SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2019-420

IN THE MATTER OF ARTHUR BERGMAN JUDGE OF THE SUPERIOR COURT	:	**PRESENTMENT**

The Advisory Committee on Judicial Conduct ("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 and the evidence of record demonstrate, clearly and convincingly, that the charges filed against Arthur Bergman, Judge of the Superior Court ("Respondent"), as set forth in Counts II and III of the Formal Complaint, have been proven by clear and convincing evidence. The Committee's findings and the evidence of record also demonstrate that the charges set forth in Count I of the Formal Complaint have not been proven by clear and convincing evidence and recommends those charges be dismissed.

Accordingly, the Committee recommends that Respondent be publicly reprimanded for his misconduct as set forth in Counts II and III of the Formal Complaint. The Committee further recommends

that the charges set forth in Count I be dismissed without the imposition of discipline.

I. PROCEDURAL HISTORY

This matter was brought to the Committee's attention by way of a grievance filed by an attorney representing the trustee in an action before the Superior Court, Chancery Division, Probate Part in the Middlesex Vicinage entitled In the Matter of the J&V Trust and Hennessy Family Trust, Docket No. 259170 (hereinafter "Hennessy Family Trust"). The grievant complained about Respondent's conduct while presiding over the Hennessy Family Trust matter, including Respondent's initiation of an *ex parte* communication with a witness and Respondent's independent factual research into personal information concerning the Trustee's daughter, without the parties' knowledge.

The Committee collected and reviewed documentation relevant to these allegations, including court filings, transcripts, and phone records. The Committee also asked Respondent directly, on two occasions, to respond to its inquiries in writing regarding his handling of the Hennessy Family Trust matter.

On October 19, 2020, the Committee issued a three-count Formal Complaint against Respondent charging him with conduct in contravention of Canon 1, Rule 1.1, Canon 2, Rule 2.1, and Canon 3, Rule 3.6(C) and Rule 3.8 of the Code of Judicial Conduct. Each of these charges relate to Respondent's conduct when presiding over

the Hennessy Family Trust matter. Count I alleged that Respondent engaged in misconduct, both during his processing of the case and in his written responses to this Committee, by providing a pretextual justification for why he telephoned a third-party witness in the matter and creating the appearance that he was less than candid with the parties and their counsel. Count II alleged that Respondent's telephone call to and voicemail left for a third-party witness constituted an impermissible *ex parte* communication violative of the Code of Judicial Conduct. Finally, Count III alleged that Respondent, along with the assistance of his law clerk, at Respondent's instruction, conducted an improper independent factual investigation to obtain personal information about the Trustee's daughter and others, without advising the parties in advance, and then relying upon said information to draw negative inferences about the Trustee's credibility, creating the appearance of a bias against the Trustee.

Respondent filed a Verified Answer to the Complaint on November 9, 2020, wherein he admitted certain factual allegations, with some clarification, denied others and denied violating the cited canons of the Code of Judicial Conduct.

The Committee held a Case Management Conference on July 28, 2021 to address outstanding discovery and procedural issues.[1] On

[1] Transcript referred to as "1T"

August 20, 2021, the Presenter and Respondent, through his counsel, filed jointly with the Committee a set of factual Stipulations. On September 1, 2021, the Committee convened a Formal Hearing[2] for the limited purpose of presenting argument concerning whether the stipulated facts and evidence of record provided clear and convincing evidence of the charged violations of the Code of Judicial Conduct.

The Presenter and Respondent offered exhibits, all of which were admitted into evidence, except for a character letter from 2014 offered by Respondent. See Presenter's Exhibits P-1 thru P-17; see also Respondent's Exhibits R-1 thru R-30. The Committee denied the admission of Respondent's proffered character letter into evidence pursuant to Canon 2, Rule 2.4, of the Code, which prohibits judges (including former judges) from offering testimony as character witnesses in any "judicial, administrative, or other adjudicatory proceeding, or [from] otherwise vouch[ing] for the character of a person in a legal proceeding." Presenter and Respondent also submitted joint exhibits, all of which were admitted into evidence. See Joint Exhibits J-1 thru J-4.

Presenter and Respondent, with leave of the Committee, filed pre-hearing briefs on August 25 and 26, 2021, respectively, which the Committee considered. After carefully reviewing the evidence,

[2] Hearing transcript referred to as "2T"

the Committee makes the following findings, which form the basis for its recommendation.

II. FINDINGS

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1981. See Formal Complaint and Answer at ¶1. At all times relevant to this matter, Respondent held the position of judge of the Superior Court of New Jersey, assigned to the General Equity Division in the Middlesex County vicinage, a position to which he was appointed in 2006 and from which he retired effective September 1, 2020. Stipulations at ¶3. The facts provided below concerning the Hennessy Family Trust matter flow from the Stipulations jointly submitted by the parties.

Michael J. Hennessy ("Plaintiff") instituted a legal action against his brother, John J. Hennessy, II, seeking his removal as trustee ("Trustee") of two trusts established by their parents for the benefit of the Hennessy children, which included Plaintiff, Trustee, and their siblings Joelyn Hennessy Melzl, Jacqueline Hennessy Fishbein, and Jeffrey Hennessy. Stipulations at ¶4. Plaintiff also sought an accounting of the trusts and to compel the sale of the home in which the decedents, the Hennessy parents, previously lived (the "Millstone home"). Id. The Hennessy siblings subsequently became parties to the Hennessy Family Trust matter. Id. at ¶5. The Trust documents granted to the Trustee broad powers to preserve, repair and/or improve the Millstone home for the

benefit of the Estate. Id. at ¶6. On or around March 14, 2018, Respondent denied Plaintiff's requested relief for removal of the Trustee but granted Plaintiff's demand for an accounting by the Trustee and ordered the Trustee to sell the Millstone home to the highest bidder, which could include an offer from any beneficiary. Id. at ¶7.

On or around September 14, 2018, Plaintiff filed a motion for partial summary judgment on three separate $100,000 payments made by the Trustee to his mother, who died shortly after payment was made to a joint account payable on her death to the Trustee. Id. at ¶8. Because this payment contravened the express terms of the Trust, Respondent ordered the Trustee to repay the funds to the Trust. Id.

On or around January 2, 2019, prior to the return date of the partial summary judgment motion, the Trustee filed a motion seeking reimbursement for himself and his daughter, Thiel Hennessy Dragon ("Ms. Dragon"), for personal funds they allegedly expended for improvements to the Millstone home. Id. at ¶9. Plaintiff objected to the Trustee's reimbursement motion on the basis that some of the expenses allegedly incurred were for the personal benefit of the Trustee and his daughter, who was living in the home at the time, claiming this was not for the benefit of the estate. Id. at ¶10. On or around February 22, 2019, Respondent heard oral argument on the Trustee's reimbursement motion during which the Trustee

provided evidence of the costs they allegedly incurred, individually, for the repairs and improvements made to the Millstone home, which totaled $83,922.32 and $28,103.12, respectively. Id. at ¶11. Respondent withheld awarding any reimbursement to the Trustee pending receipt from the Trustee of supplemental sworn certifications from those persons or entities retained to perform the work in question, stating that the work was done, and paid for, for the benefit of the Trust. Id. at ¶12. Those certifications were to be submitted to the court in lieu of a plenary hearing. Id.

On or around March 8, 2019, the Trustee submitted supplemental certifications by contractors who performed work on the Millstone home. Id. at ¶13. One of the individuals who submitted a certification was Ben Oskierko, owner of Boss Landscaping. Id. Mr. Oskierko's certification included an invoice from Boss Landscaping for work performed on the Millstone home. Id. Respondent sought to speak directly with Mr. Oskierko. Id. at ¶14. Finding no telephone number or address on the invoice submitted by Mr. Oskierko, Respondent searched online for a telephone number for "Boss Landscaping" at which Mr. Oskierko could be reached. Ibid. Finding no relevant information, Respondent continued his search utilizing the New Jersey Division of Consumer Affairs license verification service, which also yielded no results for "Boss Landscaping." Respondent then performed an online search for "Benjamin Oskierko"

and uncovered information that included Mr. Oskierko's business address, the length of time his business had been operating, the number of employees the business employs, and the business's estimated annual revenues. Ibid.

On Friday, July 19, 2019, using the information gleaned from his online research, Respondent telephoned Mr. Oskierko. Id. at ¶15. Respondent did not notify counsel for the Trustee or counsel for the Plaintiff that he intended to call Mr. Oskierko, nor were they included on the call. Id. Respondent left a voicemail message for Mr. Oskierko that did not reference an anticipated plenary hearing in the Hennessey Family Trust matter. Id. at ¶16.

In addition to researching Mr. Oskierko and his business, Respondent sought information about Ms. Dragon's marriage date and whether she owned her "marital home" while living in the Millstone home. Id. at ¶17. At Respondent's request, and without notice to the parties, his law clerk spoke with the Registrar for Vital Statistics to determine the dates of Ms. Dragon's marriage and the birth of her child, the Trustee's grandchild. Id. at ¶18. Respondent also personally researched public real estate tax records to verify when Ms. Dragon and her husband purchased their marital home. Ibid.

On or around July 22, 2019, Respondent issued his Opinion and Statement of Reasons denying most of the Trustee's application and ordered that the proceeds of the Trust be distributed. Id. at ¶20.

Respondent made various findings concerning both the Trustee and his daughter as to their intent for the Millstone home, their living preferences, and their lack of credibility. Id. at ¶21. In his July 22, 2019 Opinion, Respondent stated, *inter alia*:

> The main reason for the reluctance of the Court to accept the Trustee's certifications was his prior track record in this case, regarding actions taken and lack of candor. In addition to the approbation and reprobation regarding the in-kind distribution sought by, and asserted by, the Trustee, he had already been rebuked for his withdrawal of some three hundred thousand dollars ($300,000.00) from the Trust's corpus, which had been improperly removed.

Id. at ¶22. See also P-7, R-1.

In denying the Trustee's Motion for Reimbursement of $112,025.44 in expenses the Trustee alleged he personally incurred for the maintenance and improvement of the Millstone home, Respondent noted there was no showing by the Trustee that all of the expenditures were for the benefit of the Trust and awarded the Trustee only $4,475.46. Stipulations at ¶23. Respondent, likewise, determined, *inter alia,* that Ms. Dragon was not entitled to reimbursement for any expenses she personally incurred on the Millstone home, stating:

> To the extent that there are payments alleged for which she has not been reimbursed, her remedy should have been to ask the Trustee to reimburse her. That she did not do so to the tune of over $28,000 dollars tends to substantiate, in the Court's mind, that she was working on the house as her future residence, and was willing to pay for certain personal choices in exchange for the privilege of living in it rent free.

Id. at ¶24. See also P-7, R-1.

Respondent provided counsel with a proposed form of order in respect of Respondent's July 22, 2019 rulings and requested that "any errata or issues found should be brought to the Court's attention." Stipulations at ¶25. On or around July 31, 2019, Respondent entered an order memorializing his July 22, 2019 opinion. Id. at ¶26. On September 11, 2019, prior to deciding the Trustee's recusal motion, Respondent issued a Supplemental Statement of Reasons ("SSR") responding directly to the allegations in the recusal motion and enclosing another copy of his July 31, 2019 order. Id. at ¶27. In his SSR, Respondent, when addressing the propriety of his decision to telephone Mr. Oskierko, stated, *inter alia*:

> The reason the Court sought to contact Mr. Oskierko directly was due to the suspicious nature of his invoices submitted by Trustee and his daughter. One concern the Court had is that there might be no actual person signing the documents who performed the services, nor an actual firm, as the invoices appeared without any address or phone number in the record as submitted by the Trustee and his daughter. Moreover, as the Court indicated in its July 22 opinion, one of the invoices appears to be altered. Rather than rely on the Trustee to produce a witness, I considered it my duty to determine the availability of the witness, and then I would advise counsel that I would set a plenary hearing on whatever dates would be convenient to the witness.

Id. at ¶28. See also P-9, R-12.

Though believing himself "duty" bound to determine Mr. Oskierko's availability for a plenary hearing, and despite not

having heard back from Mr. Oskierko as requested in the voicemail Respondent left for him, Respondent issued his decision in the matter at the end of the next business day, Monday, July 22, 2019. Stipulations at ¶29.

In defense of his decision to conduct the additional independent research concerning the Trustee's daughter, Respondent relied on a theory of judicial notice, stating that "[e]ach of the facts set forth in the statement of reasons is based upon the use of judicial notice, as expressly permitted by N.J.R.E. 201 (c)." Id. at ¶30.

Respondent scheduled oral argument on the Trustee's recusal motion for September 24, 2019 and indicated that he would consider any objection to any of his findings of fact determined by judicial notice at that time. Id. at ¶31. On September 24, 2019, counsel and the parties appeared before Respondent for oral argument on the Trustee's recusal motion. Id. at ¶32. During oral argument, Respondent denied contacting Mr. Oskierko to discuss his certification. Id. at ¶33. The following colloquy between Respondent and the Trustee's counsel occurred:

> COUNSEL: So Your Honor is admitting that one of the reasons you contacted Mr. [Oskierko] was to discuss his certification and the information contained within the certification?
>
> RESPONDENT: No. I wanted to make sure he signed it.
>
> COUNSEL: So you had concerns about his signature?

RESPONDENT: No. I had concerns about the individual I reached out to was the person who signed it because they're (indiscernible) listed on mine.

COUNSEL: You're suggesting that another individual with the same name may have signed the certification?

RESPONDENT: I'm suggesting that there's (indiscernible). It looks like a father and son.

COUNSEL: Your Honor, I have no way of knowing whether that's true or not. I'll take your word for it that there are two Mr. [Oskierkos] who have the same name. I'm not sure it really matters, Your Honor.

RESPONDENT: It does.

COUNSEL: The point is that reaching out to a witness in connection - - particularly, when there's a pending motion and Your Honor is the trier of fact, concerning factual issues in dispute is simply a violation - -

RESPONDENT: What factual issue - - what factual issue in dispute was I seeing?

COUNSEL: You, apparently, had concerns about the falsity of the certification and the invoice that was attached to it is reflected in your supplemental submission.

RESPONDENT: Right.

COUNSEL: These are Your Honor's own words. I'm not adding anything here.

RESPONDENT: The point is, my concerns were - - my contact with him was strictly for scheduling purposes.

Id. See also P-12, R-9

Respondent denied the Trustee's recusal motion finding no basis for disqualification. Id. at ¶34.

On or about October 9, 2019, Plaintiff filed a motion to surcharge the Trustee, to which the Trustee objected, seeking

reimbursement for legal fees and costs incurred in the defense of the Trustee's recusal motion. Stipulations at ¶35. On or about October 15, 2019, the Trustee filed an interlocutory motion for leave to appeal Respondent's denial of his recusal motion, which the Appellate Court denied on November 18, 2019. Id. at ¶36. On or about November 29, 2019, the parties appeared before Respondent for oral argument on the Motion for Surcharge. Id. at ¶37. On or about February 13, 2020, Respondent issued an order granting Plaintiffs' surcharge request, finding that the Trustee's reimbursement and recusal motions were not for the Trust's benefit but rather for the Trustee's and his daughter's personal benefit. Id. at ¶38. Respondent ruled that the associated costs should not be borne by the Trust and surcharged the Trustee the amount of $22,755 for the Motion for Leave to Appeal an Interlocutory Order and $7,902.50 for time spent on the motion to recuse. Id. at ¶39. Respondent also opined that:

> Of concern to the Court is the lack of any fees reported as incurred for the reporting of these allegations of misconduct. For example, in the Brief for Interlocutory Relief to the Appellate Division, the Trustee noted at page 8 that "on July 31, 2019, counsel for both parties met with Assignment Judge Alberto Rivas in his chambers to informally discuss the court's *ex parte* communications and use of non-record information evidence in the Reimbursement decision." Nowhere is there any time charged for this meeting. There also appear to be gaps in the records provided. The Court therefore reserves the right to adjust the surcharges if there are other instances of fees relating to the motion for reimbursement and the denial of the recusal motion

> that are not disclosed in the materials provided to the Court pursuant to the Order as hereinafter set forth.

Id. at ¶40.

III. ANALYSIS

The burden of proof in judicial disciplinary matters is clear-and-convincing evidence. 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 factfinder 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).

As a general matter, Respondent's behavior in these instances implicates the Judiciary's core ethical principles of integrity and impartiality contained in Canon 1, Rule 1.1, and Canon 2, Rule 2.1, of the Code of Judicial Conduct. Further, the Committee finds that Respondent's specific actions in covertly obtaining non-record information to independently verify certain concerns in the case demonstrate violations of Canon 3, Rule 3.6(C) and Rule 3.8, of the Code.

Canon 1, Rule 1.1, requires judges to "participate in establishing, maintaining and enforcing, and . . . [to] personally

observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved."

Canon 2, Rule 2.1, requires judges to "act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and . . . [to] avoid impropriety and the appearance of impropriety."

Canon 3, Rule 3.6(C), prohibits judges, in the performance of their judicial duties, from manifesting, by words or conduct, any bias or prejudice, and from engaging in harassment, including but not limited to, bias, prejudice or harassment on the bases specified in Rule 3.6(A), and from allowing their staff to do so.

Canon 3, Rule 3.8, prohibits judges from initiating or considering "*ex parte* or other communications concerning pending or impending proceedings."

Count I (appearance of lack of candor)

The conduct at issue in Count I relates to Respondent's alleged lack of candor to the parties, their counsel, and the Committee concerning his reasons for attempting to communicate with Mr. Oskierko, *ex parte*. See P-9, P-12, P-14 thru P-17. In his Verified Answer, Respondent denied that his statements made during his processing of the case, along with those subsequently made to this Committee, created the appearance that he lacked candor. As such, Respondent denied that these actions constitute violations

of Canon 1, Rule 1.1, and Canon 2, Rule 2.1, of the Code of Judicial Conduct, as was charged in the Formal Complaint.

We find that Respondent's statements, both to those involved in the Hennessy Family Trust matter and to this Committee, did not clearly and convincingly rise to the level of lacking candor. First, Respondent advised the parties and counsel, via his issuance of his Supplemental Statement of Reasons, that he "attempted to call a Mr. Benjamin Oskierko before issuing [his] opinion," and that he "did so as a courtesy, and intended to inquire when he would be available, given the season for landscaping contractors, to come in *if [he] were to hold* a plenary hearing." P-9, pp. 2. Respondent explained further that his reason for contacting the third-party witness directly was "due to the suspicious nature of [the witness's] invoices submitted by Trustee and his daughter." Id. During oral argument, Respondent advised counsel that his voicemail to Mr. Oskierko was to attempt to confirm his identity and learn his availability for a potential plenary hearing.

While we understand the Trustee's view that Respondent provided multiple rationales for his contacting the third-party witness, we simply cannot find, by clear and convincing evidence on the record before us, that Respondent lacked candor in providing his explanations to the parties, counsel, and this Committee.

Count II (*ex parte* communication)

The circumstances at issue in Count II relate to Respondent's acknowledged conduct in calling third-party witness, Benjamin Oskierko, on July 19, 2019. Respondent, having acknowledged initiating a telephone call to Mr. Oskierko's mobile device and leaving a voicemail, was charged with violating Canon 1, Rule 1.1, Canon 2, Rule 2.1, and Canon 3, Rule 3.8, of the Code of Judicial Conduct. Rule 3.8 states that "[e]xcept as authorized by law or court rule, a judge shall not initiate or consider *ex parte* or other communications concerning a pending or impending proceeding."

Respondent denies that this conduct constitutes an impermissible *ex parte* communication and asserts in defense of these charges that his telephone call to Mr. Oskierko was permissible under the "scheduling" exception to the prohibition against *ex parte* communications. That exception, as contained in the comments to Rule 3.8 of the Code, provides, in relevant part, "settlement discussions, discussions regarding scheduling and a judge's handling of emergent issues are not considered to constitute *ex parte* communications in violation of this rule." See "Official Comment" [4].

In this regard, Respondent maintains that his purpose for initiating the telephone call to Mr. Oskierko was to ascertain Mr. Oskierko's availability for a plenary hearing. Given Mr.

Oskierko's profession, i.e. a landscaper, Respondent claims he was concerned, based on prior experience, that Mr. Oskierko's availability to testify would have been difficult during the summer season.

We find Respondent's reliance on the "scheduling" exception to Canon 3, Rule 3.8, of the Code, misplaced. A judge's *ex parte* communications with a witness or potential witness for "scheduling" purposes is fraught with ethical concerns and when done off-the-record and without counsels' knowledge or consent, as occurred here, may reasonably lead counsel and the parties to question the judge's integrity and impartiality. Indeed, apart from certain matters arising in the Family Part and requests for temporary restraining orders, we can conceive of no circumstance under which a judge would *need* to communicate *ex parte* with a witness, even on an emergent basis, given the various judiciary personnel available to the judge to place such a telephone call or engage in such a conversation. In the rare circumstance where such a communication may be warranted, those communications should occur on the record with notice to the parties and their counsel, neither of which occurred here.

Furthermore, Respondent argues in his defense that an impermissible *ex parte* communication did not occur in this circumstance because Respondent never met with, spoke to, or otherwise exchanged any information with Mr. Oskierko. Respondent,

relying on caselaw, argues that an *ex parte* communication requires (1) actual contact between parties, and (2) the improperly contacted party responds to the initial contact. See Rb9, citing State v. Morgan, 217 N.J. 1 (2013) and State v. Harley, No. A-2938-10T3, 2012 WL 5381783 at *3 (N.J. Super. Ct. App. Div., Nov. 5, 2012).[3] Respondent notes that neither occurred here. Respondent also argues that his "one-sided voicemail" left for Mr. Oskierko should not be considered an *ex parte* communication as there were no specific questions contained therein and his request for Mr. Oskierko to return his telephone call implicitly referred to his scheduling of a plenary hearing. Rb10. We disagee.

Canon 3, Rule 3.8, of the Code, by its very terms, prohibits not merely the act of communicating *ex parte*, but the *initiation* of that *ex parte* conversation. No exception to this prohibition exists in the Code for those circumstances in which the judge's initiation of the *ex parte* communication is unsuccessful. Such an exception would, in practice, nullify the prohibition. A plain reading of Canon 3, Rule 3.8, evinces Respondent's violation of its terms in attempting to communicate with Mr. Oskierko, *ex parte*, about the Hennessy Family Trust matter. Respondent may not now evade his responsibility for this ethical breach based on the fact

[3] Consistent with Rule 2:6-8, references to the Presenter's and Respondent's post-hearing briefs are designated as "Pb" and "Rb," respectively. The number following this designation signifies the page at which the information is located.

that Mr. Oskierko did not answer Respondent's telephone call. Notably, the cases on which Respondent relies do not address this circumstance or the Code of Judicial Conduct generally.

The Committee finds that Respondent's *initiation* of the telephone call to Mr. Oskierko, irrespective of any reciprocal communication from him, constitutes a violation of Canon 1, Rule 1.1, Canon 2, Rule 2.1, and Canon 3, Rule 3.8 of the Code of Judicial Conduct. A contrary interpretation of Rule 3.8, as Respondent advocates, would contravene the letter and spirit of the Rule and the Code generally, which is to be interpreted broadly to effectuate its purpose of maintaining public confidence in the judicial system. In re Blackman, 124 N.J. 547, 554 (1991) (finding that "rules governing judicial conduct are broadly construed, in keeping with their purpose of maintaining public confidence in the judicial system.") (Internal citations omitted).

Respondent, though denying any impropriety in this instance, asserted during the Committee's Formal Hearing that if given the opportunity to handle things differently, he would have referenced in his voicemail the scheduling of a plenary hearing and asked about the witness's availability to attend same. We find Respondent's assertions in this regard misguided. There are few, if any, circumstances under which a judge may initiate an *ex parte* discussion with a witness, potential witness, party, or lawyer involved in a matter pending before the court, particularly when

the judge presiding over the matter serves as both the trier of fact and law. Cf. In re Yaccarino, 101 N.J. 342 (1985)(finding a judge's *ex parte*, in-chambers, discussions with the parties impermissible and a violation of Canons 1, 2A, 2B and 3A(4) despite the parties' and their counsels' consent to those *ex parte* discussions).[4]

Respondent had available to him several options to satisfy himself as to the authenticity of Mr. Oskierko's certification short of initiating an *ex parte* telephone call with the witness, including denying the Trustee's reimbursement request, raising his concerns with the parties, or scheduling a plenary hearing. Respondent, by choosing instead to initiate an *ex parte* telephone call to Mr. Oskierko engendered the appearance that he lacked impartiality as to the Trustee and impugned the integrity of the judicial process in violation of the Code of Judicial Conduct. Given Respondent's long tenure on the bench, his conduct in this regard is inexplicable.

Count III (factfinding investigation / appearance of bias)

The conduct at issue in Count III concerning Respondent's impermissible independent factfinding investigation is partially the subject of a stipulation and relates to Respondent's

[4] Following the revisions to the Code of Judicial Conduct, effective September 1, 2016, the provisions of Canon 3A(4) are now reflected in Canon 3, Rule 3.8.

acknowledged conduct in instructing his law clerk to conduct an independent factual investigation to obtain personal information about the Trustee's daughter, without the parties' knowledge. Respondent was charged with relying on the information obtained and drawing negative inferences about the Trustee's credibility, which the Formal Complaint alleged created the appearance of a bias against the Trustee in violation of Canon 1, Rule 1.1, Canon 2, Rule 2.1 and Canon 3, Rule 3.6 (C) of the Code of Judicial Conduct. Respondent denies relying upon the facts revealed by his and his law clerk's investigation when drawing negative inferences about the Trustee's credibility. He likewise denies that he created the appearance of a bias against the Trustee.

Although there has not been any New Jersey judicial disciplinary matter directly addressing the limits of independent factfinding by jurists, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued a formal opinion on the topic, which interpreted the ABA Model Code of Judicial Conduct.[5] Issued on December 8, 2017, Formal Opinion 478 is predicated upon the belief, axiomatic to our legal system, that evidence should be tested through cross-examination

[5] Model Rule 2.9(C) states: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Comment [6] to Rule 2.9 clarifies that the "prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic."

and other adversarial methods of scrutiny.[6] The ABA's opinion stands for the proposition that judicial impartiality requires that a jurist consider only evidence presented on the record by the parties in court. In short, it is a matter of fundamental fairness. The opinion concludes as follows, which is instructive in the present matter:

> Stated simply, a judge should not gather adjudicative facts from any source on the Internet unless the information is subject to proper judicial notice. Further, and within the guidelines set forth in this opinion, judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information. The same is true of the activities or characteristics of the litigants or other participants in the matter.

Id. at 11.

Respondent failed to demonstrate judicial impartiality and incorrectly considered it his duty to ascertain additional information concerning the Trustee, and his daughter and her husband. Respondent subsequently used that information, which was not previously placed in the court's record, against the Trustee. A reasonable, fully informed person may construe this conduct as indicative of Respondent's bias against the Trustee and question the legitimacy of the judicial process. Judicial discipline in such circumstances is warranted to remediate that harm and restore

[6] At the time this opinion was issued, 31 states had adopted the Model Code's Rule 2.9(C) either verbatim or with substantially similar language.

the public's confidence in our court system. Cf. In re Advisory Letter No. 7-11, 213 N.J. 63, 75 (2013) (recognizing that "even a 'righteous judgment' will not find acceptance in the public's mind unless the judge's impartiality and fairness are above suspicion."). See also Goldfarb v. Solimine, No. A-3740-16T2, 2019 N.J. Super. LEXIS 99 (App. Div. June 26, 2019).

Respondent's reliance on the doctrine of judicial notice in defense to these charges is misplaced. Indeed, Respondent failed to properly employ judicial notice under New Jersey Rule of Evidence 201. N.J.R.E. 201 (a) through (c) permit the use of judicially noticing laws and facts and provide a court with the ability to take judicial notice on its own. N.J.R.E. 201 (e) provides that a court may take judicial notice *before* notifying a party, so long as the party is afforded an opportunity to be heard on the matter. Here, Respondent advised the parties about his obtaining and using information from outside the record only *after* Trustee filed a motion for disqualification on August 8, 2019, based upon, in part, Respondent's use of non-record information in connection with his reimbursement opinion issued on July 22, 2019. Although Respondent, in an email, informed the parties to advise of "any errata" in his decision[7], the parties were not yet aware of Respondent's later conceded factfinding, with the assistance of

[7] See P-9 at pp. 3.

his law clerk, which included his law clerk's verbal verification with the public registrar for vital statistics and access and use of real estate transaction records, tax records, and the Division of Consumer Affairs. Respondent's offer to the parties to advise the court of "any errata" cannot reasonably be construed as an opportunity to be heard on the issue of facts obtained from independent research, especially considering the parties were not yet informed of how Respondent obtained this information.

The evidence of record demonstrates, clearly and convincingly, that Respondent violated Canon 1, Rule 1.1, Canon 2, Rule 2.1, and Canon 3, Rule 3.6(C) and Rule 3.8 of the Code of Judicial Conduct. Given this conclusion, the sole issue remaining is the appropriate quantum of discipline. In our consideration of this issue, we are mindful that the primary purpose of our system of judicial discipline is to preserve the public's confidence in the integrity and independence of the judiciary, not to punish an offending judge. In re Seaman, supra, 133 N.J. at 96 (1993). Relevant to this inquiry is a review of both the aggravating and mitigating factors that may accompany judicial misconduct. Id. at 98-100.

The aggravating factors to consider when determining the gravity of judicial misconduct include the extent to which the misconduct demonstrates a lack of integrity and probity, a lack of independence or impartiality, misuse of judicial authority that

indicates unfitness, and whether the conduct has been repeated or has harmed others. Id. at 98-99.

Factors considered in mitigation include the length and quality of the judge's tenure in office, the judge's sincere commitment to overcoming the fault, the judge's remorse and attempts at apology, and whether the inappropriate behavior is susceptible to modification. See In re Subryan, 187 N.J. 139, 154 (2006).

The Committee finds that Respondent's failure to concede any impropriety regarding his use of non-record information to form a basis for his ruling against the Trustee's motion to aggravate his misconduct. Furthermore, this Committee previously disciplined Respondent[8] in 2017 by way of private letter of caution for his inappropriate demeanor on the bench while communicating with a *pro se* litigant in a discourteous manner.

In mitigation, the Committee recognizes Respondent's lengthy period of committed service to the bench – nearly 20 years. The Committee received and reviewed two character letters submitted by attorneys; the first worked with Respondent in private practice prior to his taking the bench and the second appeared before Respondent and complimented his judicial abilities.

[8] Respondent's incorrectly states on page 31 of his Brief dated August 26, 2021 that he "has never had prior accusations of ethics violations made against him."

IV. RECOMMENDATION

For the foregoing reasons, the Committee recommends that Respondent be publicly reprimanded for his misconduct.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

December 13, 2021 By: /s/ Virginia A. Long
Virginia A. Long, Chair

Stephen Skillman, Vice Chair, and Edwin H. Stern did not participate