

D-76-11
(069952)

SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2010-283

IN THE MATTER OF :

PRESENTMENT

GREGORY R. McCLOSKEY, :
JUDGE OF THE MUNICIPAL COURT :

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 Gregory R. McCloskey, Judge of the Municipal Court ("Respondent"), have been proven by clear and convincing evidence. The Committee recommends that the Respondent be publicly reprimanded.

On November 3, 2010, the Committee issued a Formal Complaint in this matter, which accused Respondent of engaging in an impermissible *ex parte* conversation with a prosecutor in violation of Canon 3A(6) of the Code of Judicial Conduct and of displaying an impermissible interest in the outcome of a case and partiality for one of the parties in violation of Canons 1,

2 and 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and (f) of the New Jersey Court Rules. Respondent filed an Answer to the Complaint on November 18, 2010 in which he admitted all of the factual allegations of the Formal Complaint.

Respondent waived his right to a formal hearing. P-1. Exhibits were offered by the Presenter and accepted into evidence by the Committee. See P-1 through P-9.

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**

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1977. Formal Complaint at ¶1. At all times relevant to this matter, Respondent served as a judge of the Township of Mount Laurel Municipal Court. Id. at ¶2. He retired from that position effective January 1, 2010 but continues to serve as a municipal court judge in Delanco Township and the Borough of Palmyra. Id. at ¶¶2-3.

Beginning in January 2008, Respondent presided over a trial in the Mount Laurel Municipal Court in the matter of State v. Thomas M. Grabovich, Summons No. M073387-89. Id. at ¶4. The

defendant, Mr. Grabovich, was accused of driving under the influence, refusing to submit to an Alcotest, and reckless driving. Id. at ¶4. At the end of the second day of the Grabovich trial, Respondent engaged in an *ex parte* conversation with the Mount Laurel Township Municipal Prosecutor about the case. Id. at ¶6. During that discussion, at least a portion of which was recorded, Respondent directed the Prosecutor to ask certain questions of State witnesses concerning issues relevant to the State's case and critical to the defense. Id. at ¶7.

On March 26, 2008, the defendant in Grabovich was convicted of driving under the influence and refusing to submit to an Alcotest. Id. at ¶8. See also P-4 at ACJC 010. Respondent sentenced the defendant in accordance with applicable sentencing guidelines. Id. The defendant appealed his conviction and, in the process of pursuing the appeal, learned of Respondent's *ex parte* conversation with the Mount Laurel Prosecutor. Id. at ¶9.

On August 14, 2008, the Burlington County Superior Court remanded the Grabovich matter to the Mount Laurel Township Municipal Court to give the defendant the ability to file a Motion for a New Trial due to Respondent's *ex parte* conversation with the Prosecutor. Id. at ¶10. Respondent heard oral argument on the issue on November 11, 2008 and December 17, 2008 and, on August 26, 2009, denied the defendant's motion. Id. at ¶12. See also P-9. In the course of rendering his decision,

however, Respondent admitted not only that he participated in an impermissible *ex parte* communication with the Grabovich Prosecutor but that the conversation revealed his thought process about issues pertinent to the case. Formal Complaint at ¶12.

On appeal, the Honorable John A. Almeida, J.S.C., of the Superior Court of New Jersey, Burlington Vicinage, reversed the defendant's municipal conviction and remanded the matter for a new "trial before a different municipal court judge and a different prosecutor." Id. at ¶13; P-4 at ACJC 006. Judge Almeida found that Respondent's acknowledged conduct denied the defendant his constitutional right to a fair trial. Id. at ¶13; P-4 at ACJC 013. The Superior Court specifically held as follows: "The Municipal Court's *ex parte* [sic] direction to the prosecutor to ask two questions of the witness specifically central to the State's case and specifically critical to the defense theory demonstrated the Court's partiality to the State and the Court's interest in the outcome of the proceeding. That conduct cannot be permitted." P-4 at ACJC 013. Judge Almeida referred the matter to this Committee. Id. at ACJC 003; Formal Complaint at ¶14.

Respondent was initially questioned by the Advisory Committee on Judicial Conduct about his conduct in the Grabovich case by letter dated July 7, 2010. P-3 at ACJC 002. In his

letter of response dated July 19, 2010, Respondent admitted engaging in an *ex parte* conversation with the Mount Laurel Municipal Prosecutor and that, by doing so, he violated the Code of Judicial Conduct. P-3 at ACJC 001; Formal Complaint at ¶15. By letter dated November 15, 2010, Respondent again communicated with the Committee, this time apologizing "to the Court, the Committee, the Bar, the defendant in the underlying case and the public for having engaged in an *ex parte* communication with the Prosecutor. It should not have occurred. My actions were unprofessional, improper and insensitive." P-2.

B. Analysis

The Formal Complaint in this matter charged Respondent with engaging in an impermissible *ex parte* conversation with a prosecutor in violation of Canon 3A(6) of the Code of Judicial Conduct. The Complaint further alleged that by engaging in such conversation, Respondent demonstrated a partiality for one of the parties, displayed an interest in the outcome of the case, and denied the concerned defendant a fair trial in violation of Canons 1, 2A, and 3C(1)(a) of the Code of Judicial Conduct as well as Rule 1:12-1(e) and (f) of the New Jersey Court Rules. We find that the Complaint's charges have been proven by clear and convincing evidence, and, consequently, that Respondent's conduct violated the cited Canons and Rules of Court.

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. The commentary to Canon 2 of the Code of Judicial Conduct provides that judges "must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny." Canon 3 generally provides that judges should "perform the duties of judicial office impartially and diligently." Canon 3A(6) of the Code of Judicial Conduct maintains, in pertinent part, that judges "shall neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Canon 3C(1)(a) states that a judge should disqualify himself or herself from a proceeding in which the judge's impartiality might reasonably be questioned, including, but not limited to cases in which the judge "has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding." Rule 1:12-1(e) of the New Jersey Court Rules provides that a judge is disqualified from presiding over any matter in which the judge "is interested in the event of the action." Rule 1:12-1(f) mandates a judge's disqualification from any action in which there is any "reason which might preclude a fair and unbiased

hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

Our analysis in this case is initially shaped by the fact that Respondent has stipulated to the alleged conduct and to the fact that such conduct amounted to a violation of the Code of Judicial Conduct. Specifically, Respondent admits engaging in an *ex parte* conversation with the Mount Laurel Prosecutor regarding the Grabovich case and further admits directing the Prosecutor to ask certain questions of prosecution witnesses. Though Respondent denies that his behavior violated Canon 3C(1)(a) or Rule 1:12-1(e) or Rule 1:12-1(f) of the New Jersey Court Rules, he agrees that his conduct amounted to a violation of Canons 1 and 2A of the Code of Judicial Conduct. See Respondent's Answer at ¶17; P-2.

Consequently, as there is no question that Respondent engaged in an *ex parte* conversation in the Grabovich case, we conclude that, in so doing, Respondent violated Canon 3A(6) of the Code of Judicial Conduct. Canon 3A(6) clearly prohibits the initiation or consideration of any *ex parte* communication concerning a pending case. By discussing the facts and merits of the Grabovich case with the Mount Laurel Prosecutor outside the presence of the defendant and his counsel, Respondent did precisely what Canon 3A(6) prohibits, constituting a violation of that provision. See In re Delehey, 200 N.J. 278 (2009)

(adopting ACJC Presentment in ACJC 2008-056 in which the Committee found that Respondent's *ex parte* conversation with the brother of the defendant regarding the defendant's case violated Canon 3A(6) of the Code of Judicial Conduct).

We separately comment on the content of the *ex parte* conversation between Respondent and the Mount Laurel Prosecutor. As described by Judge Almeida in April 2010, Respondent employed the *ex parte* conversation to "direct" the Prosecutor "to ask two questions of the witness specifically central to the State's case and specifically critical to the defense theory" P-4 at ACJC 013; Formal Complaint at ¶13. The questions posed occurred not only outside the presence of defense counsel, but outwardly demonstrated Respondent's reservations as to the defendant's defense in the case. They coached the Prosecutor as to what questions to ask and highlighted the Judge's private perspective of the case and its merits.

Respondent's conduct as discussed above severely violated Canons 1, 2A and 3 of the Code of Judicial Conduct and flouted Respondent's judicial obligations. Judges are constrained 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). Indeed, "[t]he polestar of our Canons of Judicial Conduct is to maintain judicial integrity and the public's confidence in that

integrity." In re Samay, 166 N.J. 25, 43 (2001) (citations omitted). See also Canon 1 and Canon 3 of the Code of Judicial Conduct. In becoming a judge, Respondent "took an oath to 'faithfully, impartially and justly perform all the duties' of judicial office." Samay, supra, 166 N.J. at 43. By coaching the Mount Laurel Prosecutor in an *ex parte* conversation as to what questions to ask a witness, and by articulating his doubts about the defense theory to the Prosecutor, Respondent displayed his interest in the Grabovich case and, even more disturbing, his apparent preference for the State's position. His conduct epitomized partiality and bias in direct violation of Canons 1, 2A and 3 of the Code of Judicial Conduct, as well as the oath that Respondent took to perform his duties objectively and justly. We agree with Judge Almeida that such conduct further denied the Grabovich defendant his constitutionally-protected right to a fair trial. P-4 at ACJC 013; Formal Complaint at ¶13. In our view, Respondent's *ex parte* conversation with the Mount Laurel Prosecutor, contrary to his judicial obligations in its own right, was rendered considerably worse by the fact that he used that conversation to assist one party outside the presence of the other. We are also troubled that his conduct may have compromised the public's confidence in an impartial and fair judiciary. See In re Citta, 201 N.J. 413 (2010) (adopting ACJC Presentment in ACJC 2008-180 and 2008-256) ("A judge's

conduct and remarks should not exhibit or foster the impression of bias that undermines impartiality, objectivity and fairness in the discharge of judicial responsibilities." (citations omitted)).

Based on his clear partiality for the position of the State in Grabovich, Respondent should have recused himself from the case. Because Respondent did not do so, continued to preside over the case and, in fact, rendered a judgment in it, Respondent also violated Canon 3C(1)(a) of the Code of Judicial Conduct and Rule 1:12-1(e) and Rule 1:12-1(f) of the New Jersey Court Rules, which require a judge's disqualification whenever the judge has an interest in the matter or where his impartiality might reasonably be questioned. See also Samay, supra, 166 N.J. at 42.

We conclude, for the reasons stated above, that Respondent's *ex parte* conversation with the Mount Laurel Prosecutor and the content of that conversation violated Canons 1, 2A, 3C(1)(a), and 3A(6) of the Code of Judicial Conduct as well as Rule 1:12-1(e) and (f) of the New Jersey Court Rules.

II. RECOMMENDATION

The Committee recommends that Respondent be publicly reprimanded for the conduct at issue in this matter. This recommendation takes into account the egregiousness of Respondent's conduct in engaging in an *ex parte* conversation

with a prosecutor and highlighting his thoughts and doubts about the case and preference for one of the parties. Such conduct greatly contravened Respondent's obligation to perform the duties of his judicial office impartially and fairly. Respondent's conduct further deprived the defendant in Grabovich of a fair trial and forced the case to be retried before a new municipal court judge and prosecutor. We are concerned about the potential damage done to the judiciary's reputation as a body of integrity and impartiality as a result of Respondent's actions.

Our recommendation also considers, however, Respondent's conduct in handling this judicial disciplinary matter. From the beginning, Respondent admitted his transgressions and apologized for them. He indicated that he would not contest any of the Committee's conclusions in this matter. Respondent labeled his own conduct as "unprofessional, improper and insensitive" and, in so doing, demonstrated his belated understanding of its significant impropriety. We further acknowledge Respondent's long history as a municipal court judge and his solid reputation.

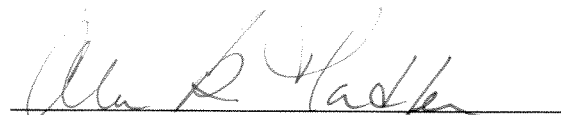
Accordingly, for all of these reasons, the Committee respectfully recommends that Respondent be publicly reprimanded for the conduct at issue in this matter.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

December 8, 2011

By:


Alan B. Handler, Chair