

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel, : Case No. 2010-0062
 :
 Relator, :
 :
 v. : On Appeal from the Board of
 : Commissioners on Grievances
 : and Discipline of the
 Judge Daniel Gaul, : Ohio Supreme Court
 :
 Respondent, :
 :
 : Board of Commissioners
 : Case No. 09-006

RESPONDENT JUDGE DANIEL GAUL'S OBJECTIONS TO THE FINAL REPORT OF
 THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Richard C. Alkire (0024816)
Dean Nieding (0003532)

Jonathan E. Coughlan, Disciplinary Counsel
Joseph M. Calgiuri, Asst. Disciplinary Counsel

Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Boulevard
Cleveland, Ohio 44131-2335
Telephone: 216-674-00550
Facsimile: 216-674-0104
r_alkire@earthlink.net
d_nieding@earthlink.net

Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, OH 43215-7411
Telephone: 614-461-0256
Facsimile: 614-461-7205
Joseph.Caligiuri@sc.ohio.gov

Counsel for Respondent

Counsel for Relator

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LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
 250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
 (216) 674-0550 • Fax: (216) 674-0104

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INTRODUCTION

Respondent Judge Daniel Gaul ("Respondent") hereby submits his objections to the Final Report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court ("the Opinion," App. A) which increases the recommended sanction of the Panel. The Panel, after hearing the testimony of ten witnesses and receiving exhibits admitted during the Hearing concerning the disciplinary rule violations alleged and certain mitigating factors, recommended that Respondent be publicly reprimanded in connection with the disciplinary Complaint brought by Disciplinary Counsel.

Because the Board erroneously increased the recommended sanction of the Panel, and because the Panel failed to completely inform the Board about substantial, significant facts adduced at the hearing or erroneously ignored, Respondent respectfully requests that this Honorable Court either dismiss this Complaint or, at the very least, impose the sanction of a public reprimand which is more appropriately warranted by virtue of the surrounding facts and circumstances applicable to this matter.

The Panel's report, to a great extent, hinges upon the legal conclusion that the information relied upon by Respondent in connection with the rulings he made in open court on November 30, 2007, including granting a mistrial, attributing the delay of the proceedings to the criminal defendant, granting a trial continuance, enforcing a witness subpoena through the issuance of a bench warrant and ultimately his recusal, was not properly before him. The Panel's repeated reference to the lack of an "evidentiary hearing" as the predicate for the various judicial Canon and professional conduct rule

violations, as well as the Board's increase in sanction, is at the heart of Respondent's objections.

STATEMENT OF THE CASE AND FACTS

A. Procedural History of Disciplinary Proceeding

The instant disciplinary matter arises from words spoken by Respondent on the record during official court proceedings of November 29 and 30, 2007 in the case of *State of Ohio v. Jeffrey Robinson*, Case No. CR-07-497572-A, then pending on Respondent's criminal docket, and words spoken to the media in chambers after the in-court hearing which took place on December 30, 2007 in the aforementioned case.

Relator asserted in his Complaint that Respondent violated Canon 2 (A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary); Canon 3(B)(5) (A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice) and Canon 3(B)(9) (While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing). Also, Relator asserted that Respondent violated Prof. Cond. R. 8.4(d) (It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice). Respondent denied violating these Canons and Rule of Professional Conduct.

Prior to the Hearing, Relator moved to exclude, *inter alia*, the testimony of Respondent's proposed expert witnesses, former judge Richard Lillie ("Lillie"), former

judge Robert Glickman (“Glickman”), Cleveland Metropolitan Bar Association President Mary Whitmer (“Whitmer”) and attorney Subodh Chandra (“Chandra”), as well as the jailhouse recordings of conversations between felon/grievant Jeffrey Robinson (“Robinson”) and the witness/victim Mozelle Taylor (“Taylor”) in which they conspired to prevent the elderly, disabled victim/witness, 83-year-old Emma Ingram (for whom Taylor was the caregiver) (“Ingram”) from testifying.¹ The Panel Chair in his Order on Pre-Trial Motions filed September 16, 2009, five days before the formal hearing on the merits was scheduled to begin, *inter alia*, ordered that expert testimony from Respondent’s witnesses would not be permitted, since “...the members of the Panel, the Board, and ultimately the Supreme Court possess knowledge of the Code of Judicial Conduct which is adequate to decide whether the evidence clearly and convincingly establishes that Respondent engaged in misconduct as alleged in the Complaint.” (App. B, p. 5)

Further, the Panel Chair prevented Respondent from introducing the jailhouse recordings, because such conversations were “...irrelevant to the issues before the Panel.” (App. B, p. 6)²

¹ A Cuyahoga County Grand Jury, on August 27, 2009, indicted Taylor for two counts of obstructing justice and two counts of intimidation of crime victim or witness and Robinson for two counts of intimidation of crime victim or witness. Case No. CR-09-528048 A & B, Court of Common Pleas, Cuyahoga County, Ohio.

² Despite ruling that such conversations were irrelevant, because they were not known by Respondent at the time he made the statements on and off the record which are the subject of the instant disciplinary Complaint, the Panel did permit testimony from Det. Daugenti concerning matters which had never been brought to the attention of Respondent, especially as it relates to the elderly victim/witness Ingram’s alleged lack of desire to testify as a witness at the hearing or that she had not been prevented from testifying at the hearing by the conduct of either Taylor or Robinson. (Tr. 337-340) Further, the Panel’s report unfairly emphasized such testimony of Det. Daugenti. (App. 1, para. 14, 23, 31, 35) In fact, Respondent was under the impression that Ingram

The formal hearing on the merits of Relator's Complaint began on Monday, September 21, 2009, in Cleveland, Ohio. After hearing opening statements by the parties (Tr. 18-36), Relator commenced its case by presenting foundation witnesses for broadcasts aired on Channels 3 and 19 in connection with the November 30, 2007 court proceeding involving Respondent. (Tr. 37-64)

Thereafter, in his case in chief, Realtor's counsel called Respondent on cross-examination, Robinson's defense attorney John Parker ("Parker"), Detective Joseph Daugenti, the investigating detective in connection with the alleged felonious assaults by Robinson upon Taylor and Ingram ("Det. Daugenti"), and Assistant Cuyahoga County Prosecutor Ralph Kolasinski present during the proceedings of November 27 through November 30, 2007 ("Pros. Kolasinski"). After certain of Relator's exhibits were admitted into evidence, Respondent's case in chief commenced.

In this regard, on Tuesday afternoon, September 22, 2009, Respondent presented the testimony of his Bailiff Mary Jo Simmerly, Emma Ingram's son Curtis Ingram and Timothy Fadel, one of the four Prosecutors assigned to the *State of Ohio v. Jeffrey Robinson* case.

Thereafter, on Wednesday morning, September 23, 2009, Respondent presented the testimony of Whitmer, Glickman, Lillie, Chandra and began the direct

(footnote continued) had been dumped at the dialysis center on Friday, November 30, 2007, learning such information just before he took the bench and made the statements attributed to him on the record. (Tr. 169) Det. Daugenti admitted in his testimony that he did not speak to Respondent about the matters attributed to him by the Panel (Tr. 355), and further, the person to whom he spoke, Pros. Kolasinski, likewise could not testify that he told Respondent any of that information. (Tr. 485) Thus, the Panel erroneously emphasized facts not known to Respondent and refused to permit into evidence the jailhouse recordings which corroborated exactly what Respondent had concluded based on the information available to him on and before November 30, 2007.

examination of Respondent.

During the testimony of Glickman, Lillie and Chandra, Respondent was precluded from presenting their expert testimony in connection with the following three questions:

1. Do you have an opinion to a reasonable degree of certainty as to what effect comments such as Respondent's on November 29 and 30 would reasonably be expected to have on the outcome or fairness of the pending matter?
2. Do you have an opinion to a reasonable degree of certainty as to whether the comments made by Respondent on November 29 and 30, both on and off the record, violated Canon 2, Canon 3(B)(5), Canon 3(B)(9) and Rule of Prof. Cond. R. 8.4(d).
3. Do you have an opinion to a reasonable degree of certainty as to whether or not a judge's expression of rulings on matters before him or her and the factual findings related thereto could ever constitute bias and prejudice as those terms are used in Canon 3(B)(5).

As to each of those three questions, each of Respondent's three expert witnesses was not permitted to provide answers. (Glickman, Tr. 745-746; Chandra, Tr. 800-802; Lillie, Tr. 843-844) It is noteworthy the Panel Chair found that these witnesses were qualified to render such expert opinions. (Tr. 744, 798-799, 841-842)

The formal hearing finally concluded on November 11, 2009 in Columbus, Ohio, at which time Respondent's direct examination and follow-up examinations by Relator and the Panel concluded.

Upon admitting Exs. A, E through HH (Ex. DD was not offered) (Tr. Vol. 3, pp. 173-174),³ Respondent then proffered certain additional exhibits, including the transcripts of the jailhouse recordings (Vol. 3, Tr. pp. 178-179), Exs. B, C and II (an Affidavit from attorney Mark Stanton showing that Assistant Disciplinary Counsel Joseph Caligiuri contacted him after the formal hearing in connection with offering assistance in Stanton's defense of Robinson to the subsequent indictment for obstructing justice arising from the jailhouse conversations Robinson had with Taylor prior to November 30, 2007, *inter alia*, Cuyahoga County Common Pleas Case No. CR-09-528048).⁴

Finally, it should be noted that Respondent moved to dismiss Relator's Complaint against him both at the conclusion of Relator's evidence (Tr. 527), and also at the conclusion of all of the evidence (Tr. Vol. 3, p. 181) While the Panel overruled the Motion at the conclusion of Relator's evidence, it chose not to rule on the same before the parties presented their closing arguments (Tr. Vol. 3, pp.182-278). The Panel chose to take the second Motion to Dismiss under advisement, but its denial is implied

³ The court reporter for the November 11, 2009 formal hearing in Columbus denominated the transcript for that day as Volume 3 and began numbering it with "1." The proceedings took place on four separate days, September 21, 22 and 23 (with the transcript in two volumes sequentially numbered 1-684) and November 11, 2009. References to the transcript created in connection with the November 11, 2009 final day of the formal hearing will be cited as ("Tr. Vol. 3, p. ____")

⁴ While Respondent asserted as an affirmative defense in his Answer the inordinate delay of more than one year associated with the investigation of the grievance instituted by Robinson, Respondent was precluded from presenting the testimony of either Jonathan Coughlan or Joseph Caligiuri in connection with the extensions of time sought during the investigation of this matter. (Tr. Vol. 3, pp. 179-180) Their testimony was also the subject of a Motion *in Limine* which in connection therewith the Panel Chair precluded such testimony at the time of the formal hearing. This testimony and the actual extensions, although proffered, will not be further argued in connection with Respondent's objections to the Final Report of the Board, due to the page limitation associated with this Brief.

by virtue of the Findings of Fact, Conclusions of Law and Recommended Sanction embodied in the Final Report of the Board. (Tr. Vol. 3, pp.180-182)

B. Criminal Case of Jeffrey Robinson

On November 27, 2007, the case of *State of Ohio v. Jeffrey Robinson*, CR-07-497572-A, was called for trial. The case involved a multi-count indictment against Robinson, including two counts of aggravated burglary, two counts of felonious assault and one count of felonious assault with a weapon alleged to have occurred on March 17, 2007. The two victims in the underlying criminal matter were the elderly, disabled Ingram, who was a dialysis patient at the time, now deceased, and her caregiver Taylor. It was alleged that Robinson struck Ingram with a chair and broke her hip and then kicked her in the face while she was on the ground. (Tr. 349) The victim Taylor was the caregiver of Ingram and controlled her whereabouts. Taylor was also a friend of Robinson. (Tr. 660)

Ingram and Taylor lived at the same residence and had been subpoenaed by the State to appear as witnesses on behalf of the prosecution at the time of trial. (Ex. A, p. 9-10)⁵ Both Ingram and Taylor had numerous contacts with the Cleveland Police Department prior to trial, and Det. Daugenti had prearranged their transport to the court for their appearance. (Tr. 173-174, 364)

Robinson's criminal matter was called for trial on Tuesday, November 27, 2007. (Ex. A, p. 3) After pretrial matters were discussed in open court and a plea was not forthcoming, the proceedings were concluded for the day. (Ex. A, p. 7)

⁵ References to Exhibits admitted during the formal hearing in the instant matter shall be cited as ("Ex. ___"). Relator's Exhibits were marked with Arabic numerals, and Respondent's Exhibits were marked with capital letters.

On Wednesday, November 28, 2007, the State conducted its *voir dire* examination, after which the case was recessed until Thursday, November 29, 2007 (Ex. A, p. 8) During the course of that *voir dire*, Respondent emphasized to the jury that the defendant was presumed innocent and that he was contesting the Indictment. He also indicated that the State must prove each and every element of the charge beyond a reasonable doubt, and then he read the reasonable doubt charge to the jury. (Tr. Vol. 3, pp. 27-28, 30-33)

At the beginning of the proceedings on Thursday, November 29, 2007, the court was informed by Pros. Kolasinski that the victims/witnesses, Ingram and Taylor, both under subpoena, were not at their place of residence at 8:30 a.m. that morning for transport to the court as had been prearranged with Det. Daugenti. (Ex. A, pp. 9-10) Because of the missing victims/witnesses, the State requested the Court to stop jury selection and allow a day to find the victims/witnesses. (Ex. A, p. 10)

At the time of the State's motion for a continuance, Respondent was aware of medical records of Taylor pertaining to medical care and treatment which she received on March 17, 2007, the day she was allegedly assaulted by Robinson. These records revealed that Taylor stated to medical care personnel on March 17, 2007 that she had been smoking crack and drinking beer with Robinson, that a fight erupted over money, that Robinson assaulted the 83-year-old Ingram and that Robinson was a friend of Taylor. (Tr. 144, 170, 292-294, 660, 668-669; Tr. Vol. 3, p. 20) Additionally, the Court was aware of a statement Taylor had given to the Cleveland Police on March 13, 2007 stating that she was the caregiver for Ingram and that Robinson assaulted Ingram by

striking her with a chair which broke her hip and kicked her in the face while she was on the ground. (Tr. 886; Tr. Vol. 3, p. 12)

Additionally, the Court's file contained Robinson's LEADS report attached to a rap sheet or record of the defendant's prior criminal cases, docket sheets pertaining to Robinson's prior criminal cases and a presentence investigation report from prior felony convictions. (Tr. 871) Robinson's LEADS report indicated caution due to prior attempted aggravated murder arrest and felonious assault, and further warned of violent tendencies. (Tr. 872, 881) The docket sheets also set forth a prior aggravated assault conviction and three convictions for aggravated burglary, as well as prior arrests for rape and kidnapping. (Exs. E-K) The docket sheets indicated that in at least one previous criminal proceeding against Robinson, the case had to be dismissed because the victim or witness did not show up for trial. (Ex. J, Tr. 877-878) In another then recent criminal case from 2006, the docket sheets also revealed that a bench warrant had to be issued for the attendance of a witness at the rape trial. (Ex. K, Tr. 878-879)

In ruling upon the State's motion for a continuance, Respondent stated that:⁶

The point is this: This is not just an 83 year old woman who can just go somewhere on her own. And given the fact that the alleged victim in this case Mozelle Taylor is a drug abuser and has had a relationship with this defendant, I am very suspicion [sic].

I mean, this isn't a case that has to be researched. It's just a case of common sense and Psychology 101, and I am concerned Mozelle Taylor may be trying to manipulate this trial and prevent this 83 year old woman from being here, and I will not permit that to happen under any circumstances whatsoever.

⁶ The specific conduct alleged by Relator to constitute violations of the Code of Judicial Conduct and/or the Ohio Rules of Professional Conduct in the Complaint all comprise statements made by Respondent which are set forth in bold in the quoted portions which follow of the transcript, in-chambers media interview and discussions in chambers with counsel.

So I'm making a record. I'm laying the cards on the table. I'm telling the transcript what is going on for purposes of appeal so if anybody is reviewing this transcript, they have a full flavor of the relationship between one of the victims and the defendant in this case.

And I'm also going to say this. Jeopardy is not attached. I will grant the State's motion for a continuance. I'm going to note defense's objection. John, if you want to make an objection I will permit you to after my comments.

I will also do this. If the witness is not here tomorrow, I will grant a mistrial, issue a warrant for Mozelle Taylor immediately. She will be arrested, incarcerated, and held in county jail until this case goes to trial, and I don't care if it's a year from now.

We may have speedy trial issues, and the other thing I want to say is this. If there is anybody involved in this case who was involved in what is obstruction of justice, **I will see to it that case will be indicted. And if that case comes to me, I will see to it that person gets maximum consecutive time.** I let no one manipulate the system of justice. I will not permit that to occur in this case.

This case will go to trial. If we have a speedy trial issue that prevents us ending disposition of the case, I anticipate at that point the State of Ohio will dismiss with the issue to reindict. There is a lot of issues to hear. (Ex. A, pp. 11-13)

Parker, on behalf of Robinson, objected to the Court's continuance. Thereafter, the Court stated:

The obvious problem with going forward with jury selection is jeopardy attaches. If the witnesses absent themselves for even a brief period of time, the defendant's case has to be dismissed and he will receive a not guilty, and I will not permit that to occur.

The witnesses need to be heard. What they say once they get here is something I can't control. But the witnesses must appear in the courtroom.

This Court has taken this position not only with this case, but particularly with other cases. And I have in fact gone out and arrested victims, and I'm prepared to arrest the victim in this case, and we'll see how long this 83 year old woman stays away from the house that she hasn't left for years because she's under care 24/7 and had been with her Alzheimer husband.

The Court is very suspicious. We will look into the matter. At the appropriate time we will reconvene, resuming the trial tomorrow morning at 9:30.
(Ex. A, pp. 14-15)

On Friday morning, November 30, 2007, in an off-the-record discussion in open court with all parties present, Respondent was informed by the prosecutors that the victims/witnesses, Ingram and Taylor, could not be found. (Tr. Vol. 3, p. 48) At that point, Respondent called the attorneys for the parties into chambers for a discussion regarding the missing victims/witnesses. Before going into chambers, Respondent requested that his bailiff put out an Amber Alert⁷ to locate victim/witness Ingram. (Tr. Vol. 3, p. 49) During the in-chambers discussion which followed, Respondent advised all counsel that he intended to recuse himself, and that in the context of locating the missing victims/witnesses, **“we are all on the same team.”**⁸ The only evidence of what occurred during the in-chambers discussion on November 30, 2007 comes from the testimony of Respondent (Tr. Vol. 3, pp. 53-54) and Parker (Tr. 234), as Pros. Kolasinski, the other person present, had no recollection of what occurred during that in-chambers conference. (Tr. 421)

Thereafter, in open court with the media present, but not with the venire present, the following proceedings occurred in which Respondent enlisted the media's help in

⁷ Although the Panel faults Respondent for “misusing a public service when he directed his bailiff to contact the media and tell them that he was issuing an ‘Amber Alert’” (App. A, para. 61), no evidence exists that an actual Amber Alert was ever issued, since one was not. Obviously, Respondent was using the term in a colloquial sense to mean obtaining the assistance of the media to publicize the plight Respondent perceived was facing the missing victims/witnesses. Indeed, although specifically addressed in Footnote 6 of the Opinion, p. 26, absolutely no evidence was presented by Relator that either a local emergency alert program or statewide emergency alert program was activated in this matter. **Thus, it was error for the Panel, in the absence of any such evidence, to base a Canon 2 violation, in part, on the misuse of a public service that was never activated.**

⁸ At the time of the formal hearing, Parker admitted that what Respondent said was “we are all on the same team,” not “I am on the same team as the state” as he had previously asserted in his Affidavit supplied to Disciplinary Counsel before the Complaint was filed. (Tr. 280-281, Ex. FF)

locating the victims/ witnesses and explained on the record his reasons for the decisions he made as follows:

We've been selecting a jury and we've had a very unusual occurrence.

I've called my friends in the media, and I've asked them to be here because I thought we were going to need their help, and I still do think we need their help to find witnesses in this case. (Ex. A, p. 16)

* * * * *

Ladies and gentlemen, I want to make a record, because it's very important in this case. Jeffrey Robinson, this defendant, is charged with aggravated burglary in two counts of the indictment, two counts of felonious assault in counts three and four, and a count of felonious assault in count five.

The victim in this case -- one of the victims in this case is Emma Ingram. I don't know her. I haven't met her. I don't know where she lives, but I do know that she's 83 years old and allegedly had her hip broken by this defendant.

The Defendant: She didn't have her hip broken by me.

The Court: **I'm going to tell you something right now. I'm not here to hear from you, and if you make one more comment to me, I'm going to have you bound and gagged.**⁹

Mr. Parker: I object to this, your Honor.

The Court: Okay, you may object to this all you want, okay. Your client will not interrupt the Court.

Mr. Parker: Thank you.

The Court: As I was saying, the defendant is charged with breaking the woman's hip, and an aggravated burglary.

The other alleged victim in this case is Mozelle Taylor. Mozelle Taylor. Mozelle Taylor is allegedly a friend of the defendant. When she appeared at the hospital, that's exactly what she said.

⁹ The Panel, in the Opinion at para. 63, **erroneously based** Respondent's violation of **Canon 3(B)(9), in part, on this statement**. As the testimony of Respondent indicated, it is necessary for a trial court to keep order during proceedings. (Tr. 63-64) Further, such practice is not prohibited by law. *Illinois v. Allen* (1970), 397 U.S. 337, 90 S.Ct. 1057. (The United States Supreme Court held that dignity, order and decorum are essential to the proper administration of criminal justice and a trial judge may constitutionally bind and gag a disruptive defendant.)

Mozelle Taylor indicated to the Cleveland Police that on March 13th of 2007, that this defendant Jeffrey Robinson assaulted the 83 year old woman and struck her with the chair and broke her hip and kicked her in the face while she was on the ground.

Now Mozelle Taylor unfortunately is the caretaker for the 83 year old woman. Mozelle Taylor became familiar with the 83 year old woman when Mozelle, the caregiver, provided the care to Emma Ingram's aged husband with Alzheimer's disease.

We know that when Mozelle Taylor, the caregiver, presented at the emergency room on March 13th of 2007, she admitted to the medical health professionals that she had been smoking crack with this defendant and drinking six beers, and that a fight erupted over money, and that Jeffrey Robinson assaulted the aged victim Emma Ingram. Those are the allegations. That's what the indictment was about.

This defendant is presumed innocent. We were involved in the trial of this case. We were involved with selecting a jury that began on Wednesday. We had to recess the case yesterday, however, because the 83 year old woman Emma Ingram went missing.

Despite the fact that she had had numerous contacts with the Cleveland Police Department and Detective Joseph Daughenti, D-a-u-g-e-n-t-i, who appeared here for trial, Emma Ingram, the 83 year old woman who was disabled, was not present yesterday at a prearranged meeting at 8:30.

The police went to her home and they were unable to locate her. They were also unable to locate Mozelle Taylor. We recessed the trial, because once a jury is impaneled, jeopardy attaches. And once that occurs, this defendant cannot be tried on those charges again if we don't have the witnesses, and the Court has to dismiss the case. That is what would happen.

I, therefore continued the case yesterday. And as of 9:30 this morning, we have been unable to locate this 83 year old woman. She was not available to the police. She was not at her home when they stopped there last night.

And I should indicate for the record that yesterday, because both of these witnesses, Emma Ingram and Mozelle Taylor were personally served with a subpoena, because Mozelle Taylor had contact with the Cleveland Police Department, because Mozelle Taylor was controlling the whereabouts of the 83 year old woman, I issued an arrest warrant for Mozelle Taylor yesterday. And there is currently pending an arrest warrant on Mozelle Taylor.

So as of 9:30 this morning as we prepared to try this case, we did not have witnesses, and we have some very tough decisions to make. Because if this case was dismissed after we impanel the jury, we cannot retry the defendant.

But perhaps more importantly, if this case was dismissed, Jeffrey Robinson has to be returned to our community and I am not prepared to do that at this time, because we have issues as to the care and protection of the 83 year old woman. And as of 9:30 this morning, we have no idea where she is.

Now we have learned within the last 45 minutes that Emma Ingram is today in dialysis, but we still cannot find Mozelle Taylor. Mozelle Taylor is a most crucial witness in this case.

And I have to step out of my role now as being a fair and impartial Judge and indicate that I have become an advocate in this case, an advocate for justice. Because justice may be blind, but justice has a heart, and it has a soul, and it has common sense.

And I would bet my life on the fact that you, sir, have been involved in obstruction of justice --

Mr. Parker: Objection, your Honor.

The Court: -- through Mozelle Taylor.

Mr. Parker: Objection, your Honor.

The Court: **Okay. And I also would bet my life, if I had to right now, that you have been involved in a technical kidnapping through Mozelle Taylor.**

Mr. Parker: Objection, your Honor.

The Court: That's what I would bet.

Mr. Parker: Objection, your Honor.

The Court: You may object. You may object. That is this Court's finding, okay. It's not binding. **And I'm going to recuse myself from this case, because obviously I cannot be fair and impartial anymore, okay.**

But I felt it important to step out of my role as a Judge and to become an advocate to protect the well-being of an 83 year old woman who has no one else in this world.

And if nothing else, even if he's not convicted, we'll know this. We'll know where Emma Ingram is, and she will be in safekeeping, because she's no longer going to be provided care by Mozelle Taylor, your friend who was smoking crack with you. She's not going to be in that household. Because Mozelle Taylor is going to be in the county jail and she's going to sit in the county jail until this case is tried.

What's more important than me stepping off this case is that justice is done. There are 33 other wonderful Judges in this building that are willing to try you, and when you go to trial, I won't be surprised if you face obstructions (sic) of kidnapping.

Mr. Parker: Objection, your Honor.

The Court: Okay. So what I am prepared to do is this. I am going to recognize the State of Ohio at this time. Mr. Zimmerman.

Mr. Zimmerman: Thank you, your Honor. Your Honor, as the State has already stated to this Court, we don't believe that the Court has to recuse himself from this case. We think that this Court can continue to go forward. I understand the Court's position, though.

If the Court is going to declare a mistrial at this time and have the case spun off to another Judge, I understand your ruling. We don't believe that that is necessary at this time, but if that is the Court's decision, that is fine, and we will continue to follow this case no matter to what courtroom this case goes.

The Court: In terms of securing the witness Mozelle Taylor, does the State of Ohio have a position?

Mr. Zimmerman: We have detectives out there already trying to locate them. We will be continuing to locate them. I'm going to, along with the detectives that are working the case already, I'm going to employ some of my investigators from the county prosecutor's office. They will be out there, and we will attempt to locate her this weekend and make sure she is safe and secure in a place where the defendant or other people that attempted to influence her won't be able to get to her.

The Court: And the woman who has been the caretaker, the caretaker who has been capiased, you know technically does the State make a motion to continue the case until she can be incarcerated?

Mr. Zimmerman: We would, your Honor, and as soon as we have information we will bring that to the Court's attention.

The Court: All right. Thank you, very much. John?

Mr. Parker: Thank you, your Honor. On behalf of Mr. Robinson, your Honor, we object to any continuance whatsoever. We're prepared to try this case.

Jury selection began on Wednesday. We were prepared to continue with jury selection yesterday. Over my objection you continued the case at the State's request.

It was my understanding this morning the prosecutor was prepared to dismiss the case, until they recently found Emma Ingram. And we are prepared to go forward. We want to select a jury. We are asking that you bring the jury up and let us continue selection, your Honor.

The State has other witnesses which have been present and available to testify. EMS personnel have been here. Cleveland police officers have been here. They can proceed, your Honor.

This Court is preventing my client from exercising his constitutional right to a timely and speedy trial. We do not think that's proper, with all due respect. We are asking to go forward.

There are 22 citizens that have answered the call for jury duty. They're waiting to perform their service. They're asking you to bring them up here, and let's try this case.

The Court: All right. Thanks John, I appreciate that.

You know, what is paramount, even more important than a speedy trial, even more important than the effective administration of justice, what's even more important is the integrity of the system. **And there are so many unusual circumstances that have occurred during this case, including the role I had to take on to address this issue.**

That the only appropriate thing to do at this point to safeguard the integrity of the criminal justice system in this case is for this Court to recuse itself on Monday, to write a letter to Nancy McDonald [sic] and asking the Presiding Administrative Judge to re-assign another Judge to take this case over.

In the meantime, Mr. Robinson will be held in the county jail. In the meantime, I'm challenging the law enforcement of the community and of the City of Cleveland, and in Cuyahoga County and in the State of Ohio to find Mozelle Taylor and have her incarcerated so that she may be present so that we may determine when she is sitting in a county jail and being interviewed by the Cleveland Police Department, **whether this defendant was involved in the disappearance of this 83 year old woman yesterday.**

And I suspect when all said is done, that's exactly what they are going to find out, because I have your rap sheet right here. (Ex. A, pp.17-28)

Thereafter, Respondent spoke to the press in chambers, during which time he stated:

. . . sometimes you get checked into the boards and sometimes you gotta check somebody else into the boards, but I'm not going to sit idly by and dismiss this case. If I dismiss this case, Jeffrey Robinson wins and he could be out on the streets of our community tonight. He could be at this elderly woman's house again, smoking crack again. And that's not going to happen on my watch. . . (Tr. 149-151; Tr. Vol. 3, pp. 113-114)

While the Panel in the Opinion emphasized certain aspects of this exchange, as set forth *supra*, other statements are noteworthy as well. First, Respondent did indicate on the record that Robinson was presumed innocent. (Ex. A, p. 19) Respondent then went on to explain on the record the facts which had been brought to his attention through representations on the record in the presence of both lawyers by Pros. Kolasinski concerning the Cleveland Police Department's efforts to secure the attendance of the victims/witnesses. (Ex. A, p. 19-20) Respondent proceeded to explain the legal issues as he perceived them, the attachment of jeopardy after a jury is impaneled, among others. He explained that he had issued a bench warrant for Taylor's attendance given the information received concerning the efforts of the Cleveland Police Department to secure her trial attendance. (Ex. A, p. 20) He continued by stating the present whereabouts of the victims/witnesses based on information again provided to him by an officer of the court in the presence of other counsel. (Ex. A, p. 21) Respondent then placed on the record the conclusion that he had reached concerning the defendant's involvement in the present state of affairs in respect to the victims/witnesses. (Ex. A, p. 21-23)

In the process of stating these conclusions, he properly indicated that he was going to recuse himself from the case, having lost the ability to be fair and impartial. (Ex. A, p. 22) After this, the court permitted the prosecutor to make a comment. Significantly, Pros. Zimmerman did not believe Respondent needed to recuse himself at that time. (Ex. A, p. 24) Finally, Respondent afforded defendant's counsel to comment on the record as well. During the course of this proceeding, the Court made it clear that its comments concerning defendant's involvement in procuring the absence of victims/witnesses were "not binding." (Ex. A, p. 22) Obviously, the Court was conveying findings for purposes of the preliminary matters before him and not findings that would have any implication in a determination of guilt in connection with the commission of crimes or contempt. Ultimately, the case was continued so that it could be reassigned to another judge.¹⁰

Clearly, Respondent made every attempt to preserve the *status quo* as he ordered the defendant to be held in the county jail, indicated that he would recuse himself on Monday, denied a Motion to Dismiss the case with prejudice and declared a mistrial in connection with the jury panel that was being selected. Respondent indicated that jeopardy had not attached. (Ex. A, p. 28)

C. Respondent's Knowledge and Reasons

Respondent was aware of a variety of facts and circumstances from legally sufficient information present in the Court's file and/or brought to his attention during the court pretrial proceedings which the Panel was required to consider pursuant to the

¹⁰ It is important to note that Robinson's counsel filed a Motion to Dismiss based on this proceeding prior to his client's guilty plea to an amended count of the Indictment. (Tr. 249) Parker never asked the Court to rule on this Motion, and did not bring it up to the Court after filing it. (Tr. 303)

Preamble of the Code of Judicial Conduct. However, reading the Opinion leaves one questioning whether the Panel was present at the same hearing during which the testimony referred to *supra* was given.

In this regard, Respondent was aware of Robinson's extensive criminal history which included the following:

1. In Case No. CR-86-204968-ZA, he was charged with felonious assault with specifications, kidnapping with violence specification and assault. (Ex. E) He pled guilty to an amended Count 1, aggravated assault, a felony 4. (Exs. E, M)

2. On August 27, 1986, he was arrested and charged with escape with specifications and assault. On February 10, 1988, he pled guilty to assault and was subsequently sentenced to Ohio State Reformatory, Mansfield, Ohio for a term of six months. (Exs. F, N)

3. On October 10, 1986, he was arrested and charged with aggravated burglary with specifications, theft with specifications and possessing criminal tools with specifications. On February 10, 1988, he pled guilty to aggravated burglary with specifications. (Exs. G, P) Thereafter, he was sentenced to Ohio State Reformatory, Mansfield, Ohio for a term of 5 to 25 years. (Ex. G)

4. On June 19, 1987, he was arrested and charged with aggravated burglary with specifications and theft. (Ex. H) On February 10, 1988, he pled guilty to aggravated burglary with specifications.

5. On November 29, 1987, he was arrested and charged with aggravated burglary with specifications and aggravated robbery with specifications. Thereafter, on February 10, 1988, he pled guilty to aggravated burglary with specifications. (Exs. I, Q)

6. On December 14, 2003, he was arrested on a charge of domestic violence with prior conviction. (Ex. J) That case was set for trial on April 20, 2004, and on that date it was continued to April 21, 2004, because the victim was not in court. This entry was highlighted by Respondent's bailiff when she placed this docket sheet in the Court's file. (Tr. 589-596) Thereafter, the case was dismissed. (Ex. J)

7. On July 14, 2006, he was arrested on charges of rape, gross sexual imposition and kidnapping. This case went to trial, and during the course of trial, a bench warrant was issued for the witness. (Ex. K, p. 5) Again, Respondent's bailiff, highlighted this entry before placing this docket sheet into the Court's file. (Tr. 589-596)

Docket sheets for prior convictions were routinely placed in Respondent's criminal files in the event that the criminal defendant was incarcerated, a determination about the safe release of such defendant could be made. (Tr. 873) This is one of the first things Respondent considers in criminal cases given the overcrowded conditions of the Cuyahoga County Jail. (Tr. 870)

The April 27, 2004 entry reflecting "no victim," as well as the October 30, 2006 entries concerning the issuance of bench warrants, led Respondent to conclude that there was a pattern of Robinson's cases which were influenced by witnesses not appearing with one case being dismissed and the other case resulting in a not guilty verdict. (Tr. 880-881) Respondent also reviewed the rap sheet highlighted in three different colors, Robinson's LEADS report and a copy of the Indictment, all of which had been placed in the file. (Tr. 871, 874-876) This pattern, along with the serious nature of Robinson's recorded numerous arrests and multiple convictions for serious felonies for which he had been incarcerated, had an impact on Respondent. (Tr. 878)

Respondent was also aware of certain specific information concerning Robinson's case before he took the bench on November 27, 2007. In particular, he was aware of the serious nature of the charges; that there was an elderly victim; that it was a serious offense; that there was a serious criminal record; that the LEADS sheets indicated he had been considered for attempted murder and should be considered a dangerous individual, and that he was indeed a dangerous person and committed crimes of violence against people. (Tr. 292-296, 881)

He also had discussed with counsel for the parties information contained within the police reports and the medical records. (Tr. 883) In this regard, Respondent learned early on that caregiver Taylor was smoking crack and drinking beer with Robinson. To Respondent, this caused a huge concern for the elderly victim in Taylor's care. This caused him to be anxious about getting the case to trial as quickly as possible. (Tr. 883) Taylor admitted in the medical records that she had been abusing drugs and drinking alcohol. (Tr. 884-885) The case information sheet (Ex. CC) contained within the Court's file was reviewed by Respondent and the police report (Ex. DD) was seen by him, having been handed to him by the prosecutor during one of the pretrials. (Tr. 886)

The Cleveland Division of Police Case Information form indicated that "on 3/13/07, defendant stopped over the victim (sic) home and assault (sic) her by hitting her with a chair causing her to fall to the ground (sic) and break her hip. Defendant also kicked victim in her face and body, victim is 83 years old." (Ex. CC, p. 2) Further, Det. Daugenti, in his synopsis of the case found in the Cleveland Police Department Offense/Incident Report, indicated that:

On 3/13/07 around 2200 hours at 3199 E. 116 Street, Cleveland, Ohio 44120, the victim Mozelle Taylor is a nurse's aide to the second victim Emma Ingram. Mozelle lives at the above location along with Emma and Emma's husband. Mozelle's friend suspect Jeffrey Robinson came over to visit Mozelle on 3/13/07. Mozelle stated that Jeffrey had been drinking two (16) packs of beer. At this time Jeffrey flipped out and assaulted both Mozelle and Emma Ingram. Emma was on the couch when the altercation began. The suspect Jeffrey and Mozelle had been smoking crack with marijuana. Jeffrey was asked to leave, at this time Jeffrey grabbed (sic) a knife and attempted to stab Mozelle. Mozelle grabbed the knife to protect herself and her right thumb was cut. Mozelle and Jeffrey were struggling for the knife. At this time Mozelle fell to the floor and was cut on the right side of her chest. Jeffrey then began to kick 83 year old Emma Ingram in her face and side. When Emma attempted to get up Jeffrey grabbed a chair from the dining room and struck Emma with the chair.

I conferred with the victim Emma Ingram at University Hospital, at the time she was in the intensive care unit, she stated she had a broken hip. I then asked the victim what happened? The victim stated that Jeffrey was over the house and he took a chair and hit her with it which caused her to fall to the floor and break her hip. I then showed her of (sic) BMV photo of Jeffrey of which she positively identified as the one who struck her with the chair.

I interviewed the victim Mozelle Taylor, she stated that Jeffrey did come over, she asked Jeffrey to leave that is when Jeffrey went crazy. Jeffrey was out of the house, when he came back in and grabbed the knife. Mozelle has not appeared for several statement dates. Another statement date is set up for 6 (13) 07.
(Ex. DD)

In addition to the police reports, Respondent discussed with counsel the details of what was alleged in order that the lawyers would have an indication of his feelings as to what an appropriate sentence might be in the event that the prosecutor and defense attorney were able to agree to a plea. (Tr. Vol. 3, p. 14) Respondent also explained that for the protection of witnesses, it is important to understand the relationship between the parties and in connection with the issuance of a bond during the pendency of the criminal case. (Tr. Vol. 3, p. 13) Respondent recalled that the victims had made statements to the medical personnel in the emergency room which implicated the defendant. (Tr. Vol. 3, p. 20)

In sum, even before the final pretrial of November 7, 2007, Respondent was aware of the pending charges; that there had been a no contact with the victims ordered; Robinson's prior record; that he had been arrested on numerous occasions; that he was in prison more than once, and that he was found not guilty of a rape where the victim was found running naked down the street. (Tr. Vol. 3, p. 9)

Before going on the record on November 27, 2007, Respondent was informed that Det. Daugenti had contacted the victims and had served them with subpoenas. He had made arrangements to pick up the witnesses and transport them to the Justice Center for trial. (Tr. Vol. 3, p. 25-26)

In open court during the proceedings on November 27, 2007, Robinson was advised that he could plea or try the case. (Tr. Vol. 3, p. 26) Robinson advised that he wanted a trial. Trial was set to commence at 1:30 p.m., but no jurors were available. Therefore, *voir dire* commenced on Wednesday morning, November 28, 2007. (Tr. Vol. 3, pp. 26-27).

Det. Daugenti conceded on cross-examination while he was in the courtroom during the proceeding on November 27, 2007, he was convinced that Robinson knew something was going on. He felt that Robinson knew the victims were not going to show up. He understood this based on Robinson's arrogance and demeanor. He indicated in his testimony that any reasonable person would have taken a plea under the facts of this case. (Tr. Vol. 3, pp. 362-363) He also corroborated the fact that Respondent had been made aware that the victims were prepared to be transported to the Justice Center at the appropriate time as of that date, November 27, 2007. (Tr. 355)

On November 29, Respondent was informed by the prosecutors, in the presence of the defense, that the witnesses were not at the place where Det. Daugenti was to pick them up at 8:30 a.m. Respondent went on to indicate on the record the details concerning the victims/witnesses about which he was aware. In particular, he indicated his awareness of some of the details of the case, as well as the efforts of Det. Daugenti to secure the attendance of the witnesses for trial. (Ex. A, pp. 10-13) At this time, the jury was not present in the room. (Tr. Vol. 3, p. 29) It was Respondent's intent to reflect the relationship between one of the victims and the defendant, thinking that there might be speedy trial issues. (Tr. Vol. 3, p. 35) He was aware that the defendant felt his right to a speedy trial had been violated. Respondent typically is very concerned about speedy trial issues regardless of whether the lawyers are. At this point, it was his belief that the defendant's conduct had to do with speedy trial issues. (Tr. Vol. 3, p. 36) He was beginning to conclude that the defendant was causing the need for a continuance. Thus, Respondent was making findings of fact and conclusions of law for speedy trial purposes at this point in the proceeding. (Tr. Vol. 3, p. 37-38)

Respondent also had an overarching concern as it relates to his belief that anyone who manipulates the system of justice or obstructs it should be punished. It was his intent to send a clear message in that regard. (Tr. Vol. 3, p. 38-39)

Respondent conceded during cross-examination by Relator's counsel that what he should have said when indicating his belief about those who want to obstruct justice is that, "my judicial philosophy is that if you commit a crime within a crime, you should receive a consecutive period of incarceration." He indicated he would always also take into account mitigation and aggravation evidence in such a case. (Tr. Vol. 3, p. 40)

It is important to note that Respondent's feelings about absent witnesses are not indicative of him taking one side or another. (Tr. 43) He feels that issuing bench warrants for victims to testify is necessary in administering the criminal docket. (Tr. Vol. 3, p. 43-45) In his mind, it would be setting bad precedent to allow prosecutors to dismiss cases if witnesses do not appear, because this would send the message that one can benefit from intimidating witnesses. (Tr. Vol. 3, p. 46)

On Friday morning, November 30, 2007, he learned in open court that the witnesses were still missing. (Tr. Vol. 3, p. 48) He talked to his bailiff, telling her that he was going to issue an "Amber Alert" for the 83-year-old victim, and he asked his bailiff to summon the media. At this point, he knew nothing of the details of issuing Amber Alerts and did nothing further. (Tr. Vol. 3, p. 49) It was his intent to alert the community through the media about the disappearance of a witness who he thought was in dire circumstances. He knew that Ingram was a victim of an alleged crime, elderly, in a wheelchair and infirm, needing 24/7 care. He knew she needed regular dialysis. He felt that the last time police spoke with the witnesses was on Wednesday, so she was missing for well over 24 hours and perhaps as long as 48 hours. It was his intent to call for an Amber Alert to safeguard the victims/witnesses in the case. He thought that their lives were literally at stake. (Tr. Vol. 3, pp. 50-52)

It was only after a meeting had been concluded in chambers and just before he assumed the bench on Friday morning that Respondent learned that Ingram had been found. (Tr. Vol. 3, p. 52) In fact, he seems to recall that he was told Ingram had been dumped at dialysis. (Tr. 125, 169; Tr. Vol. 3, p. 153) He was concerned about Taylor

being the caregiver, and he felt he would assist Ingram by protecting her from both Robinson and Taylor. (Tr. Vol. 3, pp. 153-155)

Respondent met with the lawyers between the time Respondent learned in open court that the witnesses still had not been found and when he assumed the bench in the presence of the media. He felt he was facing a unique set of exigent circumstances which he characterized as a "fierce urgency." (Tr. Vol. 3, p. 53) He told the lawyers that there was a larger issue, that they were all officers of the court, and in that sense on the same team. He indicated that no one should be able to manipulate the system of justice. He felt he was required to make findings of fact and conclusions of law; confront the individual causing the problem; secure the presence of Taylor for security reasons; declare a mistrial and continue the case. (Tr. Vol. 3, pp. 53-54) He solicited input from the lawyers during the in-chambers discussion, and the State indicated its desire to dismiss the case. He indicated that he would not do that. (Tr. Vol. 3, p. 54) He did indicate that "we are all on the same team" as it relates to the overarching issues involved in the procurement of the testimony of witnesses. (Tr. Vol. 3, pp. 55-56) It was his belief that he had to use the inherent power of the court at this point in the criminal proceedings. (Tr. 56)

In particular, he felt he had a duty under Article I, §10a of Ohio's Constitution to protect the witnesses and victims of Robinson's alleged crimes. He felt he had an ethical obligation and that his primary job at this point was to safeguard an 83-year-old victim, and he had to act decisively to do so. (Tr. Vol. 3, p. 56)

Although Respondent, a number of times in his testimony, indicated that he felt it

was his duty to the victims under Ohio's constitutional provision which specifically addresses the victims of crimes, Article I, § 10a. Nowhere in the Panel's report is this rationale even mentioned. This is despite the fact that the Preamble to the Code of Judicial Conduct requires that the Canons and Divisions "...be applied consistent with **constitutional** requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances." (Emphasis added) See Preamble to Code of Judicial Conduct.

Importantly, Respondent felt that he had to go to the media to be effective at this point in time, and that the community had to be saturated in order to locate these witnesses. (Tr. Vol. 3, pp. 58, 61-62)

Despite learning that Ingram had been found just before he assumed the bench for purposes of the proceedings that took place on November 30, 2007, the fact remains that Taylor was still at large and Respondent felt that she would re-victimize Ingram. (Ex. A, pp. 16-29) (Tr. Vol. 3, pp. 61-62) Det. Daugenti shared this concern. (Tr. 406)

Respondent recognized it was important to make a record at this point because of speedy trial problems, double jeopardy issues, who is responsible for a continuance, mistrial to be declared and his recusal. (Tr. Vol. 3, pp. 63, 69-70)

It was Respondent's intent to safeguard both the criminal justice system and the victim, and compel the attendance of both witnesses at this trial. He felt and continues to feel to this day that it would have been irresponsible for him to have done what he was about to do without stating a predicate in the record. He had a true concern for the victim. (Tr. Vol. 3, pp. 66-68) Again, none of the proceedings on November 30 occurred in the presence of the jury which was in the process of being seated. (Tr. Vol.

3, p. 85) When it is all said and done, Respondent did what was necessary to maintain the *status quo*, having determined that he could no longer preside over the matter. (Tr. Vol. 3, p. 84) Respondent felt he had to use all of the information at his disposal to make a judgment call. (Tr. Vol. 3, p. 70)

Respondent felt that if he did not make a record, there would be no basis for a mistrial, a recusal, a continuance or a bench warrant, and there would have been a record otherwise devoid of context. He felt it was important for any potential review by a higher court. Indeed, he found the fact that Robinson had procured the absence of witnesses. (Tr. Vol. 3, p. 119)

When Respondent spoke to the media in chambers after his comments on the record on November 30, 2007, he made such comments to explain the procedures of the court. (Tr. Vol. 3, p. 96) At this point, the media was unaware of what really was going on in the matter, and they did not know why Respondent was recusing himself. They were unaware of what had taken place. They did not have the full context of this matter. He wanted the media to understand how seriously the safety of the victims had been jeopardized. (Tr. Vol. 3, pp. 92, 94-95) During this conference with the media, he explained to them, in particular, that smoking crack and beating Ingram were allegations in the case. He had not made a decision about whether those alleged actions had actually occurred. (Tr. Vol. 3, pp. 113-114)

Information that Respondent felt implicated Taylor in the absence of the witnesses for trial included the fact that she was a friend of the defendant, in fact his girlfriend, and he spent a lot of time at the victim Ingram's house and was allegedly involved in a conspiracy to steal Emma's Social Security check. He was aware of

statements she had made to the emergency room personnel, and statements she had made to the Cleveland Police Department. He was aware that she had been in contact with the Cleveland Police Department for purposes of appearing at trial, and that she had been served with a subpoena. He was also aware that she had indicated her willingness to cooperate in the trial, and that apparently she had done an about face. His conclusions indeed were reasonable that she was working in concert with Jeffrey Robinson in this regard. (Tr. Vol. 3, p. 60)¹¹

Contrary to the Panel's statement that Respondent was "...unable during his testimony to clearly state whether his decision to grant a mistrial was based upon his recusal, but rather upon his determination that Robinson had engaged in misconduct by interfering with the prosecution's ability to present its case" (The Opinion, para. 57), Respondent on several occasions made it clear why he placed what he placed on the record.

In this connection, directly answering the Panel Chair's question in that regard, Respondent indicated that the reason he granted the mistrial was a combination of defendant's conduct in procuring the absence of witnesses and his inability to continue as a judge in this matter. (Tr. Vol. 3, p. 163) He indicated that he felt an obstruction of justice was taking place in his presence, and that the mistrial was caused by the actions of the defendant. (Tr. Vol. 3, p. 165) Indeed, he indicated that he recused himself, because he had become an advocate for justice. (Tr. Vol. 3, p. 156) He explained this on the record. (Ex. A, pp. 21-22) He could not have been clearer when he indicated

¹¹ This is especially so when the transcript of jailhouse recordings is reviewed. (See Exs. B and C) These recordings have provided a basis for the indictments of both Taylor and Robinson which are presently pending.

that if he had not made a record, there would have been no basis for a mistrial, recusal, continuance, bench warrant, and that a record would have otherwise been devoid of context. (Tr. Vol. 3, p. 115)

D. Facts Pertinent to Mitigation Factors

By way of mitigation, the Panel acknowledged the overwhelming mitigation evidence that existed in the evidence. As it relates to the subsections of BCGD, Proc. Reg. 10(B)(2), the Panel found in mitigation:

(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (d) full and free disclosure to disciplinary Board; and (e) character and reputation. The Panel also concludes that Robinson ultimately suffered no actual prejudice from Respondent's misconduct because he ultimately entered a plea of guilty to one count of the indictment resulting in a sentence of two years of incarceration, which was a more favorable disposition than the four-year sentence which had been offered to Robinson in plea negotiations while Respondent was presiding over the case. (The Opinion, para. 68)

Importantly, the lack of prejudice to Robinson goes well beyond his ultimate guilty plea to a count of the indictment which was amended to include his agreement that he had assaulted both women, Ingram and Taylor, a felony of the second degree in violation of Ohio Rev. Code § 2903.11(A)(1). (Ex. A, pp. 68-69) Indeed, Robinson's defense lawyer Parker admitted he felt it was likely that a jury panel could have been obtained who knew nothing about the case, even after the publicity on Friday, November 30, 2007. (Tr. 301) He was also convinced that a fair jury could have been selected to hear all of the evidence in the case. (Tr. 302) Ultimately, Parker believed his client received a fair plea bargain which he strongly advised his client to accept. (Tr. 304-305) In fact at one point, he recommended to his client that he take more than two years. (Tr. 305) Significantly, at no time did Parker doubt Respondent's sincerity about

his expressed concern regarding the absence of witnesses.¹² (Tr. 299) Pros. Kolasinski corroborated this concern. (Tr. 490) Pros. Kolasinski also affirmed that none of Respondent's comments on November 30, 2007 affected the outcome of the case or his handling of it. (Tr. 505-506)

Additionally, while the Panel in footnote 7 (The Opinion, p. 30) concluded that Respondent did not act with a selfish motive, it found that Respondent "truly believed that he was protecting the integrity of the criminal justice process and that the public would benefit from his actions." However, Respondent's beliefs went beyond this stated finding of the Panel and included his belief that Ingram was in harm's way, and therefore he acted to protect the victim pursuant to his constitutional obligation under Article I, § 10a of the Ohio Constitution. (Tr. 79-84, 103, 148-149, 170, 172-175. Tr. Vol. 3, p. 47, 50-54, 56, 62, 66-68, 76)

It must be remembered that Respondent, and the other judges in the Cuyahoga County Common Pleas Court, are assigned 1,300 to 1,400 cases a year. Roughly half are criminal. On Respondent's docket, there are 150 to 200 active criminal cases at any one time. There certainly is not enough time in a year to try all of them. Respondent tries 6 to 18 criminal cases a year. On any given day, Respondent has 25 criminal matters set for some sort of hearing. (Tr. 15-18)

Finally, as relates to Respondent's character testimony from Whitmer, current President of the Cleveland Metropolitan Bar Association; former judge Robert Glickman, incorrectly referred to as Richard Glickman in the Panel report, Chandra and former judge Lillie, the Panel acknowledged that Respondent:

¹² No evidence of record exists to support the statement in The Opinion, para. 58, that Respondent's statements were made "under the **guise** of explaining his recusal."

[g]enerally has a good reputation as a jurist among members of the bar in Cuyahoga County. Respondent has a reputation for thoroughness, decisiveness, fairness and preparedness; he is attentive to detail. Respondent's judicial demeanor is normally professional, respectful and courteous towards those who appear before him. He is typically willing to listen, to carefully and thoughtfully consider the positions of the parties, and to modify his opinions when the situation warrants. Respondent has a reputation for being brutally honest; he is not a person to mince words or to 'pull punches.' (The Opinion, para. 4)

To be sure, Respondent practiced law for ten years before becoming a judge. He has been a judge for 19 years. Throughout this time, he has amassed an unblemished record and has been a credit to the bar, bench and community.

ARGUMENT

Proposition of Law No. I: The Panel erroneously precluded Respondent from introducing expert testimony and the jailhouse recordings thereby denying him a fair hearing.

In this connection, Respondent asserts that he was denied a fair hearing when the Panel prevented him from introducing expert testimony concerning the violations asserted and jailhouse recordings which corroborate the fact that Robinson intended to procure the absence of Taylor and Ingram from his criminal trial.

First, as it relates to the expert testimony, the Panel forecasted its ruling that expert testimony would not be permitted in its Order on Pretrial Motions. (App. B, pp. 5-6) At the hearing, each of the witnesses from whom expert testimony was sought were acknowledged as qualified to render such testimony, but then their answers to the opinion questions were not permitted. See supra at 5-6.

Later, outside the presence of the hearing Panel, their expected testimony was proffered on the record. (Tr. 747-752; 809-823; 849-855)

Each of the expert witnesses were of the opinion that Respondent did not violate Canon 2, Canon 3(B)(5), Canon 3(B)(9) and Prof. Cond. R. 8.4(d). Further, they each

were of the opinion that Respondent's comments on November 29 and 30, 2007 could not reasonably have been expected to have had an effect on the outcome or fairness of the pending case. Finally, they each would have testified that a judge's expression of rulings on matters before him and the factual findings related thereto could not constitute bias and prejudice as those terms are used in Canon 3(B)(5).

While these opinions were proffered by counsel for Respondent in respect to Glickman and Lillie, Chandra's opinions were expressed through his own testimony on the record.

In this regard, Chandra's rationale shows the prejudicial effect of the Panel's refusal to permit the experts' testimony during the hearing.

In respect to Canon 2, Chandra explained:

Well, my opinion is not only that Judge Gaul didn't do anything to violate Canon 2, but, in fact, his behavior, which I read as being intended to protect the integrity of the courtroom proceedings, was designed to comply with Canon 2. ...

Two aspects of Judge Gaul's conduct are in play. Aspect number one is promoting public confidence in the integrity of the judiciary. The only way you can do that -- that's why I pointed out in my earlier testimony I wish more judges would. The only way you can do that when a victim witness has disappeared is to insure that that victim witness is all right and that the defendant doesn't benefit from potentially having absent that witness. ...

Now, as to the second part of it, which is the impartiality of the judiciary, from the materials I read Judge Gaul recused himself from further participation in the case... And that to me is consistent with a judge's responsibility in Canon 2 to promote public confidence in the impartiality of the judiciary. (Tr. 810-812)

As it relates to his opinion regarding Canon 3(B)(5), Chandra stated:

Canon 3(B)(5) requires a judge to perform judicial duties without bias or prejudice...

Mr. Alkire, one of the things that struck me reading the transcripts was that the benefit of the experience I've had as a criminal practitioner causes me -- both as a prosecutor and a criminal defense attorney I should add, causes me to read the

transcript perhaps a little differently than somebody who has never practiced criminal law. Because there are things that are happening, there are things that the Judge is saying that are consistent with the issues that were at play at those moments on that Thursday and Friday with issues in the criminal process. ...

Because the statements that had been taken in isolation from their context, the context being what was occurring, those statements taken in isolation you can nitpick and say, oh, look, doesn't this show bias? But you cannot divorce those from their content which was what was transpiring. So, for example, when the Judge -- and I'm going to take these out of order. When the Judge denies the motion to dismiss, the defendant's motion to dismiss, all he's doing is freezing the status quo and letting another judge deal with the issue after his recusal.

He is preventing the defendant from benefiting from potential misconduct which is about protecting the integrity of the proceedings. To me there is nothing in his statements in denying the motion to dismiss that suggested that he was bias or prejudice. ...

Now, I would readily concede that the words are tart tongued, they are inartful and they perhaps cause somebody who is a criminal practitioner to wince a little bit, but I don't think they manifest bias or prejudice when they were taken in the context of the facts available to the Judge.

And what we don't know sitting here now and second guessing all of this is what physical aspects of the defendant's demeanor the Judge was observing, or the defense counsel's demeanor. Those are things that are soundly committed to the discretion of trial courts for a reason. ...

So I don't believe that the words taken in context of what was transpiring manifest bias or prejudice. And the word is **manifest** bias or prejudice. ...

The preamble uses the words 'depending on the context.' I mean, it says 'depending on the context.' So you can't take individual judicial statements and pronouncements and divorce them from the context, or as the Disciplinary Counsel, who I respect a great deal, his comments in the newspaper were just flat out incorrect. His comment in the newspaper was that Judge Gaul did the actions. His reasons are irrelevant. That's just flat out wrong under the Canons. It says depending on the context. The Judge's reasons are perfectly relevant. (Tr. 811-817)

Likewise, Chandra testified that Respondent also did not violate Canon 3(B)(9) for the reasons previously provided. (Tr. 819) Finally, as relates to the alleged Prof. Cond. R. 8.4(d) violation, Chandra indicated:

...there was no conduct here that was prejudicial to the administration of justice.

* * *

And furthermore, my understanding of the facts here is that the individual defendant involved did, in fact, receive adjudication by a judge who, couldn't even be argued, had expressed or manifested any bias or prejudice, that the defendant voluntarily pled to a particular count. And my understanding is that -- maybe this can be de-emphasized, but my understanding is that Judge Gaul ultimately was right in the instincts he had as a jurist that there was something funny going on and that the individual, as I understand it, has actually been charged with obstruction because they were engaged in trying to absent the witnesses. (Tr. 821-822)

Second, the Panel also precluded Respondent from introducing the jailhouse transcripts in the Order on Pretrial Motions. (App. B, pp. 6-7) While this error standing alone might not be prejudicial, it is when measured against the Opinion which emphasized other information that was not known to Respondent at the times he made statements attributed to him on November 29 and 30, 2007.

In this respect, the Panel seemed to emphasize that Ingram actually did not want to come to court and was not in harm's way when it permitted Det. Daugenti to testify about that subject matter. (The Opinion, paras. 14, 23, 30) In fact, Respondent was not informed about these observations of Det. Daugenti. (Tr. 354-355, 485)¹³ Additionally, Det. Daugenti was concerned about Ingram's safety on Friday, because of her relationship with Taylor. (Tr. 405) While he did not believe that she could be in harm's way from Robinson if he was released, he would have been concerned if Robinson was released, based on his investigation of the facts of this case. (Tr. 406)

¹³ As Justice Stratton points out in her concurring opinion in *State v. Busch* (1996), 76 Ohio St.3d 613, 617, 669 N.E.2d 1125, 1129, 1996-Ohio-82, "all too frequently, these tragedies [victims of domestic abuse] play out in the courts, as battered victims initially agreed to testify against their abusers, only to drop the charges once the victims have convinced themselves that the abusive behavior was a passing aberration. Often, the victims have no income, nowhere to go..."

Under the law, as it relates to the admission of expert testimony, the Panel abused its discretion when it chose not to hear the testimony of Respondent's expert witnesses. Numerous courts throughout the United States have admitted expert testimony in disciplinary proceedings against judges and lawyers. In *Inquiry Concerning a Judge* (Supreme Ct. Ga. 1995), 265 Ga. 843, 462 S.E.2d 728, the court rejected the argument that the Commission's admission of expert testimony of a judge at the time of the hearing was error, stating:

We do not agree with Judge Vaughn [Respondent] that the constitutional delegation to the Commission, through this court, of the power and duty to conduct these proceedings is compromised by the testimony of a member of the judiciary who is qualified to offer an opinion regarding whether specific judicial conduct comports with that exacted by the Code, and corresponds with that expected of a judge sitting on the state court of Fulton County.

See also, *In re Complaint Against Judge Harper* (1996), 77 Ohio St.3d 211, 673 N.E.2d 1253 (Where both Relator and Respondent presented testimony of experts in legal ethics and judicial and attorney disciplinary matters); *In the Matter of Disciplinary Proceedings Against Nicholas C. Grapsas* (Supreme Ct. Wis. 1999), 225 Wis.2d 411, 591 N.W.2d 862 (In a disciplinary action alleging failure to act with reasonable diligence and promptness in representing a client regarding an immigration matter, expert testimony was admitted regarding the cause of the INS' denial of the client's petition for status change); *In re Hobart O. Pardue* (Supreme Ct. La. 1999), 731 So.2d 224 (Where Respondent had pled guilty to making and filing a false tax return, in the subsequent disciplinary proceedings expert testimony was received at the hearing from an accountant, a prior IRS agent, that the underreporting was a mistake, not intentional and was probably the reason Respondent was not charged with tax evasion); *In re The*

Honorable James P. Noecker (2005), 472 Mich. 1, 691 N.W.2d 440 (Where a psychiatrist testified regarding his interactions with Respondent and about the conduct typical of an alcoholic). Expert testimony regarding reasonable and/or excessive attorney fees has been admitted into evidence in numerous disciplinary proceedings even though panels were comprised of lawyers. *In re Complaint as to the Conduct of David W. Stauffer* (1998), 327 Or. 44, 956 P.2d 967 (Charging an estate with assets of \$132,000 more than \$100,000 for professional services is an excessive fee); *In the Matter of Susan Keiser* (1999), 694 N.Y.S.2d 189, 263 A.D.2d 609 (Where an expert testified that Respondent's \$22,000 fee in a simple matrimonial action was excessive); *The Florida Bar v. Richardson* (Supreme Ct. Fl. 1990), 574 So.2d 60 (Where an expert testified in part that the hourly rate is not necessarily a measure of what is a reasonable fee, but rather it is that time that reasonably should be devoted to accomplish a particular task).

In addition to these cases supporting the admission of expert testimony, Respondent also distinguished each and every one of the cases cited by Relator in support of its argument that expert testimony should be precluded. See Respondent's Brief in Opposition to Relator's Motion *in Limine* to Exclude Testimony of Respondent's Proposed Expert Witnesses, Jailhouse Recordings and the Testimony of Curtis Ingram at pp. 11-13.

Proposition of Law No. II: The Panel erroneously failed to permit Respondent to prove the context of all relevant circumstances which existed at the time he made the statements attributed to him, such as the jailhouse recordings of conversations between Mozelle Taylor and Jeffrey Robinson demonstrating Taylor's and Robinson's involvement in the obstruction of justice and the procurement of the absence of witnesses at Robinson's criminal trial.

There is no more poignant example of the Panel's error in ignoring the Preamble to the Judicial Canons than in its erroneous exclusion of the jailhouse recordings.

These recordings make it clear that Robinson procured the absence of Taylor and Ingram from his criminal trial. See Exs. B, C. While questioning Respondent's "findings" and "conclusions" by criticizing him for not holding an evidentiary hearing, the Panel failed to acknowledge that Respondent's instincts, as a trial court judge, based on information properly available to him, were absolutely correct.

This lack of acknowledgement by the Panel is consistent with its failure to heed the Preamble to the Judicial Canons which provides as follows:

The Canons and divisions are rules of reason. **They should be applied** consistent with constitutional requirements, statutes, other court rules and decisional law and **in the context of all relevant circumstances**. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions. (Emphasis added.)

As Respondent's expert Chandra indicated in his proffer, to consider the statements Respondent made on the record without considering their context allows one to nitpick statements and label them as bias or prejudice. (Tr. 813-814)

As I understand it the most controversial statement was the statement...that he would bet his life that the defendant's been involved in an obstruction of justice and/or a technical kidnapping.

Now, while I as criminal defense counsel in Mr. Parker's position would absolutely get up and object and make my record and hope I could make some hay of that some day, my subconscious would tell me that's not going to get me anywhere. I'm going to make my record and do my job and be a vigorous

advocate but it's not going to get me anywhere. Why? Because the whole context was one in which the police were aware that they had made an arrangement to meet these victim witnesses. The victim witnesses hadn't been available. The defendant, as I understand it, had on his criminal record having a case dismissed because the victim witness didn't show up. So there are a number of things when you're reading that transcript as a criminal practitioner that at least cause me to interpret as the Judge unmistakably voicing to the defendant that he's not going to benefit from any absencing of witnesses which he's engaging. He's going to freeze the status quo, that he's going to insure that there is scrutiny applied to the defendant's behavior, and then he recuses himself. (Tr. 814-815)

Proposition of Law No. III: The Panel erroneously failed to acknowledge Respondent's reasons for the rulings he made on the record on November 30, 2007, which included the protection of the victims who Respondent felt obligated to protect under Article I § 10a of the Ohio Constitution which the Preamble to the Code of Judicial Conduct required the Panel to consider in applying the Code of Judicial Conduct under the circumstances of this case.

Similar to Proposition of Law No. II, although the Preamble to the Code of Judicial Conduct requires that the canons and divisions be applied "consistent with constitutional requirements, statutes, or other court rules and decisional law..." the Panel failed to do so by not even acknowledging Respondent's heartfelt position that Article I § 10a of the Ohio Constitution required him to consider the safety and well-being of both victims/witnesses, Ingram and Taylor. After all, both lawyers in Robinson's criminal case acknowledge Respondent's motivation in this regard. (Tr. 299, 490)

Specifically, Article I, §10a provides that victims of criminal offenses shall be accorded fairness, dignity and respect in the criminal justice system. Further, every trial court has the inherent power to provide for the protection of material witnesses who will testify in cases before the court in order that the administration of justice not be disrupted. *State ex rel. Board of County Commissioners of Cuyahoga County, Ohio v.*

The Common Pleas Court of Cuyahoga County (Cuy. Cty. Ct. of App., August 26, 1976), 1976-WL-191210, Case No. 36307. It is within the inherent power of a trial court to secure the attendance of witnesses to the end that the rights of parties may be ascertained. *Hale v. State* (1896), 55 Ohio St. 210, 213, 45 N.E. 199.¹⁴

Contrary to the Panel's conclusion (The Opinion, para. 57), not only was Respondent responsive to "whether his decision to grant a mistrial was based upon his recusal, or rather upon his determination that Respondent had engaged in misconduct..." he indicated that both factors were a consideration in connection with his declaration of a mistrial. (Tr. Vol 3, p. 163) Respondent candidly admitted all of his reasons for making a record numerous times during the course of the hearing. *Supra* at pp. 27-30.

Proposition of Law No. IV: The Panel erroneously concluded that Respondent violated Canon 2 because, in part, he failed to hold an evidentiary hearing to provide a legally sufficient basis for his good-faith conclusion that Robinson had procured the absence of the victim witnesses and that Emma Ingram's safety was in question.

The Panel appears to base its conclusion that Respondent's on-the-record comments on November 29 and 30, 2007 and his in-chamber comments to the media following the hearing on November 30, 2007 constituted a violation of Canon 2 because they were not based on evidence "presented to the court during a fair and open hearing." (The Opinion, para. 60)¹⁵ The Panel continues to emphasize this throughout

¹⁴ The Panel's conclusion that Respondent "impermissibly crossed the line between law enforcement and the judiciary" is not supported by the facts or law. (The Opinion, para. 63)

¹⁵ The Panel also concluded that Respondent's issuance of an Amber Alert violated this Canon. Yet, Respondent never issued an Amber Alert only using those words to describe to his Bailiff the need to get the press involved. See footnote 7, *infra* at 11.

its analysis of Respondent's conduct as being a basis for the other canon violations with which he was charged. (The Opinion, para. 63, Board recommendation at p. 34-35)

However, no authority is cited which in any way supports the proposition that Respondent was obligated to hold an evidentiary hearing for purposes of continuing the trial, declaring a mistrial *sua sponte*, issuing a bench warrant in order to enforce a subpoena, or recusing himself from the case.

As it relates to *sua sponte* declarations of mistrial, Ohio law recognizes that there are no precise, inflexible standards which exist to determine whether a trial judge has acted properly in such declaration. See *State v. Widner* (1981), 68 Ohio St.2d 188, 190, 429 N.E. 1065, 1066, *citing Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717. The *Widner* court stated:

We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

See also, *State v. Shaffer* (Ohio App. 5 Dist., July 12, 2004) 2004-Ohio-3717, at para. 18.

Importantly, Ohio Evid. R. 101(C) indicates that the Rules of Evidence do not apply in miscellaneous criminal proceedings, including proceedings for issuance of warrants for arrest and criminal summonses.

Further, it was within the inherent power of the court to provide for the protection of the material witnesses. See *State ex rel Board of County Commissioners of Cuyahoga County, Ohio v. The Common Pleas Court of Cuyahoga County, Ohio, supra*, at p. 3. It has long been held in Ohio Jurisprudence that:

The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power, no other could be exercised. *Hale v. State*, (1896), 55 Ohio St. 210, 213, 45 N.E. 199

Importantly, when the trial court record affirmatively demonstrates the necessity for a continuance and the reasonableness thereof, such continuance will be upheld.

See *City of Aurora v. Patrick* (1980), 61 Ohio St.2d 107, 399 N.E.2d 1220. One factor to consider in connection with a continuance is whether defendant's conduct played a role in it. *State v. Landrum* (1990), 53 Ohio St.3d 107, 115, 559 N.E.2d 710, 721.

In essence, the Panel erroneously concluded that under the facts of this matter, Respondent should have held an evidentiary hearing to determine whether Robinson was in contempt and then, because he did not, it found that he violated the judicial Canons. (The Opinion, para. 59) Admittedly, Respondent never held a contempt hearing. However, it was not a legal error or judicial Canon violation for him to not do so.

To conclude under the circumstances of the case at bar that an evidentiary hearing was required for Respondent to have continued this matter; declare a mistrial; sustain the issuance of bench warrant and recuse himself would be to paralyze an already overburdened criminal justice system. Just what more could have been gained by such a hearing is also in question. Certainly, the defendant would not have testified. The two missing witnesses were not in court. The uncontested information concerning the service of subpoenas and ascertaining that the victims/witnesses were not available to be transported had already been placed on the record in the presence of both parties. Reliable documents concerning Robinson's criminal record were in the file. Time was of

the essence, and Respondent chose not to institute contempt proceedings thereby creating a case within a case and other issues associated with representation of the criminal defendant. (Tr. 190-193, 207)

Proposition of Law No. V: The Panel erroneously concluded that Respondent violated Canon 3(B)(5) because he was clearly prejudiced against Robinson when instead Respondent had legally justifiable grounds to conclude that Robinson was involved in procuring the absence of the witness victims and Respondent's rulings in connection with the dismissal of the multi-count felony indictment did nothing more than to preserve the *status quo* of the proceedings which did not, in fact, cause prejudice to Robinson.

The purported basis for a violation of Canon 3(B)(5) was that Respondent:

[w]as clearly prejudiced against Robinson during the course of the proceeding and expressed that prejudice on the record... Respondent violated Canon 3(B)(5) when he continued to exercise judicial authority in the proceeding... even after stating that he could no longer continue to preside in the matter because he had 'become an advocate' for the witnesses. (The Opinion, para. 62)

For several reasons, it is asserted that the Panel erroneously arrived at this conclusion. First, the rule itself indicates that in the performance of his duties, a judge shall not "by words or conduct **manifest** bias or prejudice..." (Emphasis added) Here, the manifestation of Respondent's words or conduct was indeed the declaration of a mistrial and his recusal so that another judge could properly be involved in the disposition of this serious criminal matter. Certainly, every ruling in the adversarial system of criminal justice can be said to inure to the detriment of one side or the other and therefore be biased or prejudiced.

Additionally, it is respectfully submitted that the bias or prejudice to which this rule relates is bias or prejudice related to categories applicable to a particular party, categories or classifications, such as those set forth in the subsection, *i.e.*, race, gender, religion, etc.

The term "bias or prejudice" within the context of Canon 3(B)(5) in reference to a judge implies a hostile feeling or spirit of ill-will or undue friendship or favoritism towards one of the litigants or his attorney with the formation of a fixed, anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts. *Cleveland Bar Association v. Cleary* (2001), 93 Ohio St.3d 191, 754 N.E.2d 235. To be considered a product of judicial bias under this rule, the court's decision should be premised on improper extrajudicial motives. See *Cleary, supra*. None of Respondent's statements or comments was based upon an improper extrajudicial motive, but rather was based upon facts or the law within the context of findings; rulings; making a court record; protecting witnesses; enforcing subpoenas; administering justice and in explaining the grounds for his recusal.

By the time Respondent took the bench on November 30, 2007, he had discussed with counsel in chambers the situation which confronted the court concerning the absence of the witnesses. It is not inappropriate for a judge to discuss matters with counsel before he takes the bench in open court to announce his decisions. It would have been irresponsible for Respondent to do anything other than preserve the *status quo* when he finally did take the bench. If a judge could be disciplined for concluding that recusal is appropriate, the judiciary would never take the steps to employ that procedure when it is determined that they can no longer be fair and impartial. Having made that determination in the face of exigent circumstances, Respondent appropriately preserved defendant's opportunity to receive a fair trial in the future, assure that the victims/ witnesses would be safe and that the interests of the public and the preservation of a safe community were addressed. Technically, rulings made after a

recusal are voidable. *State ex rel. Gomez v. Judge John W. Nau* (Ohio App. 7th Dist., October 29, 2008), 2008-Ohio-5685. Defendant's counsel never chose to raise this potential issue before his client pled guilty, perhaps because Respondent indicated on the record that what was left to do was "for this Court to recuse itself on Monday." (Ex. A, p. 27) and that the Court "...will [on Monday] recuse myself..." (Ex. A, p. 28)

Proposition of Law No. VI: The Panel erroneously concluded that Respondent violated Canon 3(B)(9) in connection with certain statements made on the record, because no evidence was presented concerning a reasonable jurist's expectation or a "reasonable" criminal defendant's expectation.

In the Opinion where the basis of the Canon 3(B)(9) violation is discussed (The Opinion, para. 63), the Panel seemed to be indicating that the expectation¹⁶ addressed in the Canon's subsection is that of a defendant rather than a jurist. This does not correspond to the plain meaning expressed therein.

Also, it is not correct that Respondent's findings "were criminal in nature." Robinson was not found in contempt. Robinson was not found to have violated any crime under the Ohio Revised Code. Instead, Respondent's trial for the five-count felony indictment against him was postponed to take place before a different judge in the immediate future. Respondent's decisive action in issuing the bench warrant for Taylor and statements made in court accounted for Taylor being found by Det. Daugenti and the whereabouts of Ingram being confirmed. (Tr. 73-74) Det. Daugenti would have done nothing with the bench warrant issued the evening before had Pros. Kolasinski not called him **after** the record proceeding which occurred on Friday. (Tr. 376)

¹⁶ In ruling on Relator's Motion *in Limine* to exclude Respondent's expert witnesses, the Panel Chair forecasted the standard to be applied under Canon 3(B)(9) as that of "reasonable jurist expectations." However, by the time of the Opinion, apparently, this standard changed in the Panel's collective mind.

Finally, the cases cited by the Panel are inapposite and in no way analogous to the circumstances which confronted Respondent or the actions he took in respect to them. (The Opinion, para. 63)

Additionally, Canon 3(B)(9) recognizes that judges are not prohibited from making public statements in the course of their official duties. See *Office of Disciplinary Counsel v. Souers* (1993), 66 Ohio St.3d 199, 611 N.E.2d 305 (The Supreme Court rejected the Board's conclusions of law and recommendation that Respondent violated Canon 3(A)(6), predecessor to Canon 3(B)(9), for commenting to the press in a recorded telephone interview that was broadcast.) All of Respondent's statements were in the course of his official duties as admitted by Robinson's defense lawyer Parker. (Tr. 308) Further, the subsection allows for statements to explain for public information the procedures of the court. Respondent's uncontroverted testimony indicated that this was his purpose, especially in connection with the in-chambers conference after the open court proceeding on November 30, 2007. (Tr. Vol. 3, p. 92) Respondent never expected that what he said would affect Robinson's ability to obtain a fair trial before another judge. (Tr. Vol. 3, pp. 90-91) No other evidence exists on the record, from Robinson or otherwise, concerning anyone's expectations under Canon 3(B)(9).¹⁷

¹⁷ It is interesting to note that no evidence exists on the record at all as it relates to whether the public confidence in the integrity and impartiality of the judiciary was promoted or not by virtue of Respondent's conduct in this matter.

Proposition of Law No. VII: The Panel erroneously concluded that Respondent's on-the-record comments were prejudicial to the administration of justice in violation of Prof. Cond. R. 8.4(d), when Respondent's good-faith conclusions supporting such comments were based upon legally sufficient information.

Fundamentally, the Opinion bases the conclusion that Respondent violated Prof. Cond. R. 8.4(d) on his on-the-record comments. (The Opinion, para. 64) Further, the Panel indicated that Robinson's public treatment of defendant "...during the course of a criminal proceeding was unfair, unprofessional and undignified..." With this, Respondent strongly disagrees.

Contrary to the Panel's conclusions, Robinson was treated fairly in light of the circumstances involving the absence of victims/witnesses at his criminal trial. No evidence was presented that any "objective observer would conclude that Respondent's conduct was unjudicial and prejudicial to the public esteem for the judicial office." (The Opinion, para. 64)

Given the abundance of information properly considered by Respondent which led him to the conclusion of Robinson's involvement in the absence of the victims/witness at his trial, it was perfectly appropriate for Respondent on Thursday, November 29, 2007, to express his philosophy concerning those involved in procuring the absence of witnesses. Indeed, during that on-the-record hearing, Robinson was not specifically addressed by the Court when discussing such issue. (Ex. A, p.13) Instead, Respondent expressed publicly his philosophy concerning obstruction of justice, not unlike judges running for office who profess they will be "tough on crime." If anything, such expression was meant to and did enhance and not prejudice the administration of justice.

Likewise, as it relates to the proceedings on Friday, November 30, 2007, while Respondent did specifically indicate his conclusion that Robinson was involved in both a technical kidnapping and obstruction of justice through Taylor, such statements were made while making a record indicating the basis for his granting a mistrial, continuing the matter until it could be reassigned to another judge and his recusal. Certainly, judges should be encouraged to place such matters on the record.

Had Respondent remained on the case, refused to recuse himself and either tried the case or accepted a plea from Robinson, then it could be said that his conduct in that regard was prejudicial to the administration of justice given his statements on the record. Appropriately, Respondent took the necessary steps to assure Robinson of a fair trial before another jurist who had not been influenced by the circumstances surrounding the absence of the victims/witnesses.

As such, reviewing all of the circumstances surrounding Respondent's actions, without taking particular statements individually and out of context, it must be concluded that the totality of circumstances reflected that Respondent's conduct furthered and did not prejudice the administration of justice.

As Respondent indicated during his testimony, intimidation of witnesses and obstruction of justice through such conduct is not only prevalent in Cuyahoga County but is a national problem. (Tr. 45-46) It would be irresponsible to ignore such problem and prevent judges from taking decisive action when the circumstances warrant. As Justice Pfeiffer has indicated previously in a domestic violence case:

Trial judges are at the front lines of the administration of justice in our judicial system, dealing with the realities and practicalities of managing a caseload and responding to the rights and interests of the prosecution, the accused, and victims. A court has the inherent power to regulate the practice before it and

protect the integrity of its proceedings.' Trial courts deserve the discretion to be able to craft a solution that works in a given case. (Citations omitted) *State v. Busch* (1996), 76 Ohio St.3d 613, 615-616, 669 N.E.2d 1125, 1128, 1996-Ohio-82.

Proposition of Law No. VIII: The Board erroneously rejected the Panel's recommended sanction of a public reprimand, increasing it to a one year suspension, all stayed, where Respondent's good-faith findings and conclusions were based upon legally sufficient information and his refusal to acknowledge misconduct is justified under the circumstances of this case and is far outweighed by overwhelming mitigation factors found by the Panel.

Given Respondent's justifiable reliance on information available to him which formed the basis for his rulings as expressed on the record during the proceedings on November 29 and 30, 2007, Respondent reasserts that this matter should have been dismissed at the times during the hearing when such Motions were made.

Certainly, the Preamble to the Code of Judicial Conduct in this regard is pertinent:

The text of the Canons and divisions is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system and for the protection of the public. (Preamble to Code of Judicial Conduct.)

This Preamble's cited text not only supports a dismissal of this matter, but, if this Court determines that some discipline is warranted, certainly supports the Panel's recommendation of a public reprimand, rather than a stayed suspension of one year.

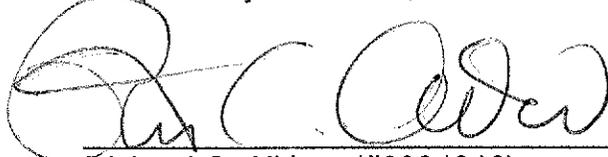
Respondent's intentions throughout these proceedings were a matter of his good-faith belief that the victims/witnesses were in harm's way. Further, Respondent's actions revolved around his dogged insistence that the integrity of the judicial

proceedings be preserved in the face of circumstances he felt drew such integrity into question. His insistence that Article I, §10a's constitutional protection of criminal victims be taken seriously, militates in favor of a sanction less severe than the stayed suspension found by the Board, if not outright dismissal.

CONCLUSION

Accordingly, for the foregoing reasons, Respondent respectfully requests that this Honorable Court sustain Respondent's Objections to the Opinion and either dismiss Disciplinary Counsel's Complaint or reduce the sanction to the Panel's recommended sanction of public reprimand.

Respectfully submitted,



Richard C. Alkire (#0024816)
Dean Nieding (#0003532)

RICHARD C. ALKIRE CO., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Blvd.
Independence, Ohio 44131-2335
216-674-0550 / Fax 216-674-0104

Attorney for Respondent

App. A

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	Case No. 09-006
Judge Daniel Gaul Attorney Reg. No. 0009721	:	Findings of Fact,
	:	Conclusions of Law and
Respondent	:	Recommendation of the
	:	Board of Commissioners on
Disciplinary Counsel	:	Grievances and Discipline of
	:	the Supreme Court of Ohio
Relator	:	
	:	

A formal hearing was held in this matter on September 21, 22 and 23, 2009, in Cleveland, Ohio, and on November 11, 2009, in Columbus, Ohio, before a panel consisting of Board members Janica Pierce Tucker, Paul DeMarco, and Roger S. Gates, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Respondent Daniel Gaul was present at the hearing. Attorneys Richard C. Alkire and Dean Nieding represented Respondent. Attorneys Joseph M. Caligirui, Assistant Disciplinary Counsel, and Jonathan E. Coughlan, Disciplinary Counsel, represented Relator.

CHARGES

Respondent was charged in a Complaint filed on February 17, 2009, with violations of the following provisions of the Code of Judicial Conduct¹ and the Rules of Professional Conduct:

¹ A revised version of the Code of Judicial Conduct became effective on March 1, 2009. All of the conduct which is relevant to this matter occurred prior to that date, and therefore, all references to the Code herein are to the version of the Code in effect prior to its 2009 revision.

- Canon 2 [A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary];
- Canon 3(B)(5) [A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice];
- Canon 3(B)(9) [While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing]; and
- Prof. Cond. R. 8.4(d) [It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice].

FINDINGS OF FACT

{¶1}. Respondent, Daniel Gaul, was admitted to the practice of law in the state of Ohio on November 6, 1981.

{¶2}. Respondent has served as a Judge of the Court of Common Pleas of Cuyahoga County for more than eighteen years. He was appointed on January 13, 1991, by Gov. Richard Celeste, to fill a vacancy, elected to serve the balance of the unexpired term in 1992, and elected to full terms in 1994, 2000 and 2006.

{¶3}. Respondent is subject to the Code of Professional Responsibility, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Rules for the Government of the Bar of Ohio.

{¶4}. Based upon the testimony of Mary Katherine Whitmer, Richard Glickman, Subodh Chandra and Richard G. Lillie, Respondent generally has a good reputation as a jurist among members of the bar in Cuyahoga County. Respondent has a reputation for thoroughness, decisiveness, fairness and preparedness; he is attentive to detail. Respondent's judicial demeanor is normally professional, respectful and courteous towards those who appear before him. He is

typically willing to listen, to carefully and thoughtfully consider the positions of the parties, and to modify his opinion when the situation warrants. Respondent has a reputation for being brutally honest; he is not a person to mince words or to “pull punches.”

{¶5}. Following his arrest on June 6, 2007, by the Cleveland Police Department, Jeffrey Robinson was indicted on June 15, 2007, by the Cuyahoga County Grand Jury on two counts of aggravated burglary and three counts of felonious assault, case no. CR-07-497572-A. The alleged victims of these crimes were Emma Ingram, who was 83 years old at the time of the incident, and her caregiver Mozelle Taylor. The crimes allegedly occurred in Ingram’s home.

{¶6}. At Robinson’s arraignment on June 20, 2007, Robinson entered a plea of not guilty. The case was randomly assigned to Respondent’s docket. Robinson was declared indigent, and Attorney John Parker was assigned to represent Robinson. Since Robinson was incarcerated in the Cuyahoga County Jail, bond was set at \$250,000.00.

{¶7}. When the case file was transmitted to Respondent’s chambers, the file contained a criminal history report (“rap sheet”) regarding Robinson as well as a copy of the indictment and a plea form. The case file also included a LEADS report (which is duplicative of the rap sheet) and a copy of a police report concerning the incident upon which the indictment was based.

{¶8}. While presiding over the Robinson case, Respondent conducted pre-trial hearings in the matter on June 28, 2007, July 12, 2007, August 2, 2007, and November 15, 2007.

{¶9}. After the first or second pre-trial hearing, Respondent directed his bailiff, Mary Jo Simmerly, to research Robinson’s prior involvement with the Court of Common Pleas. In the course of doing so, Simmerly printed-out copies of the Clerk’s Docket for several prior cases and pulled copies of at least one Pre-Sentence Investigation Report (“PSI”) concerning Robinson.

Simmerly read through these documents and highlighted the entries in the Dockets which she believed would assist Respondent.

{¶10}. Since Robinson was incarcerated, the information assembled by Simmerly, and the other information in the case file, was reviewed by Respondent at or before the first or second pre-trial for the purpose of making a decision concerning bond. Because the jail is overcrowded and each day spent in jail counts as three days toward the speedy trial deadline of two hundred seventy days from date of arrest, Respondent generally wants to retain defendants in jail only when necessary.

{¶11}. Trial in the Robinson case was originally set for September 11, 2007, but was continued first to October 10, 2007, and subsequently to October 11, 2007, November 7, 2007, November 15, 2007 and November 27, 2007.

{¶12}. During the time that Respondent presided over Robinson's case, there were at least four different prosecutors on the case, and Respondent believed that he was the person with the most institutional memory about the case. Respondent testified that I "recall sitting down and talking to prosecutors early in this case with defense counsel present. And we talked about the information that was contained not only in the file and in the dockets, but also the information that was contained in the police reports and the medical records. And I specifically remember learning very early on that Mozelle Taylor the caregiver in this case went to the hospital and admitted smoking crack and drinking beer with the defendant Jeff Robinson. And immediately – immediately in my mind there was a huge concern for the elderly victim. I had hoped that the medical professionals or the Cuyahoga County Prosecutor's Office would implement a protocol to safeguard both or one of the victims. And it never happened. I was very concerned throughout this entire case. I was very anxious to get it to trial as quickly as possible." (Tr. 883)

{¶13}. At the time of the commencement of the trial on November 27, 2007, Respondent had been substantially impacted by the information in the file which he had reviewed concerning Robinson's prior criminal history. Based upon this information, he "was reaching the conclusion that there was a pattern where cases of Jeff Robinson would be influenced by witnesses not appearing." (Tr. 880)

{¶14}. From the time he was assigned to the Robinson case, Cleveland Police Detective Joseph Daugenti had met with the victims on several occasions. During a conversation with Daugenti approximately two weeks prior to the scheduled trial date, Emma Ingram indicated that she did not want to go to court to testify. Ingram denied to Daugenti that she was being pressured by either Robinson or Mozelle Taylor to refrain from testifying.

{¶15}. At the request of Assistant Prosecuting Attorney Ralph Kolasinski, Daugenti returned to Ingram's home on the evening of Tuesday, November 27, 2007, to tell Ingram and Taylor that he would pick them up on the morning of Thursday, November 29, 2007, and take them to court so that they could testify. Although Ingram had previously arranged for her son Curtis to take her to court, she agreed to have Daugenti do so. Despite her reluctance, Curtis Ingram believed that, when he had spoken to his mother about taking her to court, she intended to appear in court to testify against Robinson.

{¶16}. The trial commenced on the morning of November 27, 2007. After a brief discussion concerning the availability of the victims to testify and whether a plea bargain was possible, the trial was adjourned until 1:30 P.M. that afternoon to commence voir dire. However, the trial did not actually resume until the next morning (Wednesday, November 28, 2007) at which time the prosecution commenced and concluded its portion of the voir dire.

{¶17}. On the morning of Thursday, November 29, 2007, Det. Daugenti arrived at Ingram's home as arranged. When no one answered the door, Daugenti looked around the house and saw no sign of activity in the house. Daugenti also asked several neighbors if they had seen Ingram leave her home that morning, and no one had seen anything. Daugenti left and went to Court where he informed Kolasinski that he had been unable to locate Ingram or Taylor.

{¶18}. Following Det. Daugenti's arrival at court, Kolasinski informed Respondent, in an off-the-record conference, that Daugenti had been unsuccessful making contact with Ingram and Taylor as arranged and informed Respondent of the efforts Daugenti had made at Ingram's home. Kolasinski requested that Respondent delay the resumption of the trial for one day to give the prosecution time to attempt to locate the victims so that they could testify.

{¶19}. Prior to taking the bench on November 29, 2007, Respondent had formed a belief that Robinson had influenced Mozelle Taylor to not appear pursuant to subpoena to testify against him and to also prevent Emma Ingram from appearing.

{¶20}. Following this conference, Respondent reconvened the trial. The transcript documents that, after Kolasinski explained the circumstances concerning his witnesses' failure to appear and stated his request for a continuance, the following colloquy occurred:

THE COURT: Thank you very much, Ralph.

A couple other things I want to place upon the record to put this issue in context. The incident in question allegedly occurred March 13th, 2007. And the record will indicate because we are in trial, I have explained the counts to the jury, that this is a serious case involving aggregate *[sic]* burglaries times two, felonious assault times three, it's a five count indictment, two victims, Mozelle Taylor and Emma Taylor. Emma is a 83 year old woman that needs care, and Mozelle Taylor is her caregiver.

Now on the day of the incident, the victim, the caretaker Mozelle Taylor, presented at the hospital and admitted to smoking crack and drinking six beers, and I believe she indicated she was smoking crack with the defendant in this case. I believe she indicated she had some sort of personal relationship with him.

Now, I have spoken to the detective in this case, because he has been present at pretrials.

MR. KOLASINSKI: At the beginning of the trial.

THE COURT: At the beginning of the trial. And he indicated he had contact with both of the witnesses, that he has communicated with them. He had been to their house. He had talked to them on numerous occasions in an effort to secure their participation in this trial, and that he planned to pick them up at 9:00 a.m. this morning.

MR. KOLASINSKI: 8:30.

THE COURT: Okay. The point is this: This is not an 83 year old woman who can just go somewhere on her own. And given the fact that the alleged victim in this case Mozelle Taylor is a drug abuser and has had a relationship with this defendant, I am very suspicion [*sic*].

I mean, this isn't a case that has to be researched. It's just a case of common sense and Psychology 101, and I am concerned Mozelle Taylor may be trying to manipulate this trial and prevent this 83 year old woman from being here, and I will not permit that to happen under any circumstances whatsoever.

So I'm making a record. I'm laying the cards on the table. I'm telling the transcript what is going on for purposes of appeal so if anybody is reviewing this transcript, they have a full flavor of the relationship between one of the victims and the defendant in this case.

And I'm also going to say this. Jeopardy is not attached. I will grant the State's motion for a continuance. I'm going to note defense's objection. John, if you want to make an objection I will permit you to after my comments.

I will also do this. If the witness is not here tomorrow, I will grant a mistrial, issue a warrant for Mozelle Taylor immediately. She will be arrested, incarcerated, and held in county jail until this case goes to trial, and I don't care if it's a year from now.

We may have speedy trial issues, and the other thing I want to say is this. If there is anybody involved in this case who was involved in what is obstruction of justice, I will see to it that case will be indicted. And if that case comes to me, I will see to it that person gets maximum consecutive time. I let no one manipulate the system of justice. I will not permit that to occur in this case.

This case will go to trial. If we have a speedy trial issue that prevents us ending disposition of the case, I anticipate at that point the State of Ohio will dismiss with the issue [*sic*] to reindict. There is a lot of issues to hear. John?

MR. PARKER: On behalf of Mr. Robinson, we object to a continuance. There are other witnesses the State could present instead of Emma Ingram and Mozelle Taylor. They have the EMS witnesses and the doctors lined up to testify. I have not begun my voir dire with the jury yet. I'm sure it would be quite short. I think we should impanel the jury and go forward.

My client has been in jail since early June, unable to make bond, and we want to proceed.

THE COURT: Thank you, very much. I appreciate your comments.

The obvious problem with going forward with jury selection is jeopardy attaches. If the witnesses absent themselves for even a brief period of time, the defendant's case has to be dismissed and he will receive a not guilty, and I will not permit that to occur.

The witnesses need to be heard. What they say once they get here is something I can't control. But the witnesses must appear in the courtroom.

This Court has taken this position not only with this case, but particularly with other cases. And I have in fact gone out and arrested victims, and I'm prepared to arrest the victim in this case, and we'll see how long this 83 year old woman stays away from the house that she hasn't left for years because she's under care 24/7 and had been with her Alzheimer husband.

The Court is very suspicious. We will look into the matter. At the appropriate time we will reconvene, resuming the trial tomorrow morning at 9:30.

All right. He is remanded to county jail.

MR. PARKER: Thank you, Judge. (Relator's Ex. 4)

{¶21}. Respondent intended his statement on November 29, 2007 concerning obstruction of justice to refer to both the defendant Jeffrey Robinson and the victim Mozelle Taylor.

{¶22}. No one other than the attorneys in the Robinson case, the defendant, Det. Daugenti, and court personnel were present in the courtroom during the foregoing statements by Respondent.

{¶23}. On the morning of Thursday, November 29, 2007, Det. Daugenti had no concern for Ingram's safety, and did not indicate to Kolasinski that he had any such concern. Although, based upon the fact that Robinson had rejected the prosecution's plea offer, Daugenti had suspicions concerning Robinson's possible involvement in Ingram and Taylor's failure to appear, he had no evidence at that time of any such involvement. Because of the relationship between Robinson and the victims, particularly Taylor, Daugenti did not think it was unusual that the victims would be reluctant to testify against Robinson.

{¶24}. After adjourning the trial on Thursday, November 29, 2007, Respondent called his bailiff Mary Jo Simmerly into the courtroom and asked her to contact the media and tell them

he was issuing an "Amber Alert" for the victims in the Robinson case. Simmerly understood from talking to Respondent that he asked her to issue the "Amber Alert" because he "was concerned for both victims" in the case. Although Simmerly had never before been involved with an "Amber Alert," she phoned the members of the media with whom she had dealt on prior occasions and told them that "the Judge is issuing an 'Amber Alert' and that some witness is missing. (Tr. 610)

{¶25}. By issuing the "Amber Alert," Respondent was intending to "saturate the community" to gain the public's assistance in locating Emma Ingram and Mozelle Taylor. In response to Simmerly's phone calls, several television stations and the Cleveland Plain Dealer directed their representatives to attend the resumption of the Robinson trial in Respondent's courtroom on Friday, November 30, 2007.

{¶26}. Respondent also issued a bench warrant for Mozelle Taylor on Thursday, November 29, 2007.

{¶27}. On the evening of Thursday, November 29, 2007, Det. Dagenti returned to Ingram's house and conducted surveillance for about ninety minutes. He observed no activity or any other indication that anyone was at home. That evening, Dagenti phoned Kolasinski's office and left a message that he had been unable to locate the victims.

{¶28}. Prior to reconvening the trial on the morning of Friday, November 30, 2007, Respondent conducted an off-the-record conversation in his chambers with Parker, Kolasinski and Kolasinski's supervisor David Zimmerman and Michael O'Malley, First Assistant Prosecuting Attorney for Cuyahoga County. Kolasinski informed Respondent that Dagenti had still been unable to locate Ingram and Taylor, and that the prosecution was requesting that the

case be dismissed without prejudice with the intention to indict Robinson again once the victims were located.

{¶29}. Respondent told Kolasinski that he was unwilling to grant the prosecution's request to dismiss this case and stated that he was not going grant his request because a dismissal would result in Robinson getting out of jail. Although Respondent told counsel that "we are on the same team," his comments were intended only to reflect his strong feeling that witnesses needed to come to court and testify so that the jury could decide the case.

{¶30}. At some time on the morning of Friday, November 30, 2007, prior to the resumption of the in-court proceeding in the Robinson case, Kolasinski phoned Daugenti and told him that Respondent considered Ingram to have been kidnapped. In response to Kolasinski's request that he try to locate Ingram, Daugenti phoned the dialysis center where he knew Ingram went every Monday, Wednesday and Friday. Although the staff of the dialysis center was reluctant to provide him with information, they eventually told Daugenti that Ingram had been there that morning, and that she was in the process of leaving with her caregiver. Daugenti asked the dialysis center staff to attempt to detain Ingram based upon Respondent's conclusion that she had been kidnapped. However, staff members were unable to stop Ingram before she left. They did, however, provide Daugenti with a license number for the car in which Ingram left the center.

{¶31}. Daugenti phoned Kolasinski and told him that Ingram had appeared that morning for her dialysis appointment, but that he did not know where she went after that. Kolasinski provided this information to Respondent.

{¶32}. After his discussions with counsel, Respondent went into the courtroom and reconvened the trial. The proceedings that morning are documented by the transcript as follows:

THE COURT: All right. You may be seated, everybody. I'd like to go on the record in 497572, the State of Ohio versus Jeffrey Robinson. We're in the middle of trial. We've been selecting a jury and we've had a very unusual occurrence.

I've called my friends in the media, and I've asked them to be here because I thought we were going to need *[sic]* their help, and I still do think we need their help to find witnesses in this case.

Let me first go on the record and say present in the courtroom is the defendant and his attorney John Parker, and also present and representing the State of Ohio is Assistant County Prosecutor Ralph Kolasinski, Assistant County Prosecutor David Zimmerman, and also present, Ralph, would you introduce the gentleman seated to your right?

MR. KOLASINSKI: Thank you, Judge. This would be First Assistant Mike O'Malley.

THE COURT: Oh, Mike, it's a pleasure to have you in my courtroom. I think this is your first appearance on the record. Nice to have you with us.

Ladies and gentlemen, I want to make a record because it's very important in this case. Jeffrey Robinson, this defendant, is charged with aggravated burglary in two counts of the indictment, two counts of felonious assault in counts three and four, and a count of felonious assault in count five.

The victim in this case -- one of the victims in this case is Emma Ingram. I don't know her. I haven't met her. I don't know where she lives, but I do know that she's 83 years old and allegedly had her hip broken by this defendant.

THE DEFENDANT: She didn't have her hip broken by me.

THE COURT: I'm going to tell you something right now. I'm not here to hear from you, and if you make one more comment to me, I'm going to have you bound and gagged.

MR. PARKER: I object to this, your Honor.

THE COURT: Okay, you may object to this all you want, okay. Your client will not interrupt the Court.

MR. PARKER: Thank you.

THE COURT: As I was saying, the defendant is charged with breaking the woman's hip, and an aggravated burglary.

The other alleged victim in this case is Mozelle Taylor. Mozelle Taylor is allegedly a friend of the defendant. When she appeared at the hospital, that's exactly what she said.

Mozelle Taylor indicated to the Cleveland Police that on March 13th of 2007, that this defendant Jeffrey Robinson assaulted the 83 year old woman and struck her with the chair and broke her hip and kicked her in the face while she was on the ground.

Now Mozelle Taylor unfortunately is the caretaker for the 83 year old woman. Mozelle Taylor became familiar with the 83 year old woman when Mozelle, the caregiver, provided the care to Emma Ingram's aged husband with Alzheimer's disease.

We know that when Mozelle Taylor, the caregiver, presented at the emergency room on March 13th of 2007, she admitted to the medical health professionals that she had been smoking crack with this defendant and drinking six beers, and that a fight erupted over money, and that Jeffrey Robinson assaulted the aged victim Emma Ingram. Those are the allegations. That's what the indictment was about.

This defendant is presumed innocent. We were involved in the trial of this case. We were involved with selecting a jury that began on Wednesday. We had to recess the case yesterday, however, because the 83 year old woman Emma Ingram went missing.

Despite the fact that she had had numerous contacts with the Cleveland Police Department and Detective Joseph Daugenti, D-a-u-g-e-n-t-i, who appeared here for trial, Emma Ingram, the 83 year old woman who was disabled, was not present yesterday at a prearranged meeting at 8:30.

The police went to her home and they were unable to locate her. They were also unable to locate Mozelle Taylor. We recessed the trial, because once a jury is impaneled, jeopardy attaches. And once that occurs, this defendant cannot be tried on those charges again if we don't have the witnesses, and the Court has to dismiss the case. That is what would happen.

I, therefore, continued the case yesterday. And as of 9:30 this morning, we have been unable to locate this 83 year old woman. She was not available to the police. She was not at her home when they stopped there last night.

And I should indicate for the record that yesterday, because both of these witnesses, Emma Ingram and Mozelle Taylor were personally served with a subpoena, because Mozelle Taylor had contact with the Cleveland Police Department, because Mozelle Taylor was controlling the whereabouts of the 83 year old woman, I issued an arrest warrant for Mozelle Taylor yesterday. And there is currently pending an arrest warrant on Mozelle Taylor.

So as of 9:30 this morning as we prepared to try this case, we did not have witnesses, and we have some very tough decisions to make. Because if this case was dismissed after we impanel the jury, we cannot retry the defendant.

But perhaps more importantly, if this case was dismissed, Jeffrey Robinson has to be returned to our community and I am not prepared to do that at this time, because we have issues as to the care and protection of the 83 year old woman. And as of 9:30 this morning, we have no idea where she is.

Now we have learned within the last 45 minutes that Emma Ingram is today in dialysis, but we still cannot find Mozelle Taylor. Mozelle Taylor is a most crucial witness in this case.

And I have to step out of my role now as being a fair and impartial Judge and indicate that I have become an advocate in this case, an advocate for justice. Because justice may be blind, but justice has a heart, and it has a soul, and it has common sense.

And I would bet my life on the fact that you, sir, have been involved in obstruction of justice --

MR. PARKER: Objection, your Honor.

THE COURT: -- through Mozelle Taylor.

MR. PARKER: Objection, your Honor.

THE COURT: Okay. And I also would bet my life, if I had to right now, that you have been involved in a technical kidnapping through Mozelle Taylor.

MR. PARKER: Objection, your Honor.

THE COURT: That's what I would bet.

MR. PARKER: Objection, your Honor.

THE COURT: You may object. You may object. That is this Court's finding, okay. It's not binding. And I'm going to recuse myself from this case, because obviously I cannot be fair and impartial anymore, okay.

But I felt it important to step out of my role as a Judge and to become an advocate to protect the well-being of an 83 year old woman who has no one else in this world.

And if nothing else, even if he's not convicted, we'll know this. We'll know where Emma Ingram is, and she will be in safekeeping, because she's no longer going to be provided care by Mozelle Taylor, your friend who was smoking crack with you. She's not going to be in that household. Because Mozelle Taylor is going to be in the county jail and she's going to sit in the county jail until this case is tried.

What's more important than me stepping off this case is that justice is done. There are 33 other wonderful Judges in this building that are willing to try you, and when you go to trial, I won't be surprised if you face obstructions of kidnapping *[sic]*.

MR. PARKER: Objection, your Honor.

THE COURT: Okay. So what I am prepared to do is this. I am going to recognize the State of Ohio at this time. Mr. Zimmerman.

MR. ZIMMERMAN: Thank you, your Honor. Your Honor, as the State has already stated to this Court, we don't believe that the Court has to recuse himself from this case. We think that this Court can continue to go forward. I understand the Court's position, though.

If the Court is going to declare a mistrial at this time and have the case spun off to another Judge, I understand your ruling. We don't believe that that is necessary at this time, but if that is the Court's decision, that is fine, and we will continue to follow this case no matter to what courtroom this case goes.

THE COURT: In terms of securing the witness Mozelle Taylor, does the State of Ohio have a position?

MR. ZIMMERMAN: We have detectives out there already trying to locate them. We will be continuing to locate them. I'm going to, along with the detectives that

are working the case already, I'm going to employ some of my investigators from the county prosecutor's office. They will be out there, and we will attempt to locate her this weekend and make sure she is safe and secure in a place where the defendant or other people that attempted to influence her won't be able to get to her.

THE COURT: And the woman who has been the caretaker, the caretaker who has been capiased, you know technically does the State make a motion to continue the case until she can be incarcerated?

MR. ZIMMERMAN: We would, your Honor, and as soon as we have information we will bring that to the Court's attention.

THE COURT: All right. Thank you, very much. John?

MR. PARKER: Thank you, your Honor. On behalf of Mr. Robinson, your Honor, we object to any continuance whatsoever. We're prepared to try this case.

Jury selection began on Wednesday. We were prepared to continue with jury selection yesterday. Over my objection you continued the case at the State's request.

It was my understanding this morning the prosecutor was prepared to dismiss the case, until they recently found Emma Ingram. And we are prepared to go forward. We want to select a jury. We are asking that you bring the jury up and let us continue selection, your Honor.

The State has other witnesses which have been present and available to testify. EMS personnel have been here. Cleveland police officers have been here. They can proceed, your Honor.

This Court is preventing my client from exercising his Constitutional right to a timely and speedy trial. We do not think that's proper, with all due respect. We are asking to go forward.

There are 22 citizens that have answered the call for jury duty. They're waiting to perform their service. They're asking you to bring them up here, and let's try this case.

THE COURT: All right. Thanks John, I appreciate that.

You know, what is paramount, even more important than a speedy trial, even more important than the effective administration of justice, what's even more important is the integrity of the system. And there are so many unusual circumstances that have occurred during this case, including the role I had to take on to address this issue.

That the only appropriate thing to do at this point to safeguard the integrity of the criminal justice system in this case is for this Court to recuse itself on Monday, to write a letter to Nancy McDonald [*sic*] and asking the Presiding Administrative Judge to re-assign another judge to take this case over.

In the meantime, Mr. Robinson will be held in the county jail. In the meantime, I'm challenging the law enforcement of the community and of the City of Cleveland, and in Cuyahoga County and in the State of Ohio to find Mozelle Taylor and have her incarcerated so that she may be present so that we may determine when she is sitting in a county jail and being interviewed by the Cleveland Police Department, whether this defendant was involved in the disappearance of this 83 year old woman yesterday.

And I suspect when all said is done, that's exactly what they are going to find out, because I have your rap sheet right here.

MR. PARKER: I object to this, your Honor.

THE COURT: So I am going to hold the defendant in the county jail, continue the case, recuse myself on Monday, ask the Administrative Judge to appoint another Judge to preside over the case.

All right. So at this time I am --

MR. PARKER: Judge, we move to dismiss the case with prejudice at this time.

THE COURT: Okay. I am going to deny the motion. I'm going to declare a mistrial for the jury panel that was selected. Jeopardy has not attached. I will recuse myself and ask the Administrative Judge to appoint another Judge to try this case. Those are my decisions at this point. Anything further, gentlemen?

MR. ZIMMERMAN: No, your Honor. Thank you on behalf of the State of Ohio.

THE COURT: Thank you, Ralph, Mike, John, thank you all very much. We're in recess. (Relator's Ex. 5)

{¶33}. After declaring a mistrial and recessing the proceeding, Respondent agreed to speak in his chambers with several members of the media who had questions concerning what they had just heard in the courtroom. While answering the reporters' questions, Respondent stated: ". . . sometimes you get checked into the boards and sometimes you gotta check somebody else into the boards, but I'm not going to sit idly by and dismiss this case. If I dismiss this case, Jeffrey Robinson wins and he could be out on the streets of our community tonight. He could be at this elderly woman's house again, smoking crack again. And that's not going to happen on my watch. . ."

This comment was broadcast as a part of at least one television station's story on November 30, 2007.

{¶34}. As a result of media representatives attending the proceedings in the Robinson case on Friday, November 30, 2007, at least three television stations, the Cleveland Plain Dealer and several internet news sites published stories concerning the Robinson case and Respondent's

comments concerning his conclusions regarding Robinson's involvement in the failure of Emma Ingram and Mozelle Taylor to attend the trial to testify.

{¶35}. After Respondent declared a mistrial and recessed the proceedings, Daugenti traced the vehicle used to pick up Ingram at the dialysis center to the home of Mozelle Taylor's sister. Mozelle Taylor, later that day, returned Ingram to her home and surrendered herself on the bench warrant as a result of Daugenti's discussion with Taylor's sister. There was no evidence that Ingram was in any danger on either November 29 or 30, 2007; in fact, she told her son that, on Friday, she and Mozelle were just out "visiting."

{¶36}. On Monday, December 3, 2007, Respondent sent a letter to Presiding Judge Nancy R. McDonnell asking her to re-assign the Robinson case to another judge. Respondent described the reason for his request as follows: "I found it necessary to recuse myself after issuing a bench warrant for a witness who failed to appear in Court. Comments made by myself at that hearing could possibly call my impartiality into question. Therefore, to avoid even the appearance of impropriety, I respectfully request you re-assign this matter."

(Respondent's Ex. EE)

{¶37}. In response to Respondent's letter, Judge McDonnell immediately re-assigned the Robinson case to Judge Nancy Margaret Russo. Judge Russo immediately recused herself, and the case was reassigned to Judge Kathleen Sutula. Due to Judge Sutula's illness, the case reassigned again to Judge McDonnell on December 18, 2007.

{¶38}. That same day, as a result of a plea bargain, Robinson appeared in Court and pled guilty to one count of the indictment and was sentenced to two years in prison. Taylor was released from jail following Robinson's guilty plea.

{¶39}. While Robinson was in prison, he was indicted for obstruction of justice based primarily on evidence which was unavailable to Respondent during the course of the original proceeding. Although Robinson was subpoenaed to testify on the first day of the panel's hearing, he did not testify because he was arrested when he appeared at the courthouse pursuant to the subpoena, based upon the warrant issued for his arrest following the issuance of this indictment.

{¶40}. Respondent claims that he made his in-court statements on November 29 and 30, 2007, concerning Robinson's involvement in the non-appearance of Ingram and Taylor because he was required to "make a record" as to why he was recusing himself and as to why he was declaring a mistrial; during his testimony Respondent referred to these statements as his "findings."

{¶41}. None of Robinson's conduct in allegedly procuring the non-attendance of the prosecution's witnesses against him occurred in Respondent's presence, or so near Respondent as to obstruct the administration of justice, and therefore, such conduct was not punishable as direct contempt.

{¶42}. Respondent's "findings" were based upon "the information that was contained in the file, the information that was contained in the police reports and medical records that I saw, and numerous statements that were made to me by the Cuyahoga County Prosecutor's Office as well as the defense attorney." (Tr. 888) Although some of these statements might have been made in open court, Respondent stated, "Most of my knowledge came from the information that I gleaned in chambers. By the time I hit the bench I knew what I had." (Tr. 889)

{¶43}. Assistant Prosecuting Attorney Kolasinski did not, either on November 29 or 30, 2007, tell Respondent that he had evidence that Robinson was involved in procuring the non-attendance of Ingram or Taylor pursuant to the subpoenas issued by Kolasinski.

{¶44}. At no time during any of the proceedings on November 27, 28, 29 and 30, 2007, did Respondent receive any sworn testimony or other admissible evidence concerning the reason for the failure of Ingram or Taylor to appear pursuant to the subpoenas served upon them, or provide Robinson with the opportunity to confront witnesses on this subject or to otherwise present evidence in response to the “findings” made by Respondent about Robinson’s involvement in the failure of the victims to appear and testify.

{¶45}. Despite his comment on Thursday, November 29, 2007, Respondent knew that, if anyone was charged with obstruction of justice for procuring the non-attendance of witnesses in the Robinson case, Respondent would not be able to hear the case because of his involvement in the original case.

{¶46}. Respondent never considered commencement of proceedings against Robinson for indirect contempt of court based upon Respondent’s belief that Robinson had been involved in procuring the non-attendance of Ingram and Taylor as witnesses at his trial.

{¶47}. During his testimony, Respondent was unable to articulate whether his declaration of a mistrial in Robinson’s case was due to Respondent’s loss of impartiality or to his conclusion that Robinson had interfered with Ingram’s and Taylor’s appearance, pursuant to subpoena, to testify in his case.

{¶48}. After stating on the record that he had become an advocate to protect Ingram and that he could not be impartial in Robinson’s case, Respondent overruled the motion made by Robinson’s counsel to dismiss the indictment with prejudice.

{¶49}. At the time of making his comments in the Robinson matter on Friday, November 30, 2007, Respondent had no confidence in the ability or desire of either the prosecuting attorney or law enforcement to protect Ingram and Taylor from harm. Respondent believed that he was

the only one who could protect the witnesses and the integrity of the criminal justice process.

Respondent had concluded that Robinson was “evil” and that it was his responsibility to confront Robinson and make sure he didn’t “win.”

{¶50}. Because of Respondent’s on-the-record comments, the proceeding conducted by Respondent on November 30, 2007, in Robinson’s case was not fair to Robinson. On the other hand, Respondent’s public and non-public statements during the course of the Robinson matter did not actually prevent Robinson from ultimately receiving a fair hearing of the charges against him following Respondent’s recusal.

CONCLUSIONS OF LAW

{¶51}. Canon 2 of the applicable Code of Judicial Conduct requires that, “A Judge Shall Respect and Comply with the Law and Shall Act at all Times in a Manner that Promotes Public Confidence in the Integrity and Impartiality of the Judiciary.” Although Respondent argues that Canon 2 primarily describes the expectations regarding a judge’s personal and extrajudicial activities, the first portion of the Commentary to Canon 2 states:

“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The admonition of Canon 2 applies to both the professional and personal conduct of a judge. It is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for compliance with Canon 2 appearance of impropriety is whether the conduct would create in

reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

{¶52}. Canon 3 of the applicable Code of Judicial Conduct requires that, “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.” In performing his/her official duties, a judge is required to comply with all of the divisions of Canon 3(B), which include in part:

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. . .

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice; and

(9) While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

The commentary to Canon 3(B)(5) states, “A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as bias or prejudice. . . .” The commentary to Canon 3(B)(9) states, “The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.” Since the statements at issue before the Panel were all public statements, the applicable standard under Canon 3(B)(9) is whether Respondent’s comment “might reasonably be expected to affect [the] outcome or impair [the] fairness” of the pending proceeding.

{¶53}. In its decision in *Cleveland Bar Assn. v. Cleary* (2001), 93 Ohio St.3d 191, the Court stated that, as used in Canon 3(B)(5), the term “bias or prejudice” when used in reference to a judge:

“[I]mplics a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.” *Id.* at 201, quoting from, *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, paragraph four of the syllabus. The Court further stated in its *Cleary* decision that, “A trial ruling . . . may be considered to be the product of judicial bias if based on improper extrajudicial motives or if ‘it is so extreme as to display clear inability to render fair judgment.’” *Id.* at 202.

{¶54}. In its decision in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, the Court, a judge made comments to a television reporter which were critical of a decision of the court of appeals reversing one of the respondent’s decisions. In finding violations of Canons 2 and 3(B)(9), the Court stated: “Canon 2 does not distinguish, as respondent would have us distinguish, between comments on and “off the record.” Nor does the canon distinguish between unedited comments to a television reporter and the edited portions of those comments that are ultimately broadcast to the general public. The canon requires that a judge “at all times” conduct himself or herself in a manner that promotes public confidence in the judiciary. We recognize that on occasion a judge may unwittingly make an inappropriate casual remark. However, respondent’s remarks about the appellate court were not unwitting, inadvertent “slips.” His statements were part of lengthy intemperate comments about the appellate court’s reversal of his decision.

By this series of statements respondent Ferreri also violated Canon 3(B)(9) of the Code of Judicial Conduct, which requires that a judge not make any comment about a pending case that might reasonably be expected to affect its outcome. Canon 3(B)(9) does not preclude judges from making "public statements in the course of their official duties or from explaining for public information the procedures of the court." However, at the time of his statements to the television reporter, respondent was not acting in the course of his official duties, nor were his comments limited to an explanation of court procedures." *Id.* at 652-653.

{¶55}. Prof. Cond. R. 8.4(d) provides that it is misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. As stated by the Supreme Court in its *Cleary* decision interpreting DR 1-102(A)(5) [the predecessor to Prof. Cond. R. 8.4(d)], "a judge acts in a manner 'prejudicial to the administration of justice' . . . when the judge engages in conduct that would appear to an objective observer to be unjudicial and prejudicial to the public esteem for the judicial office." 93 Ohio St.3d at 206. Under Prof. Cond. R. 8.4(d), a judge has a duty to deal fairly with attorneys and litigants who come before the court. A judge's "unprofessional and undignified treatment" of a criminal defendant is a violation of DR 1-102(A)(5). *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶48.

{¶56}. A fair hearing in a fair tribunal is a basic requirement of due process. *Withrow v. Larkin* (1975), 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712. "The measured and even-handed administration of justice is central to our judicial system." *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶9. A judge is required to "act as an impartial arbiter" and to demonstrate "the integrity and independence that promotes public confidence in the judiciary." *Id.* at ¶12.

{¶57}. Relator does not dispute that Respondent acted properly when he decided to recuse himself after concluding that he was unable to be fair and impartial due to his personal belief that Robinson had encouraged Mozelle Taylor to refrain from appearing to testify and to hinder Emma Ingram from doing so.² Additionally, the Panel does not disagree with Respondent's decision to grant a mistrial based on that recusal. However, even though Respondent claimed that he was required to "make a record" as to why he was recusing himself, he was unable during his testimony to clearly state whether his decision to grant a mistrial was based upon his recusal, or rather upon his determination that Robinson had engaged in misconduct by interfering with the prosecution's ability to present its case.³

{¶58}. If the mistrial was based upon his recusal, Respondent's statements on the record on November 29 and 30, 2007, went far beyond what was required to document his reasons for his recusal. Respondent was required by Canon 3(B)(9) to make every effort to prevent his bias from tainting the fairness of the proceedings in Robinson's criminal case. Although Respondent could have complied with his duty by simply stating that he was unable to continue to perform his judicial functions because of personal bias, Respondent made multiple comments, both in court and in his chambers, accusing Robinson of misconduct in the nonappearance of the prosecution's witnesses under the guise of explaining his recusal. Respondent apparently believed that, because he intended to recuse himself, he could make these accusations of

² Canon 3(E)(1) requires that a judge disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned including when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding."

³ This distinction is relevant to the impact of the mistrial on Robinson's speedy trial rights. See, R.C. §2945.72(D) (Statutory time period within which an accused must be brought to trial is extended by any period of delay caused by the improper act of the accused); see, also, *State v. Hendricks*, 2009-Ohio-5556, ¶150 (Any prejudice to Hendricks was caused by his own actions and as a result, his speedy trial rights were not violated.)

misconduct even though they were highly prejudicial towards Robinson and his “findings” were unsupported by any evidence in the record.

{¶59}. On the other hand, if the mistrial was based upon Respondent’s “findings” concerning Robinson’s alleged misconduct in procuring the non-attendance of prosecution witnesses, Respondent failed to comply with legal requirements that findings of misconduct occurring outside the presence of the Court must be based upon evidence presented at a hearing. *See, e.g., State v. Vandyke*, 2007-Ohio-1356, ¶11 (A court is required to conduct a hearing before granting a mistrial based upon juror misconduct involving extrajudicial contact with a witness), *State v. Chavez-Juarez*, 2009-Ohio-6130, ¶41 (“When the court is informed that an act of indirect contempt has taken place, the accused contemnor will be given notice and a hearing held on the charge”), and *State v. Brandon*, 2008-Ohio-403, ¶11-12 (A person accused of criminal contempt has many of the due process rights required in criminal proceedings including notice of the charges and an opportunity to be heard concerning them). In its decision in *Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402, the Court found misconduct when a judge decided the merits of legal issues in both civil and criminal actions without first hearing from parties on both sides of those issues and in derogation of clear procedural rules; the Court stated: “A judge is charged with the responsibility of enforcing the rule of law, both substantive and procedural. A judge may not blatantly disregard procedural rules simply to accomplish what he or she may unilaterally consider to be a speedier or more efficient administration of justice.” *Id.* at ¶42. By making “findings” of defendant’s misconduct without conducting a hearing to receive evidence concerning the alleged misconduct, Respondent violated the requirements of Canons 2 that a judge comply with the law in the performance of his official duties.

{¶60}. Respondent's on-the-record comments on November 29 and 30, 2007, and his in-chambers comments to the media following the hearing on November 30, 2007, also constitute a violation of Canon 2 because they could only create in reasonable minds a perception that Respondent's ability to carry out his judicial responsibilities with integrity, impartiality and competence was impaired by Respondent's clearly expressed belief that Robinson was involved in procuring the non-attendance of the prosecution's witnesses at his trial. If those comments had been based upon evidence, presented to the Court during a fair and open hearing, which established a factual basis for defendant's misconduct, the panel may have reached a different conclusion. However in the absence of such a hearing, the panel concludes that Respondent's conduct violated Canon 2.

{¶61}. Respondent also violated Canon 2 by misusing a public service when he directed his bailiff to contact the media and tell them that he was issuing an "Amber Alert" for the two missing victims. *See, Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶41 (Judge abused 9-1-1 system by calling police to respond to a nonemergency). The term "Amber Alert" generally refers to the statewide emergency alert programs regarding abducted children and missing adults who either have a mental impairment or are sixty-five years of age or older. *See*, R.C. §§5502.52(A)⁴ and 5502.522. These programs are "a coordinated effort among the governor's office, the department of public safety, the attorney general, law enforcement agencies, the state's public and commercial television and radio broadcasters, and others as deemed necessary by the governor." Even though Emma Ingram was more than 65 years of age, the triggering of the statewide emergency alert program requires a determination by a law

⁴ The Governor is also empowered, under R.C. §5502.521, to appoint an AMBER Alert Advisory Committee to "advise the governor, the attorney general, the department of public safety, and law enforcement agencies on an ongoing basis on the implementation, operation, improvement, and evaluation of the statewide emergency alert program created under section 5502.52 of the Revised Code."

enforcement agency that the elderly person's disappearance "poses a credible threat of immediate danger of serious bodily harm or death to the missing individual;"⁵ no law enforcement agency made such a determination regarding Emma Ingram in this case.⁶

Additionally, Respondent possessed no actual evidence that Emma Ingram was subject to an "a credible threat of immediate danger of serious bodily harm or death." Rather than relying on evidence to support his conclusions concerning why the witnesses had not appeared, Respondent stated on Thursday November 29, 2007: "I mean, this isn't a case that has to be researched. It's just a case of common sense and Psychology 101, and I am concerned Mozelle Taylor may be trying to manipulate this trial and prevent this 83 year old woman from being here, and I will not permit that to happen under any circumstances whatsoever." (Respondent's Ex. V)

Det. Daugenti testified that it is not unusual for victims of violence to fail to appear to testify against their family members, relatives or acquaintances. Daugenti testified that he did not believe that Ms. Ingram's failure to appear indicated that she was threatened with harm.

Ultimately, the evidence presented to the Panel established the lack of any such threat. Although Respondent publicly expressed that he believed Emma Ingram was in danger while in the care of Mozelle Taylor because of Taylor's connection to Robinson, Ingram's son Curtis testified that he had regular contact with his mother, that he knew Mozelle Taylor as his mother's companion and

⁵ Respondent's on-the-record comments fail to make clear the precise reason for his decision to issue an Amber Alert. Although Respondent repeatedly expressed his concerns for the safety of Emma Ingram, he also repeatedly stated that he wanted to find the witnesses to ensure that they would be available to testify against Robinson so that the integrity of the criminal justice process would be protected. An Amber Alert is designed to protect missing persons from harm, not to rectify behavior which is a contempt of court process.

⁶ Although R.C. §5502.522(C) provides that the existence of the statewide emergency alert program does not prevent the activation of a local emergency alert program based upon different criteria than specified in the statute, Respondent presented no evidence to establish that he was activating a local emergency alert program which permitted a judge to activate the program.

caregiver and that he believed his mother and Taylor were “playing games” when they decided not to show up in court.

In short, the issuance of an Amber Alert is a law enforcement function, and a judge presiding in a criminal proceeding has no authority to issue an Amber Alert. Respondent violated Canon 2 by misusing the local media’s commitment to assisting in the statewide emergency alert program by representing to them that he was issuing an Amber Alert.

{¶62}. Respondent’s handling of the Robinson case violated Canon 3(B)(5) because he was clearly prejudiced against Robinson during the course of the proceeding and expressed that prejudice on the record. Even before taking the bench on November 30, 2007, Respondent had clearly decided that, although the trial could not continue, he was going to deny the prosecution’s request to dismiss the case without prejudice, and instead grant a mistrial for the sole purpose of keeping Robinson incarcerated until Ingram and Taylor were located and brought to Court to testify against Robinson. Respondent violated Canon 3(B)(5) when he continued to exercise judicial authority in the proceeding (by denying both the prosecution’s request that the case be dismissed without prejudice and the defense’s motion to dismiss the case with prejudice) even after stating that he could no longer continue to preside in the matter because he had “become an advocate” for the witnesses.

{¶63}. Respondent violated Canon 3(B)(9) by telling Robinson that Respondent would personally see that anyone involved in obstruction of justice would be indicted, convicted and given the maximum sentence; that Respondent was not on the bench to hear from Robinson and that “he would bet his life” that Robinson would ultimately be found to have been involved in kidnapping Emma Ingram. Respondent should have reasonably expected that his comments would impair Robinson’s perception of the fairness of the proceedings over which Respondent

was presiding. No reasonable person in Robinson's position would have perceived that he/she was receiving a fair hearing from Respondent. Even if Respondent turns out to have been totally correct in his conclusions about Robinson's involvement in the non-appearance of the prosecution's witnesses, Respondent's "findings" were criminal in nature, and Robinson was entitled to the basic requirements of due process including notice of the charges against him, a presumption of innocence, the opportunity to be heard in response to the charges and the right to confront the witnesses against him. Respondent "impermissibly crossed the line between law enforcement and the judiciary," and his conduct "cast grave doubt on his ability to act as an impartial arbiter." See, *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶¶11-12; see, also, *Disciplinary Counsel v. Medley*, 104 Ohio St.3d 251, 2004-Ohio-6402, ¶10 [Judge violated Canons 1, 2, 3(B)(7), and 4, and DR 1-102(A)(5), by improperly assuming the roles of both the prosecutor and defense counsel, as well as that of the court, when he unilaterally negotiated and accepted a plea bargain in the absence of the prosecutor.]

{¶64}. Respondent's on-the-record comments were prejudicial to the administration of justice in violation of Prof. Cond. R. 8.4(d). Respondent's public treatment of Robinson during the course of a criminal proceeding was unfair, unprofessional and undignified, and an objective observer would conclude that Respondent's conduct was unjudicial and prejudicial to the public esteem for the judicial office.

MITIGATION AND AGGRAVATION

{¶65}. Pursuant to BCGD Proc. Reg. 10(B)(1)(g), the Panel finds in aggravation that Respondent refuses to acknowledge that his conduct in this matter violates any of the provisions of the Code of Judicial Conduct. Despite his admission that he misspoke when he stated that he would personally see that anyone involved in obstruction of justice in the Robinson case was

indicted and given the maximum punishment, Respondent otherwise believes that he acted appropriately. *See, Disciplinary Counsel v. Kaup*, 102 Ohio St.3d 29, 2004-Ohio-1525, ¶12 (“As an aggravating factor, respondent expresses no regret for his actions and ‘insists he did nothing wrong.’ Respondent thus refuses ‘to acknowledge [the] wrongful nature of [his] conduct.’”). Respondent was clearly proud that he stepped out of his judicial role and became an advocate for the witnesses and the protection of the judicial process. Respondent admitted an absolute lack of confidence in the ability or desire of both the Prosecuting Attorney and the appropriate law enforcement agencies to enforce the law, and seemed to boast that he was the only person able to protect the witnesses in the Robinson case. In his testimony, Respondent directly accused the Prosecuting Attorney of “mailing it in” when Kolasinski asked to dismiss the case without prejudice.

{¶66}. Although Respondent certainly has a right to defend himself against the charges brought by Relator in this matter, his defense was directed primarily at attempting to prove that his conclusions concerning Robinson turned out to be correct, so as to deflect the panel’s attention from Respondent’s clearly unprofessional and undignified treatment of Robinson.

{¶67}. Respondent also attempted to portray himself as the victim of “persecution” by an overzealous, process-focused disciplinary system that, in his view, cares little for the truth. Respondent testified that he believed his remarks during the Robinson case “received elevated scrutiny” because he had made comments critical of the Office of Disciplinary Counsel while participating in a panel discussion with Disciplinary Counsel Jonathan Coughlin at a conference in May, 2007 (Tr. 162). In response to a question by Relator’s counsel as to whether the filing of this case was motivated by “in large part” by those remarks, Respondent stated, “I would not say in large part but I do think that your office’s judgment in this case has been influenced by my

criticism of your office at that conference.” (Tr. 161). Respondent further testified at the November 11, 2009 hearing: “It’s been, you know, just this – this whole prosecution of me, if you will, and some would say persecution of me, I think, is deleterious to the system of justice. Look, I am thoughtful and sensitive enough to know that I have maybe offended some of the tender dignities of the people present in this room. I don’t work in the court of appeals or in the cloistered halls of the Supreme Court. I’m a trial court judge at the fiery (sic) line in the front line every day, as Paul Pfeiffer would say, and other judges are alarmed and they’re scared. Because, you know, we’re all – this really almost isn’t about truth anymore. It really isn’t about who wins or loses. It’s not about truth. It really is about process. And when Disciplinary Counsel uses poor discretion and prosecutes a case like this, I think it’s deleterious because it has a chilling effect on the entire judiciary.” (Tr. 105) In short, Respondent not only refused to acknowledge the wrongful nature of his conduct but also clearly demonstrated his contempt for the fact that Disciplinary Counsel has called attention to his behavior in this case. He suggests that those “in the cloistered halls of the Supreme Court” could not possibly appreciate what trial court judges face, implying that “the entire judiciary” and “the system of justice” would be harmed if he is found to have committed misconduct as alleged in the Complaint.

{¶68}. Pursuant to BCGD Proc. Reg. 10(B)(2), the panel finds in mitigation: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive;⁷ (d) full and free disclosure to disciplinary Board; and (e) character and reputation. The Panel also concludes that Robinson ultimately suffered no actual prejudice from Respondent’s misconduct because he ultimately entered a plea of guilty to one count of the indictment resulting in a sentence of two

⁷The Panel concludes that Respondent truly believed that he was protecting the integrity of the criminal justice process and that the public would benefit from his actions. Therefore, the Panel concludes that Respondent did not act with a selfish motive. *See, Disciplinary Counsel v. Runyan*, 108 Ohio St.3d 43, 2006-Ohio-80, ¶18.

years of incarceration, which was a more favorable disposition than the four-year sentence which had been offered to Robinson in plea negotiations while Respondent was presiding over the case.

SANCTION

{¶69}. In determining the appropriate sanction to impose for Respondent's violations of the Code of Judicial Conduct and Rules of Professional Conduct, the Panel must consider the duties violated, respondent's mental state, the injury caused, the existence of aggravating or mitigating circumstances, and applicable precedent. *Disciplinary Counsel v. Parker*, 116 Ohio St.3d 64, 2007-Ohio-5635, ¶56. Relator recommended a suspension for twelve months, all stayed. Because Respondent believes the charges should all be dismissed, he made no recommendation as to a sanction.

{¶70}. Based primarily upon the character evidence presented by Respondent, the Panel concludes that Respondent is normally a fair and even-handed jurist. Although the Panel concludes that this case presents behavior which is an aberration from Respondent's normal judicial behavior, the Panel is unable to dismiss such conduct as being undeserving of some sanction. In reliance on certain language contained in the Preamble⁸ to the applicable Code of Judicial Conduct, Respondent's counsel repeatedly argued that not every violation of the Code is deserving of disciplinary action, and that Respondent's conduct in this matter does not warrant a sanction. Although the evidence fails to demonstrate a pattern of improper activity, the Panel

⁸The Preamble to the applicable Code of Judicial conduct states that the "The Canons and divisions are rules of reason." The Preamble further states:

The text of the Canons and divisions is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system and for the protection of the public.

disagrees with Respondent's counsel and has concluded that Respondent's misconduct was sufficiently serious to warrant discipline.

{¶71}. In its decision in *Ohio State Bar Assn. v. Goldie*, 119 Ohio St.3d 428, 2008-Ohio-4606, the Court accepted the Board's recommendation of a public reprimand for a judge's failure to comply with the law by flagrantly denying due process to three different criminal defendants. The respondent had been previously publicly reprimanded in her judicial capacity for attempting to preside in a case after she had been removed from the case by judicial order. *Id.* at ¶2. The Court noted that each of the denials of due process had been corrected on appeal and other mitigating evidence, and stated that since the respondent was no longer serving as a judge, an actual suspension was not required to protect the public. *Id.* at ¶26.

{¶72}. In its decision in *Disciplinary Counsel v. Runyan*, 108 Ohio St.3d 43, 2006-Ohio-80, the Court publicly reprimanded a judge for violating Canons 2 and 3 of the Code of Judicial Conduct, and DR 1-102(A)(5) by acting outside the scope of his judicial authority in proposing a settlement to a dispute between the prosecuting attorney and a chief of police which arose from a proceeding in which the respondent presided. In determining the appropriate sanction, the Court noted the respondent's lack of a prior disciplinary record, his cooperation in the disciplinary process, the fact that the respondent had apologized for his misconduct and that the respondent truly believed that the public would benefit from his actions as showing that he did not act out of self-interest. *Id.* at ¶18.

{¶73}. In its decision in *Ohio State Bar Assn. v. Vukelic*, 102 Ohio St.3d 421, 2004-Ohio-3651, the Court approved a Consent to Discipline Agreement in which the respondent agreed to a sanction of a public reprimand for his violation of Canon 3(E)(1) while serving as a part-time magistrate in a mayor's court. Although the respondent realized that the appearance before him

of a client whom he represented in an unrelated matter presented a situation in which his impartiality might be reasonably questioned requiring his disqualification, the respondent failed to immediately transfer the case to another jurisdiction and permitted his client's case to be discussed in his presence. In considering the appropriate sanction, the Court concluded that the panel had found in mitigation that "respondent had no prior disciplinary record, had not acted dishonestly, had cooperated completely in the disciplinary process, and had a reputation for good character in his community." Id. at ¶4.

{¶74}. In its decision in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, the Court suspended a judge from the practice of law for eighteen months with the final twelve months stayed for violations of Canons 2, 3(B)(9), 3(C)(1), and 4 based upon statements made to the media on three separate occasions. The panel found that some of the statements contained false and derogatory information and were made with the intention of influencing the public concerning matters before the respondent. The panel further concluded that the respondent "acted without due regard for the impression he left as to the character and reputation of the party against whom he had ruled, the integrity of the court of appeals, the fairness and objectivity of the judicial system, and his own impartiality and judicial temperament." Id. at 650. The Court stated: "Respondent, like many judges, cares deeply about the area of the law under his jurisdiction. The mitigation evidence introduced in this case is directed to his concern for children, and particularly the welfare of underprivileged children. But strong feelings do not excuse a judge from complying with the judicial canons and the Disciplinary Rules." Id. at 654.

{¶75}. In its decision in *Disciplinary Counsel v. Hoague* (2000), 88 Ohio St.3d 321, the Court suspended a judge for six months, with the entire six months stayed, based upon a

single violation of Canon 2. After the respondent personally observed a motor vehicle being driven recklessly, he discovered the name of the person to whom the vehicle was registered and sent a letter on court letterhead threatening that person with prosecution unless she contacted the court “to discuss [her] involvement in the incident.” When the driver of the vehicle appeared at the court, the respondent threatened her with criminal prosecution, told her to “shut your mouth until I’m finished talking,” and stated that he would contact the county sheriff’s office and make sure they have a “fuller picture of what actually happened.” Id. at 322. Although the Court viewed this as an “isolated incident,” and the respondent subsequently made a public apology for his misconduct, the Court concluded that the respondent “failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Id. at 324.

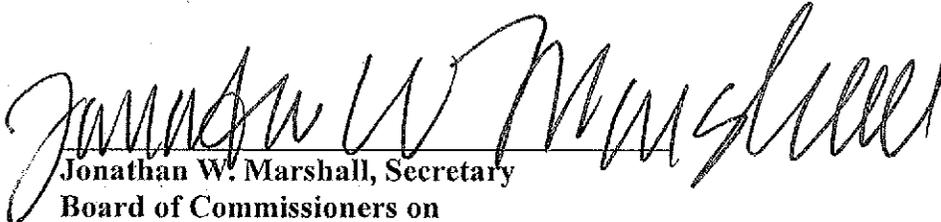
{¶76}. Although Respondent remains in his judicial position, the Panel concludes that, based primarily upon the testimony of Respondent’s character witness, the lack of any prior disciplinary record, his state of mind which motivated his actions and the ultimate lack of any actual prejudice to Robinson as a result of Respondent’s misconduct, a sanction of a public reprimand is adequate to protect the public from a reoccurrence of this type of behavior. Therefore, the Panel recommends a sanction of a public reprimand and that Respondent be ordered to pay the costs of prosecution in this matter.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 4, 2009. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board , however, amended the panel’s sanction based on Respondent’s inability to follow a judge’s

obligation to decide a matter based on actual evidence in a fair and impartial manner and his refusal to acknowledge his misconduct in making a series of intemperate remarks. The disciplinary sanction must address the damage to the public perception of fairness and the integrity of the judicial process. Therefore, it recommends that the Respondent, Daniel Gaul, be suspended from the practice of law for a period of one year with the entire one year stayed. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**


**Jonathan W. Marshall, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

App. B

**BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO**

FILED

SEP 16 2009

**BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE**

In re:

Complaint Against

Hon. Daniel Gaul

Respondent

Disciplinary Counsel

Relator

No. 09-006

ORDER ON PRE-TRIAL MOTIONS

This matter is before a Hearing Panel ("Panel") of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ("Board") pursuant to the following motions:

1. Motion to Quash Subpoena issued to Jonathan Coughlan, Disciplinary Counsel;
2. Relator's Motion *in Limine* as to Respondent's Identified Expert Witnesses, Transcripts as to Certain Recordings of Telephone Conversations and Proposed Testimony of Curtis Ingram;
3. Respondent's Objection and Motion *in Limine* regarding Relator's Exhibits 11-15, 24 and 25; and
4. Relator's Objections to Respondent's Exhibits B-K, R, S, T and BB

The Complaint in this matter alleges that Respondent engaged in misconduct in violation of the Code of Judicial Conduct¹ Canon 2 [*A Judge Shall Respect and Comply with the Law and Shall Act at all Times in a Manner that Promotes Public Confidence in the Integrity and Impartiality of the Judiciary*] and Canon 3 [*A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently*]; in regards to Canon 3, the Complaint specifically alleges violations of Canon 3(B)(5)² and 3(B)(9).³

¹ All conduct relevant to this action occurred prior to March 1, 2009, and so the Complaint is based upon the version of the Code of Judicial Conduct in effect prior to that date.

² A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender,

MOTION TO QUASH SUBPOENA

Upon Respondent's request, a subpoena has been issued to Jonathan Coughlan, Disciplinary Counsel, for appearance at the formal hearing before the Panel in this matter. On behalf of Mr. Coughlan, the Attorney General of Ohio has filed a Motion to Quash this subpoena.⁴ In his Memorandum contra to the Motion to Quash, Respondent argues that Mr. Coughlan's testimony is relevant to a determination of whether there has been a violation of Gov. Bar Rule V(4)(D) which provides:

(D) Time for Investigation. The investigation of grievances by Disciplinary Counsel or a Certified Grievance Committee shall be concluded within sixty days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

(3) Time Limits not Jurisdictional. Time limits set forth in this rule are not jurisdictional. No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

Respondent appears to argue that Coughlan's testimony is necessary to explain why Disciplinary Counsel's investigation allegedly extended beyond the one year time frame.⁵

religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

³ While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. Division (B)(9) of this canon does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. Division (B)(9) of this canon does not apply to proceedings in which the judge is a litigant in a personal capacity.

⁴ Since the filing of the Motion to Quash, Respondent has also filed a praecipe for a subpoena for Joseph Caligiuri, Assistant Disciplinary Counsel, who is counsel of record in this matter. On September 15, 2009, a substantially similar Motion to Quash was filed in regards to the subpoena issued to Mr. Caligiuri. The arguments advanced by the Attorney General in the recently filed Motion to Quash are identical, in most material respects, to the Motion to Quash the subpoena issued to Mr. Coughlan. Therefore, this Order will apply to both subpoenas.

⁵ In his Reply Memorandum in Support of the Motion to Quash, the Attorney General asserts that the investigation was concluded within one year after Relator's receipt of the grievance.

In its decision in *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074, the respondent argued that the Complaint should be dismissed because an allegedly “unreasonable delay in relator’s investigation prejudiced his defense and violated his right to a fair disciplinary hearing.” In that case, Disciplinary Counsel had closed its investigation file pending an appeal from the trial court’s decision relating to the respondent’s fee application, but advised the respondent that the investigation could be reopened once the appeal was finally decided. In refusing to dismiss the disciplinary complaint, the Court stated:

{¶ 78} Relator insists that the investigation was completed in a timely manner, but we need not decide this question. Under Gov.Bar R. V(4)(D)(3), none of the time limits set forth in the rule are jurisdictional, and the rule requires prejudice in addition to unreasonable delay for dismissal. We see no prejudice to respondent’s defense.

{¶ 79} The incidents underlying relator’s complaint ended nearly four years before the panel hearing, and respondent complains that witnesses have died, memories have faded, and evidence has grown stale. It is true that Bryan and Lauder are both deceased, but neither would have been competent to testify had they still been living. Respondent’s co-counsel in the Bryan and Lauder cases also died before the hearing, but his testimony would merely have corroborated that respondent actually did all the work reflected in his billing records, a fact that is not in dispute. Moreover, respondent’s meticulous and comprehensive billing records are at the heart of this case; all were available for review, and respondent testified about them with no significant memory lapse.

In the instant action, the Panel Chair concludes that the issue of the unreasonableness of the delay becomes relevant only after Respondent’s demonstration that any delay in Relator’s investigation caused him material prejudice of such a nature as to deny him the possibility of a fair hearing on the charges against him. Respondent’s only assertion of prejudice is that Emma Ingram, an alleged victim in the criminal proceedings during which the alleged misconduct occurred, has died since the filing of the Complaint in this matter. However, the Panel Chair is unable to conclude that Ms. Ingram would have been competent to testify as to any matter which is the subject of the instant proceeding.

The issue before the Panel is not whether the criminal defendant Jeffrey Robinson committed any criminal offense, either as alleged in the indictment or based upon obstruction of justice. Rather, the sole issue before the Panel is whether Respondent's conduct as alleged in the Complaint constitutes a violation of either Canon 2 or Canon 3 of the Code of Judicial Conduct. From the allegations of the Complaint, the Panel Chair can only conclude that Ms. Ingram was not physically present during the proceedings which form the basis for the Complaint. Furthermore, there appears to be little dispute as to what Respondent stated in the underlying proceedings, and that multiple witnesses may be available who could provide context for Respondent's remarks if that is necessary in this matter.

For this reason, the Panel Chair concludes that there is no showing of prejudice from any alleged delay in the investigation in this matter. In the absence of a showing of material prejudice, the Panel Chair will not permit Respondent to compel the testimony of opposing counsel, and therefore, the Motion to Quash is hereby granted. In the event that Respondent is able to produce evidence of material prejudice, the Panel may reconsider this Order if Respondent also demonstrates good cause, including a showing that Respondent is unable to obtain the required information from any source other than Relator's testimony.

RELATOR'S MOTION IN LIMINE

Relator asks the Panel Chair to determine that Respondent should be precluded from presenting testimony from:

1. Various witnesses whom Respondent has identified as expert witnesses;
2. Certain recordings of telephone conversation between Jeffrey Robinson and Mozelle Taylor; and
3. Curtis Ingram, son of Emma Ingram.

A motion in limine is a pre-trial device to test the admissibility of specified evidence, and the Panel Chair's ruling on such a motion must be viewed as a preliminary ruling based upon the information before him. *See, State v. Baker*, 170 Ohio App.3d 331, 2006-Ohio-7085, ¶9. The Panel Chair may revisit the ruling during the course of the formal hearing based upon the actual circumstances before the Panel at the time the evidence is offered during the hearing. *Id.* The party objecting to the admissibility of the evidence must object to the admission of the evidence at the time it is offered so as to preserve any objection for further proceedings. *Id.* If such an objection is sustained, the party offering such evidence is free to make, outside of the hearing of the Panel, a proffer of the evidence for the record.

As to the witnesses identified *by both parties* as experts to provide testimony regarding the interpretation of the Code of Judicial Conduct, and the application of the Canons to the particular facts of this case, the Panel Chair agrees with Relator's argument that the proposed witnesses (no matter how learned and experienced they may be) should not be permitted to testify as experts. Even if expert testimony might be permissible in disciplinary proceedings upon ultimate questions of fact or law, the decision whether to permit such testimony in any particular case is within the discretion of the Panel. In regards to the instant matter, the Panel Chair determines that the members of the Panel, the Board and ultimately the Supreme Court, possess knowledge of the Code of Judicial Conduct which is adequate to decide whether the evidence clearly and convincingly establishes that Respondent engaged in misconduct as alleged in the Complaint. The testimony of other attorneys and judges would not provide information which is beyond the knowledge or experience of the Panel and assist the Panel in performing its duties. *See, Evid. R. 702.*

Respondent further argues that the identified experts may be helpful to assist the Panel to "identify and apply the substantive and procedural law . . . relevant to the context of the

circumstances and identify the competing responsibilities then confronting Judge Gaul.”

Respondent's Brief in Opposition to Relator's Motion in Limine to Exclude Testimony of Respondent's Proposed Expert Witnesses, Jailhouse Recordings and the Testimony of Curtis Ingram at p. 3. In this regard, Respondent appears to argue that the Panel is to determine whether he made the correct decision in granting the State's Motion for a Mistrial. However, that is not the issue which is before the Panel in this hearing. Rather, the only issues presented by the Complaint are whether Respondent's conduct in the Robinson matter violated the Code of Judicial Conduct.

Respondent will undoubtedly be asked during the hearing in this matter to explain his conduct which forms the basis of the Complaint; he may also offer testimony from any other persons who actually witnessed the events of those dates so as to provide context to his action.⁶ Respondent may also choose, if he deems it appropriate, to explain his rationale for his decision. He may also provide the Panel with a trial brief providing legal authorities supporting his decision. The Panel members do not require “expert” testimony to assist them with their decision-making process in this matter.

The Panel Chair also concludes that evidence allegedly contained within the recordings of telephone conversations between Jeffrey Robinson and Mozelle Taylor is irrelevant to the issues before the Panel. Evidence is relevant if it has “any tendency to make the existence of any fact that

⁶ Respondent has further argues that some of these witnesses may provide testimony which does not involve expressing opinions concerning the ultimate issues in this matter. Specifically, Respondent contends that some of these witnesses will be able to testify concerning their personal experience in Cuyahoga County relating to the process of jury selection in cases which have received some degree of media coverage. To the extent that any such testimony is based upon such witnesses' personal experience, the Panel Chair may permit such testimony to the extent that it is relevant to what impact a reasonable judge would have expected comments like those made by Respondent to have on the prospects for a fair hearing in a pending action. However, this does not mean that any of these witnesses will be permitted to express opinions concerning whether the comments made by Respondent actually violated the Code of Judicial Conduct as alleged in the Complaint in this matter.

Finally, Respondent also argues that some of these witnesses may be asked to provide character testimony on his behalf and that such witnesses may be asked if they are aware of the allegations in this matter and whether those allegations affect their opinion of Respondent's character. In this regard, character witnesses may testify as to their knowledge of the charges, but will not be permitted to opine as to whether the charges are supported by the evidence, or whether a violation actually occurred.

is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evid. R. 401. The issue presented by the Complaint is whether Respondent’s statements and conduct as alleged in the Complaint constitute one or more violations of the Code of Judicial Conduct. The Complaint does not allege that Jeffrey Robinson and Mozelle Taylor conspired to obstruct justice in the trial of the underlying criminal case, nor is the existence of such a conspiracy of any consequence to the Panel’s consideration of the charges in the Complaint.⁷ Therefore, the Panel Chair concludes that such evidence should not be admitted at the formal hearing in this matter.

Because it appears to be undisputed that Curtis Ingram was not present to witness Respondent’s statements and conduct which forms the basis of the charges set forth in the Complaint, the Panel Chair likewise concludes that he has no personal knowledge of those facts and that he is incompetent to testify as a witness in this proceeding.

RESPONDENT’S OBJECTION AND MOTION IN LIMINE

Respondent requests that the Panel Chair exclude from evidence several media accounts of the events which form the basis of the charges of misconduct as alleged in the Complaint. Respondent also asks that the Report, and Supplemental Report, of Gerald Stern, Relator’s proposed expert witness, be excluded as hearsay.

Initially, based upon the foregoing ruling concerning expert testimony, Respondent’s objections as to Mr. Stern’s reports are well-taken. However, if the Panel Chair would ultimately permit expert testimony, such reports could be used solely for impeachment purposes.

⁷ Relator asserts that Respondent admitted in his deposition that he was unaware of the contents of these recordings at the time of the alleged misconduct. However, it is possible that the recordings might possibly have some relevance if the evidence would ultimately establish that Respondent was aware of the contents of the recordings at that time.

As to the media accounts, Relator would first be required to lay a proper foundation to establish the reliability of the evidence. *See, e.g., State v. Arafat*, 2006-Ohio-1722, ¶86. Any documentary evidence (including video recordings) must be properly authenticated to be admissible. *See, Evid. R. 901*. Although edited recordings may prove to portray events in a false light and thus prove to be unreliable, that is not always the case. *See, e.g., State v. Arafat*, 2006-Ohio-1722, ¶86. The Panel Chair cannot determine whether the identified recordings are reliable until Relator attempts to lay a foundation for their admission into evidence. If the reliability of the recordings can be established, they may be admissible as an admission of a party. *See, Evid. R. 801(D)(2)*. Furthermore, even if the entire recording is inadmissible, portions thereof may be admissible for impeachment purposes if Respondent's testimony conflicts with statements or actions actually recorded therein.

As to the online "newspaper" accounts of the events upon which the misconduct charges are based, the Panel Chair would conclude that they may not be offered for the truth of any fact represented therein. However, they might possibly be admissible for the limited purpose of demonstrating publication of accounts of the matter in question.⁸ The same could also be true of the broadcast media reports of these events. Whether these exhibits are admitted for this purpose would be determined based upon the foundation laid for their admissibility and the purpose for which they are offered.

In its decision in *In re Complaint Against Harper* (1996), 77 Ohio St.3d 211, 217, the Court held that the relator was not required to present public opinion polls to establish that the public was actually misled by the contents of a campaign ad. The Court in analyzing the decision of the U.S.

⁸ The Panel Chair also notes the allegation in the Complaint that Respondent invited "his friends in the media" to attend the second day of the underlying criminal proceeding so as to enlist their help in locating the missing witnesses.

Supreme Court in *Ibanez v. Florida Dept. of Business & Professional Regulation* (1994), 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 stated:

Given the innocuous nature of the initials "CFP," which have no objectively deceptive connotation, evidence that the public, in fact, was misled would have been helpful. However, no such difficulty presents itself in the case at hand, since the language used is readily susceptible of interpretation by an objective observer, without resort to proof from members of the public.

Although Respondent is correct that the *Harper* decision involves a violation of Canon 2, the Panel Chair's conclusion is that the "reasonably be expected to affect its outcome or impair its fairness" standard contained in Canon 3(B)(9) presents a similar objective standard. Thus, to find a violation of Canon 3(B)(9), the Panel is required to conclude not that Respondent's statements actually prejudiced Mr. Robinson's right to a fair trial, but rather that, by clear and convincing evidence, a reasonably prudent judge would expect that his/her "public comment," made during the course of a proceeding, could "affect [the proceeding's] outcome or impair its fairness." In this regard, the Panel Chair would conclude that the media reports, upon the laying of a proper foundation, might be relevant to establish the public nature of the judge's comment and what impact the judge might reasonably expect his comment to have upon the outcome or fairness of the proceeding.

In his memorandum in support of his Objections and Motion in Limine, Respondent's counsel sets forth substantial arguments concerning the prejudice which might occur from the admission of media accounts of the subject events. The Panel members are all capable of understanding the difference between admissibility of evidence in a proceeding of this type, and the weight to be given to such evidence. For this reason, the protections afforded by Evid. R. 403 may be somewhat relaxed in a proceeding of this type.

For the foregoing reasons, the Panel Chair is unable, at this time, to determine the admissibility of Relator's Exhibits 11-14 and will reserve such issue for decision based upon the

evidentiary foundation laid for such exhibits and the purpose for which they might ultimately be offered by Relator.

RELATOR'S OBJECTIONS TO RESPONDENT'S EXHIBITS

For the reasons stated above, the Panel Chair is inclined to agree with Relator's Objections to Respondent's Exhibits B through K, R, S, T and BB; these documents do not appear to be relevant to a determination of the charges of misconduct as delineated in the Complaint. However, if Respondent is able to demonstrate how these documents are relevant, the Panel will reconsider its ruling.

However, the Panel Chair will not allow any presentence investigation report ("PSI") to be admitted into evidence because such a document is confidential pursuant to R.C. §2951.03(D), and such reports are required to be retained under seal by the court or other authorized holder of the report. The knowing use or disclosure of confidential personal information⁹ in a manner prohibited by law may also constitute a criminal offense which is a misdemeanor of the first degree. *See*, R.C. §§1347.15(H)(2) and 1347.99(B). The Panel Chair will not permit the improper use of confidential personal information.

On the other hand, to the extent that Respondent relied upon information contained within any PSI which was properly within the file before Respondent at the time of the alleged misconduct, Respondent may be permitted to testify concerning what information he relied upon. However, the Panel will reserve the right to determine what impact the unavailability of the PSI for use by Relator in cross-examination may ultimately have upon the admissibility of such testimony.

⁹ "Personal information" means any information that describes anything about a person, or that indicates actions done by or to a person, or that indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person. R.C. §1347.01(E).

Additionally, Respondent's counsel intends to seek an Order from a Court of appropriate jurisdiction which would allow the PSI, and a LEADS report, to be used in this proceeding. If such an order is obtained, the Panel Chair would permit Respondent to use such documents to refresh his recollection concerning the information he relied upon in making his decision on the Motion for Mistrial, and would permit Relator to use the documents to cross-examine Respondent concerning such testimony.

Roger S. Gates 19 Jan
 Roger S. Gates, Panel Chair
Secretary
with permission

App. C



Baldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure (Refs & Annos)

Chapter 2903. Homicide and Assault

Assault

→ **2903.11 Felonious assault**

(A) No person shall knowingly do either of the following:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

(B) No person, with knowledge that the person has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome, shall knowingly do any of the following:

(1) Engage in sexual conduct with another person without disclosing that knowledge to the other person prior to engaging in the sexual conduct;

(2) Engage in sexual conduct with a person whom the offender knows or has reasonable cause to believe lacks the mental capacity to appreciate the significance of the knowledge that the offender has tested positive as a carrier of a virus that causes acquired immunodeficiency syndrome;

(3) Engage in sexual conduct with a person under eighteen years of age who is not the spouse of the offender.

(C) The prosecution of a person under this section does not preclude prosecution of that person under section 2907.02 of the Revised Code.

(D)(1)(a) Whoever violates this section is guilty of felonious assault. Except as otherwise provided in this division or division (D)(1)(b) of this section, felonious assault is a felony of the second degree. If the victim of a violation of division (A) of this section is a peace officer or an investigator of the bureau of criminal identification and investigation, felonious assault is a felony of the first degree.

(b) Regardless of whether the felonious assault is a felony of the first or second degree under division (D)(1)(a) of this section, if the offender also is convicted of or pleads guilty to a specification as described in section

2941.1423 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, except as otherwise provided in this division or unless a longer prison term is required under any other provision of law, the court shall sentence the offender to a mandatory prison term as provided in division (D)(8) of section 2929.14 of the Revised Code. If the victim of the offense is a peace officer or an investigator of the bureau of criminal identification and investigation, and if the victim suffered serious physical harm as a result of the commission of the offense, felonious assault is a felony of the first degree, and the court, pursuant to division (F) of section 2929.13 of the Revised Code, shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the first degree.

(2) In addition to any other sanctions imposed pursuant to division (D)(1) of this section for felonious assault committed in violation of division (A)(2) of this section, if the deadly weapon used in the commission of the violation is a motor vehicle, the court shall impose upon the offender a class two suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege as specified in division (A)(2) of section 4510.02 of the Revised Code.

(E) As used in this section:

(1) "Deadly weapon" and "dangerous ordnance" have the same meanings as in section 2923.11 of the Revised Code.

(2) "Motor vehicle" has the same meaning as in section 4501.01 of the Revised Code.

(3) "Peace officer" has the same meaning as in section 2935.01 of the Revised Code.

(4) "Sexual conduct" has the same meaning as in section 2907.01 of the Revised Code, except that, as used in this section, it does not include the insertion of an instrument, apparatus, or other object that is not a part of the body into the vaginal or anal opening of another, unless the offender knew at the time of the insertion that the instrument, apparatus, or other object carried the offender's bodily fluid.

(5) "Investigator of the bureau of criminal identification and investigation" means an investigator of the bureau of criminal identification and investigation who is commissioned by the superintendent of the bureau as a special agent for the purpose of assisting law enforcement officers or providing emergency assistance to peace officers pursuant to authority granted under section 109.541 of the Revised Code.

(6) "Investigator" has the same meaning as in section 109.541 of the Revised Code.

CREDIT(S)

(2008 H 280, eff. 4-7-09; 2006 H 461, eff. 4-4-07; 2006 H 347, eff. 3-14-07; 2006 H 95, eff. 8-3-06; 1999 H 100, eff. 3-23-00; 1999 S 142, eff. 2-3-00; 1996 S 239, eff. 9-6-96; 1995 S 2, eff. 7-1-96; 1983 S 210, eff.

7-1-83; 1982 H 269, S 199; 1972 H 511)

UNCODIFIED LAW

1996 S 239, § 4: See Uncodified Law under RC 2903.09.

HISTORICAL AND STATUTORY NOTES

Ed. Note: The legal review and technical services staff of the Legislative Service Commission has issued an opinion regarding the treatment of multiple amendments, stating “H 461 and H 347 harmonize. Division lettering adjusted to give effect to the manifest intent of each amendment” The opinion is neither legally authoritative nor binding, but is provided as a general indication that the amendments of the several acts [2006 H 461, eff. 4-4-07 and 2006 H 347, eff. 3-14-07] may be harmonized pursuant to the rule of construction contained in R.C. 1.52(B) requiring all amendments be given effect if they can reasonably be put into simultaneous operation. See *Baldwin's Ohio Legislative Service Annotated*, 2006, pages 7/L-3180 and 7/L-2261, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts.

Ed. Note: 2903.11 contains provisions analogous to former 2901.08, 2901.11, 2901.18, 2901.19, 2901.22 to 2901.241, 2901.251, 2901.252, and 2907.081, repealed by 1972 H 511, eff. 1-1-74.

Ed. Note: Former 2903.11 repealed by 1970 H 84, eff. 9-15-70; 130 v S 115; 126 v 1039.

Amendment Note: 2006 H 461 redesignated division (D) as division (D)(1); added division (D)(2); added a new division (E)(2); and redesignated former divisions (E)(2) and (E)(3) as divisions (E)(3) and (E)(4), respectively.

Amendment Note: 2006 H 347 inserted “or an investigator of the bureau of criminal identification and investigation” twice in division (D); deleted “, as defined in section 2935.01 of the Revised Code” after “peace officer” in the third sentence of division (D); and added division (D)(4) and (5).

Amendment Note: 2006 H 95 substituted “opening” for “cavity” in division (E)(3).

Amendment Note: 1999 H 100 deleted “, as defined in section 2923.11 of the Revised Code” after “dangerous ordnance” in division (A)(2); added new divisions (B), (C), and (E) and redesignated former division (B) as new division (D); and deleted “the offense” after “victim of” and “as defined in section 2935.01 of the Revised Code” after “peace officer” and inserted “a violation of division (A) of this section” in new division (D).

Amendment Note: 1999 S 142 added the last sentence in division (B).

Amendment Note: 1996 S 239 inserted “or to another's unborn” in divisions (A)(1) and (A)(2).

App. D

(2) To be considered at the Board meeting, the panel report should be submitted to the Secretary at least seven days prior to that date.

(C) Failure by the Board to meet the time guidelines set forth in Section 9 of this rule shall not be grounds for dismissal of the complaint.

(D) Voluntary Dismissals and Amendments

Following the filing of the complaint, the relator may not voluntarily dismiss the complaint without permission of the chair of the hearing panel. A motion to voluntarily dismiss must be accompanied by a memorandum setting forth the basis for the dismissal with supporting affidavits, depositions, or documents, if required by the panel, that support the dismissal. The panel chair may conduct a hearing on the motion to dismiss and may require the testimony of witnesses and production of documents.

The relator may not amend the complaint within thirty days of the scheduled hearing without a showing of good cause to the satisfaction of the panel chair.

(E) Probable Cause Panels

(1) Two probable cause panels will convene on the day of the Board meeting to consider all new formal complaints filed with the Board during the interim period preceding the week of the Board meeting and any other new complaints that may be otherwise pending since the Board last met.

(2) Both probable cause panels will be available to convene by telephone conference call between scheduled Board meetings if required by extraordinary circumstances. On that occasion probable cause panels would consider and decide new complaints received by the Board since the Board last met. Copies of the complaints will be sent by the Secretary and will be reviewed by panel members prior to the scheduled conference call.

[Section 9 Adopted by the Supreme Court of Ohio, effective June 1, 2000]

Section 10. Guidelines for Imposing Lawyer Sanctions

(A) Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

(B) In determining the appropriate sanction, the Board shall consider all relevant factors; precedent established by the Supreme Court of Ohio; and the following:

(1) Aggravation. The following shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) lack of cooperation in the disciplinary process;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of and resulting harm to victims of the misconduct;
- (i) failure to make restitution.

(2) Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;
- (e) character or reputation;
- (f) imposition of other penalties or sanctions;
- (g) chemical dependency or mental disability when there has been all of the following:
 - (i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;
 - (ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;
 - (iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;
 - (iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(h) other interim rehabilitation.

[Section 10 Adopted by the Supreme Court of Ohio, effective June 1, 2000;
amended effective February 1, 2003]

App. E

CODE OF JUDICIAL CONDUCT

PREAMBLE TO CODE OF JUDICIAL CONDUCT

The Ohio Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in divisions under each Canon, a Terminology Section, a Compliance Section, and Commentary. The text of the Canons and the divisions, including the Terminology and Compliance Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and divisions. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and divisions are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and divisions is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system and for the protection of the public.

[Effective: December 20, 1973; amended effective May 1, 1997.]

App. F

CANON 2

A Judge Shall Respect and Comply with the Law and Shall Act at all Times in a Manner that Promotes Public Confidence in the Integrity and Impartiality of the Judiciary.

(A) **Activities to Improve the Law.** A judge may engage in activities to improve the law, the legal system, and the administration of justice, provided those activities do not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties.

(1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

(2) Subject to the restrictions of Canon 4(C)(1), a judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and otherwise may consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

(B) **Membership in Organizations.** A judge may serve as an officer, director, trustee, or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal, or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(1) A judge shall not serve as an officer, director, trustee, or non-legal advisor if it is likely that the organization will be engaged in either of the following:

(a) Proceedings that ordinarily would come before the judge;

(b) Adversary proceedings with frequency in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(2) A judge, as an officer, director, trustee, or non-legal advisor, or as a member or otherwise shall comply with all of the following:

(a) The judge may assist an organization in planning fundraising and may participate in the management and investment of the organization's funds, but, except as expressly authorized by this canon, shall not personally participate in the solicitation of funds or other fund-raising activities. A judge may do either of the following:

(i) Solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

App. G

CANON 3

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

(A) **Judicial Duties in General.** The judicial duties of a judge take precedence over all of the judge's other activities. The judge's judicial duties include all the duties of office prescribed by law. In the performance of these duties, the following standards apply.

(B) **Adjudicative Responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel or others. Division (B)(6) of this canon does not preclude legitimate advocacy when race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall not initiate, receive, permit, or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding except:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not address substantive matters or issues on the merits are permitted if the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) As authorized by law.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly and comply with guidelines set forth in the Rules of Superintendence for the Courts of Ohio.

(9) While a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. Division (B)(9) of this canon does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. Division (B)(9) of this canon does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

(11)(a) A judge shall not knowingly disclose or cause to be disclosed, without appropriate authorization, information regarding the probable or actual decision in a case or legal proceeding pending before a court, including the vote of a justice, judge, or court in a case pending before the Supreme Court, a court of appeals, or a panel of judges of a trial court, prior to the announcement of the decision by the court or journalization of an opinion, entry, or other document reflecting that decision under either of the following circumstances:

(i) The probable or actual decision is confidential because of statutory or rule provisions;

(ii) The probable or actual decision clearly has been designated to the judge as confidential when confidentiality is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving confidentiality is necessary to the proper conduct of court business.

(b) Nothing in division (B)(11)(a) of this canon shall prohibit the disclosure of any of the following:

App. H

C

Baldwin's Ohio Revised Code Annotated Currentness

Ohio Rules of Evidence (Refs & Annos)

☞ Article I. General Provisions

→ **Evid R 101 Scope of rules: applicability; privileges; exceptions****(A) Applicability**

These rules govern proceedings in the courts of this state, subject to the exceptions stated in division (C) of this rule.

(B) Privileges

The rule with respect to privileges applies at all stages of all actions, cases, and proceedings conducted under these rules.

(C) Exceptions

These rules (other than with respect to privileges) do not apply in the following situations:

(1) *Admissibility determinations.* Determinations prerequisite to rulings on the admissibility of evidence when the issue is to be determined by the court under Evid.R. 104.

(2) *Grand jury.* Proceedings before grand juries.

(3) *Miscellaneous criminal proceedings.* Proceedings for extradition or rendition of fugitives; sentencing; granting or revoking probation; proceedings with respect to community control sanctions; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.

(4) *Contempt.* Contempt proceedings in which the court may act summarily.

(5) *Arbitration.* Proceedings for those mandatory arbitrations of civil cases authorized by the rules of superintendence and governed by local rules of court.

(6) *Other rules.* Proceedings in which other rules prescribed by the Supreme Court govern matters relating to evidence.

(7) *Special non-adversary statutory proceedings.* Special statutory proceedings of a non-adversary nature in which these rules would by their nature be clearly inapplicable.

(8) *Small claims division.* Proceedings in the small claims division of a county or municipal court.

CREDIT(S)

(Adopted eff. 7-1-80; amended eff. 7-1-90, 7-1-96, 7-1-99)

(Articles I to V)

HISTORICAL AND STATUTORY NOTES

Amendment Note: The 7-1-99 amendment inserted “proceedings with respect to community control sanctions;” in division (C)(3).

Amendment Note: The 7-1-96 amendment deleted “and before court-appointed referees and magistrates of this state” after “courts of this state” in division (A).

STAFF NOTES

1999:

(C) Exceptions

The phrase “community control sanctions” was added to division (C)(3) of the rule in accordance with changes resulting from the adoption of Senate Bill 2, effective July 1, 1996, and in order to make the rule conform to current Ohio criminal practice.

1996:

The amendment deleted the rule’s reference to proceedings “before court-appointed referees and magistrates.” The deleted language was redundant, since proceedings before these judicial officers are “proceedings in the courts of this state.” The amendment also harmonized the statement of the rules’ applicability with the usage in other rules of practice and procedure, none of which makes specific reference to particular classes of judicial officers before whom proceedings governed by the rules might be conducted. See Civ. R. 1(A), Crim. R. 19A [*sic*], and Juv. R. 1(A). The amendment is intended only as a technical modification and no substantive change is intended.

1980:

Rule 101(A) Applicability

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App. I

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

App. J

C

Baldwin's Ohio Revised Code Annotated Currentness
 Constitution of the State of Ohio (Refs & Annos)
 ▢ Article I. Bill of Rights (Refs & Annos)
 → **O Const I Sec. 10a Rights of victims of crimes**

Victims of criminal offenses shall be accorded fairness, dignity, and respect in the criminal justice process, and, as the general assembly shall define and provide by law, shall be accorded rights to reasonable and appropriate notice, information, access, and protection and to a meaningful role in the criminal justice process. This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this constitution, and does not create any cause of action for compensation or damages against the state, any political subdivision of the state, any officer, employee, or agent of the state or of any political subdivision, or any officer of the court.

CREDIT(S)

(1994 HJR 3, eff. 11-8-94)

EDITOR'S COMMENT

1994:

This section, adopted November 8, 1994, reflects a long-term trend toward formalizing "victims' rights" in the administration of criminal justice. Proponents of the measure pointed out that while §10, Article I of the Ohio Constitution was adopted to protect the rights of persons accused of crime, there was no corresponding section in the Constitution to protect the rights of victims of crime, and adoption of this section was thus "a question of balance." In essence, the section is a statement of policy; its broad, general language appears to be directory rather than mandatory.

Under the section, the rights of crime victims to "notice, information, access and protection and to a meaningful role in the criminal justice process" are as the legislature "shall define and provide by law." In fact, a number of measures in keeping with this mandate have been in place in the statute law for some time. Some of these include: a program of compensation for victims of crime, RC 2743.51 to 2743.72; the impact of a criminal offense on the victim or his family as a factor in sentencing, RC 2929.11(E), 2929.12(B), 2947.051; notice to the victim (or a surviving member of his family) of various key stages of the criminal process; the right of a victim or member of his family to make a statement in open court, RC 2937.081, 2943.041, 2945.07; and notice to the victim when a prisoner is to be released, RC 2947.052, 2967.12, 5120.073.

RESEARCH REFERENCES

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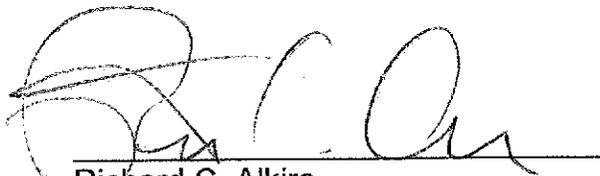
App. J

CERTIFICATE OF SERVICE

A copy of the foregoing **RESPONDENT JUDGE DANIEL GAUL'S**
OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE has been mailed by ordinary U.S. mail this 26th day of
February, 2010 to:

Jonathan E. Coughlan, Disciplinary Counsel
Joseph M. Caligiuri, Asst. Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, OH 43215-7411

Counsel for Relator



Richard C. Alkire
Attorney for Respondent