SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

IN THE MATTER OF

WILBUR H. MATHESIUS,

JUDGE OF THE SUPERIOR COURT

DOCKET NOS.: ACJC 2005-072
2005-103 & 2006-078

PRESENTMENT

The Advisory Committee on Judicial Conduct, pursuant to Rule 2:15-15(a), presents to the Supreme Court its Findings that charges set forth in a Formal Complaint against Wilbur H. Mathesius, Judge of the Superior Court, have been proved by clear and convincing evidence and its Recommendation that the Respondent be subject to public discipline.

The Advisory Committee on Judicial Conduct issued a Formal Complaint alleging that Respondent, Superior Court Judge Wilbur H. Mathesius, engaged in conduct in violation of Canons 1, 2A, 3A(3), 3A(6), and 3A(10) of the Code of Judicial Conduct and in violation of Rule 2:15-8(a)(6) by criticizing a jury for its verdict and telling the jurors information that had not been taken in evidence at trial (Count I); by entering the jury room in the course of another trial without notice to counsel, by being discourteous in his reply to defense counsel when the latter protested that entry into the jury room, and then by commending the jury on its verdict (Count II); and by engaging in a pattern of improper conduct in that the Committee had previously admonished him in other matters (Count III, subsequently renumbered Count IV, vide infra).

The Committee subsequently issued an amended complaint adding a new Count III concerning various inappropriate actions and remarks by Respondent directed against the judges on an appellate panel who, in reversing the criminal conviction of a defendant, had criticized certain of his rulings.

Respondent filed an Answer in which he admitted that his remarks to jurors in Count I and his reply to an attorney in Count II violated the Code of Judicial Conduct. He generally admitted the conduct set forth in other allegations but he sought to explain it and maintained that it did not violate the Code.

Respondent also sought to dismiss certain charges in Counts III and IV on the grounds that his comments were protected by the First Amendment to the Constitution of the United States. The Committee has rejected that contention. Like other public employees, judges must accept certain restrictions that do not apply to other citizens. See, e.g., United States v. National Treasury Employees Union, 513 U.S. 454, 115 S.Ct. 1003 (1995); Pickering v. Bd. Of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968).

Respondent requested that the Committee apply to the Supreme Court for permission to retain confidentiality of certain sensitive personal information to be introduced in evidence at the hearing. In accordance with Rule 2:15-20(b), the Committee sought and received from the Court permission to retain confidentiality of that specific evidence. Consistent with that approval, the Committee, weighing privacy interests, received in evidence as confidential testimony concerning the Respondent's personal background.

The Committee held a formal hearing. Respondent appeared, with counsel, and testified under oath, as did three former jurors and an assistant prosecutor. After carefully reviewing the testimony and the other evidence, the Committee made factual determinations supported by clear and convincing evidence that are the basis for its Findings and Recommendation.

I. FINDINGS

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1965. At all times relevant to the current matters, Respondent was a Judge

of the Superior Court of New Jersey, assigned to the Mercer Vicinage, a position which he continues to hold.

A. As to Count I

In February 2005, Respondent presided over a jury trial in State v. McDaniels, after which the jury found the defendant not guilty of unlawful possession of a handgun. After the jury had delivered its verdict and was polled, Respondent addressed the defendant:

> Mr. McDaniels, I ask you to stand. You are, sir, a very, very lucky man. The evidence was very strong that you were guilty of this offense. I don't know what they were thinking, but they're thinking other than what I was thinking. You have a number of convictions and I'll tell you this: If you find yourself in trouble again, the resolution of the case is other than the windfall you received today, do you understand how lucky you are, Mr. McDaniels? Do you understand that?

Respondent continued in the same vein, telling the defendant that he was lucky, that one potential witness for the prosecution had been "scared and didn't testify" but could have changed the jury's verdict if he had testified, that a witness who did testify for the State was "one of the most credible witnesses this Court has ever seen." Respondent told the defendant to get on his "hands and knees tonight and thank God that this jury didn't see the forest for the trees."

Respondent then excused the jury and everyone else from the courtroom. However, when the jurors were leaving the courtroom for the jury room to retrieve their personal possessions, they were instructed to remain in the jury room. Then they were told that Respondent would be coming to speak to them.

As the jurors stood in the jury room wondering what was happening, Respondent strode purposefully into the room. He was clearly angry and he asked the jurors "what the hell" they had been thinking when they reached their verdict. He told them that the prosecution's witness was probably one of the most credible witnesses he had ever heard, that the defendant did not take the stand because he had prior convictions, and that someone who had been going to testify

against the defendant had not done so because he had been threatened. After additional remarks along the same lines, Respondent apologized and said that he spoke out of frustration.

Most of the jurors were shocked and upset. One juror said that it almost brought her back to being a child screamed at by parents, and she added that she does not permit "people in my personal life to speak to me like that, I just don't allow it." Some jurors were then taken by bus to the parking lot, and there was silence on the bus.

Canon 3A(10) of the Code of Judicial Conduct provides in its entirety: "A judge shall not commend or criticize jurors for their verdict, other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community."

It is clear that Respondent's post-verdict remarks, both those from the bench and those made in the jury room, were not only critical of the jurors for their verdict but were also insulting and denigrating of those who had responded to a call to public service and who had performed that service. Instead of thanking them for their service, Respondent castigated them because he did not agree with their decision. At least two of the jurors were so adversely affected by this that they would not wish to serve on another jury in Respondent's court.

Although Respondent apologized to the jurors before leaving the jury room and although he testified that his behavior had been "grossly inappropriate," that does not mitigate the seriousness of his violation.

Further, Respondent's remarks suggested that he might be biased in favor of the prosecution. A reasonable observer hearing those remarks could reasonably believe that Respondent would not be fair or impartial because he had such strong feelings about what the outcome of the case should have been. Respondent should have realized that one purpose for the proscriptions contained in Canon 3A(10) is the avoidance of just such an appearance of bias.

By his conduct, Respondent also violated Canon 1, which requires judges to personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, and Canon 2A, which requires judges to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, and engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

B. As to Count II

In July 2004, Respondent presided over a jury trial in the matter of State v. Byrd and Dean. On July 22, 2004, while the jury was deliberating in the jury room, Respondent entered and asked the jurors whether they wished to continue deliberating that day or to go home and return in the morning. Respondent did not inform the prosecutor or defense counsel before he entered the jury room, and neither attorney was present when he spoke to the jurors.

When Respondent resumed the bench, the attorney for Defendant Dean objected to Respondent's speaking to the jurors off the record in the jury room. That attorney said that he also thought that the jurors should be brought into the courtroom and dismissed on the record in the presence of the court.

Respondent replied: "Thank you. You can do that when you're a judge. I'll do it the way I do it when I'm a judge." Respondent then read a note that he had just received from the jurors, asking that they be released for the day. He told counsel that he was going in to release the jury, but he did not ask counsel to accompany him.

In the jury room, outside the presence of counsel but this time on the record, Respondent instructed the jury concerning what materials they could bring home with them, and he released them for the day.

When Respondent resumed the bench, the attorney for Defendant Dean moved that any communication with the jury take place only in court. Respondent replied: "It doesn't sound like a motion. Was there a motion attached to that?"

The attorney replied: "That's the motion. I think all of the communications between the judge and the jury should be in open court on the record." Respondent said: "Mr. Schneider, I appreciate very much your motion" and concluded the matter for the day.

By his remarks to Mr. Schneider, Respondent violated Canon 3A(3) of the Code of Judicial Conduct, which requires judges to be patient, dignified, and courteous to attorneys and others. Respondent admits that his remarks were inappropriate.

Respondent entered the jury room twice and spoke to the jurors off the record on the first occasion but on the record the second time. He justified his going to the jury room on the basis of the jurors' security, testifying that bringing the jurors back to the courtroom to communicate with them would, because of the physical layout of the building, have meant putting them in unacceptable proximity to criminal defendants. Assuming some need to enter the jury room himself, as opposed to dispatching a sheriff's officer to handle the communication, Respondent should have been on the record both times and accompanied by counsel both times. A judge has no right to speak to jurors outside the presence of counsel during trial, and certainly not off the record in the jury room.

By entering the jury room outside the presence of counsel before the jury delivered its verdict, Respondent violated Canon 3A(6) of the Code of Judicial Conduct, which requires judges to accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law.

On July 23, 2004, after the jury had delivered its verdict finding the defendants guilty of certain charges and not guilty of other charges, Respondent addressed the jury and said:

> Once again, ladies and gentlemen, you have vindicated this Court's faith in the jury system. Your verdict has been adequately and amply supported by

> the evidence. You have deliberated long, and you've deliberated hard. You've overcome disagreements and the strife that necessarily is imposed upon jurors in such critical and difficult decision-making. You are not the television shows. You are the bulwark and the foundation of the jury system in this country and you have acquitted nicely.

Although Respondent maintains those remarks do not constitute commending the jury for its verdict, it is clear from the first two sentences alone that Respondent approved the decision. He told the jurors that they had "vindicated" his faith in the jury system, thereby conveying his personal approval, and he went on to find the verdict "amply" supported by the evidence. That is a commendation for reaching the right decision.

By commending the jury on its verdict, Respondent violated Canon 3A(10) of the Code of Judicial Conduct, which prohibits judges from commending or criticizing jurors for their verdict.

Respondent's conduct, as detailed above, also violated Canons 1 and 2A of the Code of Judicial Conduct and constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

C. As to Count III

On August 31, 2005, the Appellate Division issued its opinion in State v. Fletcher, reversing the conviction of the defendant and ruling that the trial judge had erred in respect of certain jury instructions and the admissibility of incriminating statements. Respondent was the trial judge.

On September 26, 2005, Respondent wrote to the judge who had written the opinion, sharply criticizing her, as well as the Appellate Division panel, for the decision. That letter was marked as personal and confidential. Nevertheless, Respondent did not treat the matter as private or confidential.

On September 14, 2005, Respondent attended a dinner held by the Mercer County Bar Association. During the social hour preceding the dinner, he was present when the law clerk of the judge who authored the opinion was being introduced to various attorneys and judges. Respondent addressed the law clerk and said that he hoped she had had nothing to do with the Fletcher opinion. The law clerk, who had begun her clerkship after the opinion was delivered, had no idea what Respondent was talking about and said as much. Although Respondent testified that he does not recall doing so, he then told the law clerk to deliver a derogatory message to the judge for whom she worked. That message was clearly derogatory, expressing Respondent's view that the judge was inexperienced and not competent.

The clerk did not know who Respondent was and thought that he was an attorney. It was not until the following day, while discussing the events of the dinner, that she learned from an attorney who Respondent was.

According to Respondent, he addressed the law clerk because the Fletcher decision was "stuck in his craw" at the time. He lashed out against the judge who authored that decision. These remarks and conduct implied that he might have difficulty in accepting the decision of a higher court as binding authority, as all judges must, regardless of personal disagreement. His attack on the decision was public. He used the judge's new clerk to express publicly his resentment.

On November 22, 2005, during the annual Judicial College, Respondent attended a session dealing with literature and the law, where he made remarks about the Fletcher decision and also publicly identified one the judges of the appellate panel.

According to Respondent, one of the texts assigned for discussion at that session mentioned so-called "boilerplate confessions" by criminal defendants, apparently referring to

generalized and standardized confessions. Respondent testified that when the moderator of the session, a college professor, expressed dismay that so many people were in prison throughout the country because of boilerplate confessions, Respondent objected, saying that there was an "incredible effort" in New Jersey to protect against the use of improper and involuntary confessions. Respondent then mentioned the Fletcher decision and identified one of the judges present at the session as having been a member of the appellate panel that reviewed the case. Respondent testified that his remarks were intended to set the moderator straight by pointing out that New Jersey does not permit boilerplate confessions.

That is Respondent's version of events. The appellate judge remembered it differently. He considered Respondent's remarks an "angry tirade" that included comments about the judges on the appellate panel being inexperienced in criminal law. Although another judge who was present did not characterize Respondent's remarks as a "tirade," Respondent's testimony before this Committee supports the appellate judge's recollection, indicating that Respondent through his remarks was clearly angry and critical of the Appellate Division's opinion.

Respondent further testified: "And I proceeded again, to the bane of my existence, the Fletcher opinion, which involved the transmutation of an off the record comment from subsequent to Miranda rights, to now being applicable, pre Miranda rights." Respondent's wording, from "transmutation" on, betrays his continuing disagreement with the appellate holding that the defendant's self-incriminating statements were inadmissible even though they were made after the defendant received written Miranda warnings and signed a waiver of rights form because the police, in the person of a detective who was a friend of the defendant's family, had promised the defendant he could make a statement off the record and that promise was neither retracted nor explained in terms of how it conflicted with the waiver of rights.

Respondent was further charged in the Formal Complaint with acting in a confrontational and intimidating manner to the judge who wrote the Fletcher opinion at another scheduled session of the Judicial College program. In his testimony he explained that he attended that session not knowing that it was intended for appellate judges only or that the judge in question was present. According to Respondent, a judicial colleague had spoken in glowing terms of a particular moderator, and Respondent happened to see that moderator in the room because the door to the corridor was open. He listened for a while from the hall and found the moderator to be both entertaining and informative, so he entered and took a seat. It was only after he moved to accommodate another late entrant that he realized the appellate judge in question was in the room and sitting near him. At the first opportunity, Respondent got up and left.

Although the appellate judge was aware of Respondent's presence and made uncomfortable by it, the Committee does not find clear and convincing evidence that Respondent sought to achieve that result. Accordingly, that charge against Respondent is dismissed.

Although Respondent later apologized to both appellate judges, his apology does not mitigate his conduct. Respondent's other actions as charged in Count III demonstrate gross disrespect of the judicial system, the settled procedures for the handling and disposition of cases, and for the appellate process and judicial review in the adjudication of cases. They constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

Respondent's expression of his personal views and strong criticism to various persons manifested a lack of proper judicial temperament, balance and judgment. It exhibited disrespect and a lack of deference to appellate courts that reflects adversely on the proper and sound administration of justice and Respondent's capacity to preside over cases fairly, objectively and

without prejudgment, consistent with appellate dispositions. These expressions of personal feelings were inconsistent with the deference and respect required in the orderly and proper administration of justice, and violated Canon 1 of the Code of Judicial Conduct, which requires judges to observe high standards of conduct to maintain the integrity and independence of the Judiciary, and Canon 2A, which requires judges to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the Judiciary.

D. As to Count IV

The matters discussed above were not the Committee's only experiences with Respondent. On June 8, 2001, at a time when he was a municipal court judge and had not been reappointed to his position, the Committee sent a him letter of admonition for sending two local newspapers a letter to the editor in which he expressed his gratitude to those with whom he had dealt during the course of his judgeship, including police officers and the State Police, and to a local mayor for a new appointment to a part-time position. The Committee also informed Respondent that it was inappropriate for him to have expressed in the letter to the editor his personal opinion regarding a political matter, viz., the procedure for reappointment of municipal court judges.

On May 11, 2004, the Committee sent Respondent a letter of admonition concerning gratuitous remarks he had made while sentencing a defendant in a criminal matter. The Committee emphasized to Respondent that the bench is not a forum for the expression of personal views, particularly if they indicate or suggest prejudgment or a fixed opinion. The Committee also noted that, because of its earlier admonition, there was sentiment on the Committee for referring the matter to the Supreme Court for public discipline.

On October 27, 2004, the Committee held an informal conference with Respondent concerning his asking a defendant if the defendant were "nuts" for rejecting a plea agreement and concerning his sarcastic remarks to that defendant regarding the defendant's attire. Respondent acknowledged that his remark "Are you nuts?" was inappropriate, and he said that it would not happen again.

At the same informal conference, the Committee also discussed with Respondent his conduct in connection with a petition for post-conviction relief in State v. Harris. The Supreme Court had taken original jurisdiction of the matter because of what it referred to as Respondent's "outrageous, sarcastic and pejorative comments about this State's death penalty system and this Court's capital jurisprudence, including gratuitous personal attacks against current and former members of the Court." Respondent's comments gave rise to a reasonable perception that he was biased and lacked fairness in such a case. Respondent explained to the Committee that he had been on the Superior Court bench for only one year at the time of the Harris case and would not have written his decision in the same way if he had it to do over again.

What those earlier matters have in common with the present matters is that they all reflect Respondent's poor judgment, impulsiveness and lack of self-control, and tendency to act without sufficient regard for the propriety or the consequences of his actions. He was offended by the jury's decision in the McDaniels case because he considered it to be the wrong result, so he angrily went to the jury room and vented his emotions. Without sufficient reflection or understanding, he entered the jury room in the Byrd and Dean case during jury deliberations without advising counsel or bringing a court reporter, indifferent to the risk that jurors might spontaneously say something about the case itself. He snapped at defense counsel for objecting to that visit to the jury room and then showed his pique by returning to the jury room to dismiss the jurors for the day. His conduct in respect of the Fletcher case goes beyond impulsivity. In a lengthy, sarcastic, and personally insulting letter, he criticized the author of the Fletcher opinion;

he seized on a chance encounter with that judge's new law clerk to denigrate the judge; and weeks later he went out of his way at a session of the Judicial College to express his displeasure with the opinion.

Respondent's actions constitute a pattern of improper conduct that calls into question his judgment, temperament, and ability to conform his conduct to the requirements of the Code of Judicial Conduct.

By that pattern of conduct, Respondent has violated Canons 1 and 2A of the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of Rule 2:15-8(a)(6).

II. RECOMMENDATION

Respondent is intelligent and, by all accounts, a competent, fair and hard-working jurist. This assessment is supported by his evaluations in connection with the Judicial Performance Program. Nevertheless, when frustrated, disappointed or angry, he has acted impulsively and without restraint. The jurors in the McDaniels case were witnesses to that tendency on his part; a major reason they were shocked by his outburst in the jury room was because his manner contrasted so sharply with the professional manner with which he presided over the trial.

Respondent recognizes that he is prone to such conduct, and he has arranged for professional assistance in that regard. He attributes such conduct to his prior experience as a political figure, which, he claims, accounts for his penchant for spontaneity and bluntness and which he acknowledges must be restrained if he is to continue in his current role as a judge.

The character of Respondent's improper conduct, however, is so serious and prolonged that it calls for a severe measure of public discipline. Accordingly, the Committee respectfully recommends that he be suspended for a period of six months. Because Respondent has spent most of his adult life in public service, the Committee recognizes that six months without

compensation could be financially onerous. Therefore, the Committee recommends that only three months of his suspension be without pay.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

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