of the appropriate quantum of discipline in this matter. We also find noteworthy Respondent's acknowledgment of wrongdoing, his acceptance of responsibility, his assurance that he will not repeat the misconduct, and his heretofore

unblemished record as a jurist. These mitigating factors, taken cumulatively, justify the imposition of discipline less severe than that imposed in the aforementioned judicial disciplinary matters. See In re Rivera-Soto, supra, 192 N.J. 109; In re McElroy, supra, 179 N.J. 418; In re Sonstein, supra, 175 N.J. 498; In re Murray, supra, 92 N.J. 567; In re Anastasi, supra, 76 N.J. 510.

IV. RECOMMENDATION

For the foregoing reasons, the Committee recommends that Respondent be publicly admonished for his violations of Canons 1, 2A and 2B of the Code of Judicial Conduct. This recommendation to impose on Respondent the least severe measure of public discipline reflects the Judiciary's resolute policy prohibiting the use of judicial stationery or other indices of the judicial office in a private context while also accounting for the mitigating circumstances present in this matter.

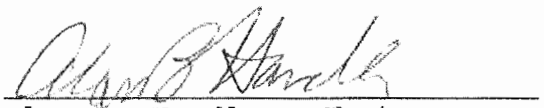
The Committee further recommends that the charges set forth in Count II of the Formal Complaint be dismissed without the

imposition of discipline.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

November 4, 2013

By: 

Alan B. Handler, Chair

Joined By: Hon. Theodore Z. Davis (Ret.), John J. Farmer, Esq., Richard W. Roper, and David P. Anderson.

James R. Zazzali, Vice Chairman, Justice Virginia A. Long (Ret.), Hon. Edwin H. Stern, J.A.D. (Ret.), and Alice Olick Dissenting:

We agree with the majority's conclusions that the allegations in Count One of the Complaint (acknowledged by Respondent) were established and that those in Count II of the Complaint were not proven. We write to address the penalty recommended for Respondent whose exemplary record and genuine remorse were acknowledged by the majority and with respect to whom public discipline is disproportionate to the offenses proven.

Distilled to their essence, the facts are as follows: Respondent used his judicial letterhead as a fax cover sheet (according to the majority apparently inadvertently) to forward a handwritten note (not on judicial stationery) to an old personal friend and former law partner of 14 years. The note was about a private educational matter involving respondent's soon-to-be stepson. In addition, he called that friend and another long-time acquaintance about the child. As the majority acknowledges, there is no evidence that any actual influence on the outcome occurred. What is at issue is the appearance of impropriety.

In reaching its conclusions, the majority declares pertinent a number of prior disciplinary cases, which it acknowledges are not on all fours with what is before us. A

review of the facts of those matters is instructive. In Re Anastasi 76 NJ 510 (1998), a case in which respondent received a public reprimand, is emblematic of the differences. According to the Supreme Court:

> The evidence before the Committee demonstrated that sometime before October 10, 1977, a "client and good friend" of respondent was denied a Racing license by the New Jersey Racing Commission because of a prior criminal record in the State of New York. On the aforementioned date a letter was sent to the Racing Commission on official stationery of the Municipal Court for the Town of West New York, signed in the name of respondent, who was and still is the Judge of that Municipal Court. The letter indicated respondent was "shocked and dismayed" to learn that his client had been denied a racing license because of "some incident involving a misdemeanor" which had occurred some twelve years previously, concerning a "conspiracy to violate gambling laws." In urging reconsideration of the ***513** application, respondent's letter continued: "As a Municipal Court Judge I am very familiar with 'conspiracy to violate gambling laws' (and) (t)he mere fact that it is a misdemeanor indicates the lack of importance that the State has given this particular act." [FN2] The letter further suggested that to penalize the applicant "would make a mockery of those clichés I use in my courtroom quite often such as 'rehabilitation', 'paying a debt back to society' and 'people will take you for what you are today'." As the Committee's presentment observes, respondent "made it abundantly clear in the letter that he was a municipal court judge and, as such, familiar with the magnitude of his client's offense. Despite the latter claim he acknowledged at the hearing that he never inquired of New York authorities as to the nature of the

> applicant's offense and merely set forth in his letter to the Racing Commission the information given him by his client.

Another example is In Re Murray, 92 NJ 567 (1986), a case in which respondent was also publicly reprimanded. There a municipal court judge, while representing a client, wrote a letter described by the ACJC as follows:

> In this letter, respondent identified himself as having been a municipal court judge for many years and informed Judge Houston that he was writing to the Judge because he was "personally involved" in the case as he represented to the McDonalds in a civil matter which was related to the criminal complaint. Respondent proceeded to describe the civil matter in some detail.
>
> He further advised Judge Houston that his "clients" would not waive a probable cause hearing in the criminal case and that he would advise them to "seriously consider liable and slander charges against Mr. Cowan and seek damages for malicious abuse of judicial process." Respondent concluded by expressing the desire that Judge Houston transmit the letter to the "investigating officer" and that the officer be given an opportunity to speak to respondent prior to the probable cause hearing.* Nowhere in the body of his letter did respondent request an adjournment of the scheduled probable cause hearing. Neither the complaining witness nor municipal prosecutor was carboned on the letter.

Likewise, the respondent In Re McElroy 179 NJ 418 (2004) was a municipal court judge who sent his client to another municipal court with the judge's judicial business card in hand. On it was written the suggestion of a downgrade of the client's

offense which the ACJC found was intended for the prosecutor. McElroy received a public reprimand.

The outrageous activities of those judges stand in stark relief from what is before us. They contacted perfect strangers, who would not otherwise have known of their judicial office, and identified their office specifically to use its status for private advantage. Importantly, each of the cited cases was exacerbated because it occurred in the setting of a judicial proceeding in which the Judge's office was intended to be the coin of the realm.

Here, respondent obviously did not use his judicial stationery to make his former long-time law partner aware of his judicial status. It was well known to everyone involved in the matter. The office was simply not part of the calculus. What the judge sought was the counsel and assistance of old friends based upon the length and depth of their shared history. That could not be further from the opportunism involved in the cited cases. Critical to us as well is that the exacerbating factor of pending judicial proceedings is entirely absent here.

Perhaps it would have been more prudent for the judge to remain in the background in this matter. Indeed, the proof of that pudding is in these proceedings. But it is clear to us that he did not intend to nor did he actually misuse his office as did the respondents in the cited cases, although concededly,

he violated the rule against using judicial stationery in a private matter.

The fact that we chose to initiate formal proceedings and file a Complaint, R.2:15-10(b), R.2:15-12, does not mean that we are required to recommend public discipline when it is not otherwise warranted. Indeed, R.2:15-15(b) expressly provides that if the hearing conducted after the filing of the Complaint leads to the conclusion "that the conduct does not warrant a recommendation for public reprimand, censure, suspension or removal", we "shall recommend to the Supreme Court the dismissal of the Complaint with or without private discipline."

Here, the Complaint sounded in two counts - the second of which we have unanimously found to be baseless. Whether we would have filed a Complaint at all without the dismissed count cannot be second-guessed. But the fact that we did so should not set the cant for discipline.

To be sure respondent received brutal press coverage when the Complaint was filed, at least in part, as a result of the allegations in Count II which have been dismissed. That publicity is one of the apparent rationales for public discipline now. But public perception, though a primary concern, is not absolute. See In the Matter of Yaccarino, 117 N.J. 175 *1989) (O'Hern and Garibaldi dissenting). It is simply no answer to suggest that the public will be unaware of the

outcome here without public discipline. As we have noted, private discipline in these circumstances is an outcome specifically provided for in our rules. In the final analysis, discipline should be based on the facts. Here those facts, fairly viewed, justly demand no further public excoriation of this respondent. We would dismiss the complaint and impose private discipline.