

ORIGINAL

IN THE
SUPREME COURT OF OHIO

In re:	:	
HON. DANIEL GAUL	:	CASE NO. 2010-0062
Attorney Registration No. (0009721)	:	
Cuyahoga County Common Pleas Court	:	
1200 Ontario Street	:	
Cleveland, OH 44113	:	
Respondent	:	
	:	RELATOR'S ANSWER TO
	:	RESPONDENT'S OBJECTIONS TO
DISCIPLINARY COUNSEL	:	THE BOARD OF COMMISSIONERS
250 Civic Center Drive, Suite 325	:	REPORT AND RECOMMENDATIONS
Columbus, OH 43215-7411	:	
Relator	:	

**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF
COMMISSIONERS' REPORT AND RECOMMENDATIONS**

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¶14] On November 26, 2007, Assistant Prosecutor, Ralph Kolasinski noted in his file, “Note— victims do not want to prosecute.” Id.

The case was scheduled for trial on Tuesday, November 27, 2007. On that day, Robinson rejected the state’s final plea offer and elected to proceed to trial. At that time, Kolasinski informed respondent that arrangements had been made for Daugenti, who was also present in the courtroom, to transport the victims/witnesses to court to testify. (Ex. 2, p.5) Daugenti had made arrangements to pick-up Taylor and Ingram at Ingram’s residence at 8:30am on Thursday, November 29, 2007. Jury selection began on Wednesday morning, November 28, 2007.

On Thursday, November 29, 2007, Detective Daugenti arrived at Ingram’s residence as planned; however, neither Ingram nor Taylor were present. [Report, ¶17] Consequently, Kolasinski conferred with his supervisor and thereafter requested that respondent allow a one-day continuance so that the state could locate Ingram and Taylor. Id. at ¶18. At the disciplinary hearing, Detective Daugenti testified that, at no time, did he have reason to suspect Robinson was involved in the victims/witnesses’ non-appearance. [Tr. p. 340]

In response to the state’s request for a continuance, respondent asserted, in part:

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.

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 objections. 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 re-indict.

[Report, ¶20, Ex. 4 p. 13-14]

Over defense counsel's objection, respondent granted the state's request for a one-day continuance. *Id.* Respondent also issued an arrest warrant for Taylor's arrest.

On Thursday evening, Detective Daugenti stopped by Ingram's residence, but saw no sign of Ingram or Taylor. Late Thursday evening, Daugenti left a voicemail message for Kolasinski informing him that he could not locate the victims/witnesses. [Tr. p. 342] Daugenti testified that he had no concern for Ingram's safety and assumed the prosecutor would dismiss the case and re-indict once the witnesses were located. *Id.*

On Friday morning, the victims/witnesses did not appear for trial. Again Kolasinski conferred with his supervisors, who instructed Kolasinski to dismiss the case without prejudice. Kolasinski's supervisor made the following notation in the file, "OK to dismiss but have [Detective] continue to try to locate victims." [Ex. 22]

Kolasinski discussed the situation with respondent's bailiff and learned that respondent wanted to see counsel in chambers. [Tr. p. 233] While in chambers, Kolasinski informed

respondent of the situation and indicated that the state was going to dismiss the case without prejudice. At the hearing, Robinson's lawyer, John Parker, testified that in chambers, respondent directed all of his comments to the prosecutor and described respondent as "irate" and "ranting." Id. at 234. In speaking directly to Kolasinski, respondent stated, "We are all on the same team," and indicated that he would not allow the state to dismiss the case because he did not want Robinson to be released from jail. Id. at 235. Parker, who was not involved in the conversation, understood respondent to be saying that respondent was on the same team as the state. Id. During the in-chambers conference, respondent told the lawyers that he was going to hold a press conference and recuse himself from the Robinson's case. Id. When counsel exited respondent's chambers, the courtroom was filled with cameras and media. Id. at 240. By that time, there had been no discussion about respondent's alleged concern for the victims' safety. Id. at 239. Although the victims/witnesses had not appeared, Kolasinski had no reason to believe that Robinson had any involvement in the victims/witnesses non-appearance. Id. at 414, 430.

After speaking with respondent in chambers, Kolasinski contacted Daugenti and relayed respondent's belief that Ingram had been kidnapped. Id. at 341. Daugenti thought the belief that Taylor would kidnap Ingram was "BS." Id. at 343. Daugenti knew that Ingram received her dialysis treatments on Monday, Wednesday, and Fridays; therefore, he contacted the dialysis center and learned that Ingram and Taylor were there, as scheduled. Id. Based upon respondent's concerns, Daugenti asked the staff to detain Ingram and Taylor, but Ingram and Taylor had just left the building. Id. at 344. The staff provided Daugenti with a license plate number. Daugenti called Kolasinski and informed him that Ingram had been located at the dialysis center. Kolasinski advised respondent that Ingram had been located. Id. at 427.

Later that same day, Daugenti was present when Taylor and Ingram arrived at Ingram's home. Daugenti testified that there was no evidence that Ingram had been harmed or kidnapped. *Id.* at 346. While Daugenti was arresting Taylor on respondent's arrest warrant, Ingram was crying saying that it was her idea not to go to court. *Id.* Further, Ingram's son, Curtis, who was present when Taylor and Ingram arrived home, testified at the disciplinary hearing, that he believed Taylor and Ingram were playing games. *Id.* at 639.

Earlier, on Friday morning, respondent instructed his bailiff to call the media and issue an Amber Alert.¹ When the lawyers exited respondent's chambers, the jury box was filled with reporters and television cameras.

Before taking the bench, respondent had received word that Ingram had been located at the dialysis center; therefore, he no longer needed the media's assistance in locating Ingram. [Tr. p. 129] Despite knowing that Ingram had been located, respondent took the bench and addressed the media with the following remarks:

Respondent: **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. [Emphasis added]

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.

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

Respondent: **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.** [Emphasis added]

Defense Counsel: I object to this your honor.

¹ The board's report incorrectly states that respondent instructed his bailiff to issue the Amber Alert on Thursday evening; however, the uncontroverted testimony was that respondent instructed his bailiff to issue the Amber Alert and contact the media on Friday, November 30, 2007.

Respondent:

Okay, you may object to this all you want, okay. Your client will not interrupt 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 pre-arranged 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 - - [Emphasis added]

Defense Counsel: Objection, your Honor.

Respondent: - - through Mozelle Taylor.

Defense Counsel: Objection, your Honor.

Respondent: **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.** [Emphasis Added]

Defense Counsel: Objection, your Honor.

Respondent: That's what I would bet.

Defense Counsel: Objection, your Honor.

Respondent: 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. [Emphasis added]

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. [Emphasis added]

Defense Counsel: Objection, your Honor.

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

Prosecutor: 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.

- Respondent: In terms of securing the witness Mozelle Taylor, does the State of Ohio have a position?
- Prosecutor: 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.
- Respondent: 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?
- Prosecutor: We would, your Honor, and as soon as we have information we will bring that to the Court's attention.
- Respondent: All right. Thank you, very much. John?
- Defense Counsel: 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.

Respondent: All right. Thanks John, I appreciate that.

Respondent: 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.** [Emphasis added]

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 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.** [Emphasis added]

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. [Emphasis added]

Defense Counsel: I object to this, your Honor.

Respondent: 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 - -

Defense Counsel: Judge, we move to dismiss the case with prejudice at this time.

Respondent: 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?

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

Respondent: Thank you, Ralph, Mike, John, thank you all very much. We're in recess.

Prosecutor: Thank you, your Honor.

[Report, ¶ 32]

Immediately after declaring a mistrial and recusing himself from Robinson's case, respondent held a press conference in his chambers, which was broadcast over multiple television stations throughout the Cleveland Metropolitan area. During the press conference, respondent's remarks included the following:

...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...

[Report, ¶33, Ex. 11, 13]

Later that same day, Friday, November 30, 2007, Daugenti arrested Taylor on respondent's warrant and she was placed in the Cuyahoga County Jail. Robinson's case was transferred to Judge Nancy Russo. On December 5, 2007, Judge Russo recused herself due to a scheduling conflict and transferred the case to Judge Sutula. [Report, ¶37] On December 18, 2007, Judge Sutula recused herself and transferred the case to Judge McDonnell, before whom Robinson pled guilty to felonious assault, a second-degree felony. [Report, ¶38] On December

19, 2007, Judge McDonnell released Taylor from the Cuyahoga County Jail after Taylor spent 19 days in jail on respondent's arrest warrant. [Ex. 10]

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. THE PANEL APPROPRIATELY PRECLUDED THE INTRODUCTION OF THE JAILHOUSE RECORDINGS AND EXPERT TESTIMONY OF BOTH PARTIES.

Under his first Proposition of Law, respondent erroneously asserts, "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." However, respondent fails to cite any authority to support his argument. Based upon relator's research, there appears to be no case in which a court found an abuse of discretion for failing to admit expert testimony in a judicial disciplinary proceeding. In the case at bar, the panel followed the applicable law and precedent and properly excluded expert testimony of both parties upon relator's motion. In his pre-trial order, attached hereto as "Appendix A," the panel chair concluded:

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.

[App. A, p. 5.]

Respondent concedes that all questions regarding the admission of testimony of an expert witness lie within the sound discretion of the trial court—and in this case—the hearing panel. *Scott v. Yates* (1994) 71 Ohio St.3d 219, 643 N.E.2d 105. As evidenced by its pre-trial order, the panel chair's decision to exclude the expert testimony was based upon its sound interpretation of applicable law and the rules of evidence. *See* App. A, p. 5.

In Ohio, Evid. R. 702 determines the admissibility of expert testimony. The rule states, in relevant part, “A witness may testify as an expert if all of the following apply: (A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception among lay persons; (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; (C) the witness’ testimony is based on reliable scientific, technical, or other specialized information.”

In accordance with the rule, expert testimony is admissible only as to relevant factual issues that are beyond the experience, knowledge or comprehension of the trier of fact. See, e.g. *State v. Daws* (1994), 104 Ohio App.3d 448, 462, 662 N.E.2d 805. “If the trier of fact can understand the issues and the evidence and arrive at a correct determination, expert testimony is unnecessary and inadmissible.” *Id.* (citation omitted).

Although Evid.R. 704 provides that an opinion “is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact,” the Staff Note to Evid.R.704 provides, “[t]h[is] rule must be read in conjunction with Rule 701 and Rule 702, each of which requires that opinion testimony be helpful to, or assist, the trier of fact in the determination of a factual issue.” (Emphasis added.) “The competency of the trier of the fact to resolve the factual issue determines whether or not the opinion testimony is of assistance.” *Id.* Despite respondent’s best efforts to complicate this disciplinary case, there was nothing unusually complex about it—either factually or legally. The hearing panel did not need any assistance in determining the ultimate issue in this case; therefore, the panel properly excluded the expert testimony.

In *In re Zoarski* (1993), 227 Conn. 784, 632 A.2d 1114, the Supreme Court of Connecticut upheld the exclusion of expert testimony in a judicial disciplinary proceeding, citing the qualifications of the lawyers and judges that sat on the council. “It is reasonable to expect lawyers [on the council] to have a special understanding of the ethical standards that govern judges.” Id. at 793, 632 A.2d at 1119. Further, the court noted that the state’s Supreme Court “review of a finding of judicial misconduct assures the application of proper standards in any particular case.” Id.

Like the council in *Zoarski*, this panel was well-qualified to decide the issues presented. In fact, in his pre-trial order, the panel chair articulated the basis for excluding the expert testimony.

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

[App. A. p. 5]

As evidenced by the panel chair’s pre-trial order, the panel carefully scrutinized the issue before making its ultimate determination. Equally important, this Court has specifically addressed the use of expert witnesses in judicial disciplinary hearings. In *Disciplinary Counsel v. Karto*, 94 Ohio St.3d 109, 2002-Ohio-61, 760 N.E.2d 412, the respondent-judge attempted to elicit testimony from an expert witness on issues surrounding the use of a judge’s contempt power. In upholding the hearing panel’s decision to exclude the testimony, this Court stated,

[T]he panel members consisted of an attorney, a judge, and a layperson who had served on the board for several years. These individuals were qualified to decide the issues of whether respondent had abused his contempt power and whether his actions constituted judicial misconduct. Therefore, since no expert testimony was necessary to decide these issues, the panel chair properly excluded the expert testimony sought.”

Id. at 113, 2002-Ohio-61, 760 N.E.2d 412.

The cases cited in support of respondent’s erroneous assertion do nothing more than confirm that the admission of expert testimony is subject to the discretion of the hearing panel. In support of his argument that the panel abused its discretion, respondent cites eight cases from around the country in which expert witnesses were permitted to testify in judicial or attorney disciplinary proceedings. But respondent’s argument misses the point. While there may be situations in which expert testimony is relevant and admissible—this was not one of those situations. Just because expert testimony is permitted in one case, does not mean that precluding expert testimony in another, unrelated case amounts to an abuse of discretion. Each case must turn on its own set of facts. In the case at bar, the panel applied the rules of evidence and—upon motion by the relator—determined that both parties’ experts were precluded from testifying.

Similarly, respondent argues that the panel abused its discretion and denied the respondent a fair hearing by failing to admit the jailhouse recordings into evidence. It is undisputed that respondent was unaware of the existence of the jailhouse recordings at the time of respondent’s alleged misconduct. Consequently, the jailhouse recordings had no impact upon respondent’s actions. The panel chair correctly ruled *in limine* that “evidence allegedly contained within the recordings of the telephone conversations between Jeffrey Robinson and Mozelle Taylor is irrelevant to the issues before the Panel.” [App. A. p. 6]

Respondent further argues that the jailhouse recordings should have been admitted since the panel admitted other evidence that “was not known to respondent at the time he made the

statements attributed to him on November 29 and 30, 2007.” Specifically, respondent refers to the panel’s findings of fact regarding Detective Daugenti’s testimony that:

- Ingram did not want to testify and that she told Daugenti that she was not being pressured by Taylor or Robinson. [Report at ¶14]
- On Thursday, November 29, 2007, Daugenti had no concern for Ingram’s safety and that given the relationship between Robinson and the victims, Daugenti did not think it was unusual that the victims would be reluctant to testify against Robinson. [Report at ¶23]

Respondent’s attempt to classify the jailhouse recordings and Detective Daugenti’s testimony as similar in that neither were known to respondent at the time of his comments is disingenuous.

The jailhouse recordings were not known to respondent—or anyone else—because no one knew they even existed until after the alleged misconduct. For all intents and purposes, the jailhouse recordings did not exist at the time of respondent’s misconduct. On the contrary, Detective Daugenti was present in court on Tuesday and Thursday, and available by phone on Friday, but respondent chose not to avail himself of Daugenti’s thoughts and perceptions because, as the panel found, “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.” [Report, ¶49]. While it may be true that “respondent was never informed about these observations of Detective Daugenti,” it was because respondent never asked. Instead, respondent made irrational decisions with no basis in fact. The panel concluded, “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.’” [Id. at ¶35] Respondent overreacted to a benign situation.

Respondent's actions in the criminal case were based upon his instincts—nothing more, nothing less. “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.” [Report, ¶20] While respondent would have this Court believe that he possessed overwhelming evidence of Robinson's involvement in obstruction of justice and kidnapping, it's beyond the pale that he never bothered to ask Kolasinski and Daugenti, the only two persons that had had substantial contact with the victims, if they believed the victims were in harm's way.

II. THE PANEL CORRECTLY PRECLUDED RESPONDENT FROM ENTERING THE JAILHOUSE RECORDINGS INTO EVIDENCE.

In arguing that the panel improperly precluded respondent from entering the jailhouse recordings into evidence, respondent asserts, “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.” Respondent then quotes the Preamble, which states,

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 to not impinge on the essential independence of the judges in making judicial decisions.

Respondent relies upon the language “...in the context of all relevant circumstances” despite the obvious fact that the jailhouse recordings were irrelevant to the disciplinary proceedings. Respondent's misconduct culminated on Friday, November 30, 2007—the very day respondent's involvement in the underlying criminal case ended. It is undisputed that as of November 30, 2007, respondent was unaware of the existence of the recordings; therefore, the

recordings could not have influenced or contributed to respondent's conduct through November 30, 2007. In the Order on Pre-Trial Motions, the Panel Chair analyzed the admissibility of the jailhouse recordings under Evid. R. 401. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence...[T]herefore, the Panel Chair concludes that such evidence should not be admitted at the formal hearing in this matter.'" [App. A. p. 7] It is inconceivable how the CD of the recordings, which was not even in existence at the time of respondent's alleged misconduct, could have been relevant to the current proceedings.

Even assuming, *arguendo*, that respondent was in possession of the jailhouse recordings, relator asserts that his actions still would have amounted to misconduct under the Code of Judicial Conduct and the Ohio Rules of Professional Conduct.

III. THE PANEL GAVE DUE CONSIDERATION TO RESPONDENT'S REASONS FOR THE RULINGS HE MADE ON THE RECORD ON NOVEMBER 30, 2007.

In his Third Proposition of Law, respondent asserts:

[T]he 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 1 §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 in this case.

The flaw in respondent's argument is that he assumes the panel failed to acknowledge respondent's reasons behind his rulings. The absence of a discussion about respondent's reasons is not equivalent of a failure to consider. The more plausible theory is that the panel acknowledged respondent's self-serving reasons, but dismissed them as disingenuous. Based upon the evidence presented at the hearing, it was obvious that respondent's recent reliance on Article 1§10a was nothing more than an after-the-fact attempt to justify his misconduct.

Despite allegedly “having to make a record” and “laying all his cards out on the table,” nowhere in the transcripts of November 29 & 30, 2007 does respondent ever mention Article 1§10a or his constitutional duty to protect the victims. To further illustrate, in response to relator’s investigation, respondent authored a letter detailing the reasons why he acted the way he did, yet he never mentioned Article 1§10a, his constitutional duties, or his need to make a record. [Ex. 21]. Eleven months later, after retaining counsel, respondent submitted a response to relator’s Notice of Intent to File a Formal Complaint, yet nowhere in the response did respondent mention Article 1§10a of the Ohio Constitution. It is likely that respondent’s alleged reliance on Article 1§10a rang hollow with the panel.

Even assuming that respondent felt obligated to protect the victims under the Ohio Constitution, nothing in Article 1§10a permits a judge to convene a press conference, abandon his or her impartiality, become an advocate, and implicate the defendant in uncharged crimes.²

Further, respondent argues that the panel ignored 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.” [Emphasis Added]. Again, Article I§10a does not provide justification for respondent’s actions. Additionally, a review of the transcripts from November 29 & 30, 2007 illustrates respondent’s lack of concern for Taylor’s safety or well-being.

On Thursday, November 29, 2007, respondent stated:

²Article 1§10a of the Ohio Constitution reads, “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.”

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.

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.

* * *

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 re-indict.

[Report, ¶20]

Respondent admitted at the hearing that these comments were directed primarily at Taylor. On Friday, November 30, 2007, respondent stated:

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.

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.

[Report, ¶32]

At the hearing, respondent confirmed his belief that Taylor had kidnapped Ingram. [Tr. Vol. 3, p. 159]. Aside from respondent's self-serving testimony, the evidence clearly established that respondent had no concern for Taylor's safety or well-being.

IV. RESPONDENT'S CONDUCT VIOLATED CANON 2 OF THE CODE OF JUDICIAL CONDUCT.

In his fourth Proposition of Law, respondent asserts:

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.

Respondent continues, "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."

Respondent misinterprets the panel's finding. In its report, the panel stated:

Respondent's on the record comments on November 29 & 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 2.³

[Report, ¶60]

The panel's concern was not that respondent needed to conduct an evidentiary hearing to declare a mistrial, continue the hearing, or recuse himself, but that respondent was making findings of fact and conclusions of law without any factual foundation or evidence. It is axiomatic that any "findings" must be based upon evidence received through some type of evidentiary hearing. Respondent denied Robinson the basic fundamentals of due process. At the disciplinary hearing, the following dialogue between the panel chair and respondent illustrates the panel's concern:

Panel Chair: Was the reason you granted a mistrial Mr. Robinson's conduct in procuring the nonattendance of the witnesses, or was it your inability to continue as the judge in this hearing, in this trial?

Respondent: That's an excellent question...I obviously think, I'm concluding that he's involved in the procurement of the absence of witnesses. I got to confront him. I got to call him out on it. I got to jump his grill. I got to tell him that this really goes beyond. So I think it's a combination of those factors. I do. I think it's a combination of those factors.

Panel Chair: The reason I ask the question is that throughout your testimony, especially today, you've repeatedly talked about the things that you knew or the findings you were making.

Respondent: Uh-huh.

Panel Chair: Yet I'm struck by the fact that all of this information is coming to you outside any sort of evidentiary hearing. You're relying on police reports in prior cases, you're relying upon police reports, statements allegedly

³ Canon 2 of the Code of Judicial Conduct states that a judge shall respect and comply with the law and shall act at all times and act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

made that are reflected in medical records, statements of counsel. None of that evidence per se was in the record. So, again, I'm just trying to find whether you felt comfortable or felt that you could grant a mistrial because of Mr. Robinson's misconduct when you hadn't had any evidence, direct evidence that he was confronted with any of the misconduct.

Respondent: Well, on the day in question, I don't know if it would have been possible to prove it by clear and convincing evidence or beyond a reasonable doubt. I didn't have the woman there. We didn't have Mozelle Taylor there. But you must do something. You must go forward. You must reach some conclusion. You know, if you feel—if you're the trial court judge and you feel that this kind of obstruction of justice has taken place in your presence, you have to do something. I think you are duty bound to do something.

[Tr. Vol.3, p. 164-165]

Based on respondent's testimony, the panel concluded,

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 I gleaned in chambers. By the time I hit the bench I knew what I had." (Tr. 889)

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 and Taylor to appear pursuant to the subpoenas served upon them, or provide Robinson with the opportunity to confront witnesses on the 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.

[Report, ¶42, 44]

The board adopted the panel's findings of fact and conclusions of law, but "amended the panel's sanction based on Respondent's inability to follow a judge's obligation to decide a matter based upon actual evidence in a fair and impartial manner...."

[Report, p.34-35]

Respondent was not required to hold an evidentiary hearing in order to declare a mistrial. However, because respondent decided to make “findings of fact” and “conclusions of law,” he was required to hold an evidentiary hearing to receive evidence to enable him to make those decisions. Instead, respondent dispensed with the most basic procedural requirements—notice, presumption of innocence, opportunity to be heard, and the right to confront witnesses—and leapt to the unfounded conclusion that Robinson was guilty of procuring the witnesses absence from court. [Report, ¶63] The panel found that “Respondent possessed no actual evidence that Emma Ingram was subject to an [sic] ‘a credible threat of immediate danger of serious bodily harm or death’... [U]ltimately, the evidence presented to the Panel established the lack of any such threat.” [Report, ¶61]

In his objections, respondent incorrectly asserts that the panel committed error when it “concluded that Respondent’s issuance of an Amber Alert violated [Canon 2].” Respondent argues that he cannot be found to have violated Canon 2 for issuing an Amber Alert, because he never issued the Amber Alert. While true, respondent misinterprets the panel’s conclusion.

The panel did not base its Canon 2 violation on respondent use of the Amber Alert system, but on respondent’s improper use of the media to facilitate what respondent believed to be an Amber Alert.

Respondent also violated Canon 2 by misusing a public service when he directed his bailiff to contact the media and tell them he was issuing an ‘Amber Alert’ for the two missing victims... 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.

[Report, ¶61].

V. THE BOARD PROPERLY CONCLUDED THAT RESPONDENT'S CONDUCT VIOLATED CANON 3(B)(5).

Canon 3(B)(5) states, "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."

In his fifth Proposition of Law, respondent asserts that the panel's decision to impose a Canon 3(B)(5) violation was erroneous because "respondent's rulings did nothing more than preserve the *status quo* of the proceedings." Regardless of their affect on the proceedings, respondent was in no position to rule on substantive matters after having declared that he "had to step out of his role as a fair and impartial judge and had become an advocate." [Ex. 5, p. 21] Further, despite respondent's protestations to the contrary, respondent's actions did not preserve the *status quo*. At the time respondent ruled on defense counsel's motion to dismiss the case with prejudice, respondent had already declared a mistrial and announced his new role as an advocate for justice. There was nothing to preserve. If respondent truly wanted to preserve the status quo, he would have not have entertained the motion. Instead, ruling on the substantive motion presented respondent with one last opportunity to broadcast his bias against Robinson.

Respondent would like this Court to believe that there can be no Canon 3(B)(5) violation because 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." While it is true that the case resulted in a mistrial and that respondent recused himself, one cannot overlook the glaring fact that respondent's conduct manifested bias and prejudice against Robinson.

In *Cleveland Bar Assn. v. Cleary* (2001), 93 Ohio St.3d 191, 754 N.E.2d 235, this Court

defined bias and prejudice in the context of Canon 3(B)(5) as “imply[ing] a hostile feeling or spirit or 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.” *Id.* at 102, quoting *State ex rel. Pratt v. Weygandt* (1956), 164 Ohio St. 463, ¶4 of the syllabus.

Following the *Cleary* rationale, the board properly concluded that respondent’s conduct in “handling the Robinson case” manifested bias and prejudice because respondent was “clearly prejudiced against Robinson during the course of the proceeding and expressed prejudice on the record.” [Report, ¶62] In support of its findings, the board noted that “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.” [Report, ¶62] Respondent’s actions were hostile, vindictive, and outright unethical.

The board’s conclusion that “Respondent’s handling of the Robinson case violated Canon 3(B)(5)...” encompasses all of the statements respondent made on the record that evidence a hostile feeling or a fixed, anticipatory judgment. For example, while on the record, respondent stated:

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

- 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.
- 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.
- 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.

[Report, ¶¶ 23, 32]

Respondent's comments were laced with bias and prejudice. Respondent's testimony at the hearing confirmed his bias, as he referred to Robinson as "evil" and that he felt obligated to confront "evil." [Tr. Vol.3, p. 157] Respondent's attitude towards Robinson was not lost on the panel. "Respondent had concluded that respondent was 'evil' and that it was his responsibility to confront Robinson and make sure he didn't 'win.'" [Report, ¶49]

Finally, respondent asserts that the bias and prejudice referred to in Canon 3(B)(5) can only emanate from improper extrajudicial motives, such as those set forth in Canon 3(B)(5)—race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status. Respondent's argument is specious at best. Canon 3(B)(5) expressly states, "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 and prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status...” [Emphasis added] In addition to its unambiguous language, this Court has found violations of Canon 3(B)(5) in situations wholly unrelated to those specifically identified in the text of Canon 3(B)(5). See *Disciplinary Counsel v. Squire* (2007), 116 Ohio St.3d 110, 876 N.E.2d 933 (Numerous Canon 3(B)(5) violations based solely upon the respondent-judge’s hostile interactions with litigants and attorneys).

VI. RESPONDENT’S “ON THE RECORD” STATEMENTS VIOLATED CANON 3(B)(9).

In his sixth Proposition of Law, respondent asserts that the panel erred in finding a Canon 3(B)(9) violation “because no evidence was presented concerning a reasonable jurist’s expectations or a ‘reasonable’ criminal defendant’s expectation.” Again, respondent’s argument lacks merit and must fail. Ohio judges have been found to have violated Canon 3(B)(9) without any indication that evidence was received regarding a reasonable jurist’s or defendant’s expectation that the judge’s comments might impact its outcome or impair its fairness. See *Disciplinary Counsel v. Hoskins*, 119 Ohio St.3d 17, 2008-Ohio-3194, 891 N.E.2d 324, and *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, 710 N.E.2d 1107.

The standard in evaluating judicial conduct is an objective one. In *In re Complaint Against Judge Harper* (1996), 77 Ohio St. 3d 211, 673 N.E.2d 1253, this Court found Judge Harper’s use of a campaign video violated Canon 2A [A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary]. The Court held that in proving a Canon 2A

violation, “relator was not required to submit evidence that public confidence in the integrity and impartiality of the judiciary was, in fact, undermined.” Id. Neither a public opinion poll nor outside testimony (i.e., the general public) is required to establish violations pertaining to public confidence in the judiciary. Id. at 216, 673 N.E.2d 1253, 1259. The *Harper* Court reviewed a number of disciplinary cases from Ohio, as well as other jurisdictions and held, “[w]hat is apparent from the cases is that an objective standard should be applied, **** ‘conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office .’” Id. at 218, 673 N.E.2d 1253, 1260.

Applying the *Harper* rationale, relator was not required to offer testimony from a jurist or defendant in order to establish a Canon 3(B)(9) violation. Like Canon 2, Canon 3(B)(9) requires an objective standard be applied when evaluating whether a judge’s comments rise to the level of an ethical violation. The objective standard makes an actual jurist’s or defendant’s expectation irrelevant to the determination of whether the respondent violated the Code of Judicial Conduct. Like the campaign video in *Harper*, respondent’s comments are “readily susceptible of interpretation by an objective observer without resort to proof from members of the public.” Id. at 217, 673 N.E.2d 1253, 1259.

Respondent also argues that respondent could not have violated Canon 3(B)(9) because his comments were made during the course of his official duties or for purposes of explaining for public information the procedures of the court. In support of respondent’s specious argument, he relies upon the language in Canon 3(B)(9), which states, “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.”

Canon 3(B)(9) unequivocally prohibits judges from making public comments—in any forum or capacity—that might reasonably be expected to affect the outcome of a proceeding or impair its fairness. Under respondent’s theory, no comment—no matter how prejudicial or inflammatory—could be subject to scrutiny under Canon 3(B)(9), so long as the comment was made from the bench. Accepting respondent’s flawed interpretation of the rule would eviscerate the rule itself. Equally important, respondent was not acting in his official capacity, as evidenced by his own statement on the record that he was acting not as a fair and impartial judge, but as an advocate. [Report, ¶32, p.12]

At the hearing, respondent testified that his in-chambers press conference after he had declared a mistrial and recused himself was for the purpose of explaining to the public the procedures of the court. Respondent’s testimony was self-serving and highly suspect.

Respondent’s Counsel: Judge, after you left the bench on Friday, November 30th, did you speak to the media further?

Respondent: I did.

Respondent’s Counsel: Where?

Respondent: In my chambers.

Respondent’s Counsel: Why?

Respondent: The media was unsure of what was going on. They didn’t know why I was recusing myself. They didn’t know what had taken place. They heard and they saw, but they didn’t have the full context and wanted to ask some follow-up questions.

Respondent’s Counsel: What did you tell the media in your chambers?

Respondent: I told them why I was concerned. I stressed that, you know, the defendant was entitled to a fair trial. He will get

one, but it can't be in front of me because I had to confront these unseemingly issues. And I told them that, you know, I was very concerned because of the allegations of drug abuse and the infirmed victim. **And basically, I was explaining the procedures of the court and why we did what we did.** [Emphasis added]

Contrary to respondent's testimony, the record reveals that he was not explaining the procedures of the court, but was boasting about how he had just gone toe-to-toe with Robinson and won.

The following quote from respondent's in-chambers press conference was broadcast on at least one television station:

...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...

[Report, ¶33]

Even assuming, *arguendo*, that respondent was explaining the procedures of the court, respondent's explanation went above and beyond the information necessary to accomplish that task. In *In Re Complaint Against Schenck* (1994), 318 Ore. 402, 870 P.2d 185, the Oregon Supreme Court found Judge Schenck to have violated Canon 3(A)(6), which is identical to Ohio's Canon 3(B)(9), for comments he made in an editorial regarding a prosecutor's trial capabilities. "Many of the judges statements do not meet the exception in Canon 3(A)(6) for 'public statements in the course of official duties' or for 'explaining for public information the procedures of the court'... The presence of some permissible information does not sanitize the other material in each communiqué that is a public comment about a pending or impending circuit court case." *Id.* at 427, 870 P.2d 185, 201. Similarly, in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, 654, 710 N.E.2d 1107, this Court found a Canon 3(B)(9) violation

based upon Judge Ferreri's out-of-court statements to a reporter. "However, at the time of his statements to the television reporter, respondent was not acting in his official capacity, nor were his statements limited to explaining the procedures of the court." *Id.*

In the case at bar, respondent was not acting in his official capacity during the in-chambers press conference, as respondent had already recused himself from Robinson's case. Further, respondent's comments were clearly not limited to explaining court procedures. Therefore, respondent's comments violated Canon 3(B)(9).

VII. RESPONDENT'S ON-THE-RECORD COMMENTS VIOLATED ORPC 8.4(D) AS THEY WERE PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

In *Disciplinary Counsel v. Karto* (2002), 94 Ohio St.3d 109, 760 N.E.2d 412, this Court held, "A judge acts in a manner that is prejudicial to the administration of justice within the meaning of DR 1-102(A)(5) 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." *Id.* at 114, 760 N.E.2d 412, 418, citing *Cleveland Bar Assn. v. Cleary* (2001), 93 Ohio St.3d 191, 754 N.E.2d 235.

Respondent's contention that his comments from November 29 & 30, 2007 were not prejudicial to the administration of justice underscores respondent's continued refusal to accept responsibility for his actions. An objective reading of the November 29 & 30, 2007 transcripts can only lead to one conclusion—"Respondent's public treatment of Robinson during the course of a criminal proceeding was unfair, unprofessional, and undignified." [Report, ¶64]

Respondent assertion that “contrary to the Panel’s conclusions, Robinson was treated fairly in light of the circumstances involving the absence of victims/witnesses at this criminal trial,” is absurd. Respondent made a mockery of the independence and integrity of the judiciary and he did so at Robinson’s expense.

On Thursday, November 29, 2007, after granting the state a one-day continue to secure their witnesses, respondent stated:

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. [Emphasis added]

In his objections to the board’s report, respondent, speaking of the aforementioned quote, asserts that he was “express[ing] his philosophy concerning those involved in procuring the absence of witnesses.” If this is indeed respondent’s philosophy, one must question respondent’s ability to serve as a fair and impartial jurist. Incredibly, respondent continues to argue that his November 29, 2007 statements enhanced the administration of justice.

Regarding his statements on Friday, November 30, 2007, respondent asserts that his comments could not be prejudicial to the administration of justice because they were made while making a record to indicate the basis for the mistrial and recusal. As the board appropriately concluded:

Although respondent could have complied with his duty [to make a record] 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 believed that, because he intended to recuse himself, he could make these accusations of misconduct even though they were highly prejudicial towards Robinson and his “findings” were unsupported by any evidence in the record. [Emphasis added]

[Report, ¶58]

Throughout the hearing and in his objections to the board’s report, respondent mistakenly relies upon *State v. Busch*, 76 Ohio St. 613, 1996-Ohio-82, 669 N.E.2d 1125, to justify his misconduct. In *Busch*, the trial court dismissed a domestic violence case over objection of the prosecutor based upon the victim’s desire to drop the charges against the defendant. In upholding the trial court’s decision, Justice Pfeifer stated:

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 the proceedings.’ Trial courts deserve the discretion to be able to craft a solution that works in a given case. (Citations omitted) *Id.* at 615-616, 1996-Ohio-82, 669 N.E.2d 1125, 1128.

But respondent takes Justice Pfeifer’s statements out of context and conveniently omits the remainder of his comments. In *Busch*, the trial court engaged in an exhaustive analysis before exercising its discretion to dismiss the case. The Court continued:

The trial court methodically over a period of at least a month determined that Cordiano was not being coerced and truly did not wish to testify. The court had her August 5, 1994 affidavit to that effect. She so testified under oath in a pretrial, on two other occasions when the trial was continued, and finally on the day when the charges were dismissed. The trial judge made sure the couple was in counseling, that Cordiano wanted to see the charges dropped, and that she was not being coerced. The trial court knew that Cordiano had spoken with prosecutors and a representative of the prosecutor’s witness assistance program. Cordiano also testified that she did not fear a flare-up in Busch’s behavior.

An abuse of discretion implies that the trial court’s attitude, as evidenced by its decision, was unreasonable, arbitrary, or unconscionable. *State v. Jenkins* (1984), 15 Ohio St.3d

164, 222, 15 OBR 311, 361, 473 N.E.2d 264, 313. The trial court in this case handled the case well. It was not until Cordiano had testified on several occasions that the trial court finally dismissed the charges. Until that point, the court used a possible dismissal as an incentive for the couple to continue in counseling.

In this case, the trial court used its judicial power to do its best with a matter which no longer seemed to fit the court system. Trial judges have the discretion to determine when the court has ceased to be useful in a given case. The trial judge made a permissible determination here.

Id. at 616, 1996-Ohio-82, 669 N.E.2d 1125, 1128.

In the case at bar, despite the absence of any evidence to suggest that the victims were in danger, respondent called a press conference, disparaged the defendant by waving his rap sheet in front of the cameras, issued an Amber Alert, and proceeded to accuse the defendant of kidnapping and obstruction of justice. Respondent acted in a wanton, reckless, and unconscionable manner. Unlike the judge in *Busch*, Respondent took no efforts to corroborate his suspicions, leading the board to conclude:

Respondent possessed no actual evidence that Emma Ingram was subject to an “a credible threat of immediate danger or 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.”

[Report, ¶61]

Respondent’s conduct and comments were offensive, highly prejudicial to the administration of justice, and unbecoming of a judge.

VIII. THE BOARD'S RECOMMENDED SANCTION OF 12 MONTHS STAYED IS COMMENSURATE WITH RESPONDENT'S MISCONDUCT.

At the close of the hearing, relator requested a one-year, stayed suspension based upon respondent's misconduct and his indignant refusal to acknowledge the wrongful nature of his misconduct. Respondent requested that the case be dismissed. Although the panel recommended a public reprimand, it was struck by respondent's arrogance.

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 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.

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.

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 Coughlan 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, some would say persecution of me, I think, is deleterious to the system of justice. Look, I am thoughtful and sensitive enough 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 Pfeifer would say, and other judges are alarmed and they're scared. Because, you know, we're all---this really isn't about the truth anymore. It really isn't about who wins or loses. It's not about the 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.

[Report, ¶¶64-67]

The board adopted the panel's findings of fact and conclusions of law, but adopted relator's recommended sanction of a one-year, stayed suspension. "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 matter and his refusal to acknowledge his misconduct in making a series of intemperate remarks." [Report, p. 34-35]

When deciding what sanction to impose, this Court "considers the duties violated, respondent's mental state, the injury caused, the existence of aggravating or mitigating circumstances, and applicable precedent." *Disciplinary Counsel v. Evans*, 89 Ohio St.3d 497, 2000-Ohio-227, 733 N.E.2d 609. Based upon relator's research, this Court has never imposed a public reprimand upon a judge who refused to acknowledge the wrongful nature of his or her misconduct. In the case at bar, it is respondent's refusal to acknowledge the wrongful nature of his misconduct—an aggravating factor—that warrants a one-year, stayed suspension.

In imposing a public reprimand against a municipal court judge, this Court stated, "We find no evidence of any aggravating circumstances that would lead us to increase the sanction against respondent." *Disciplinary Counsel v. Medley*, 93 Ohio St.3d 474, 756 N.E.2d 104.

Although *Disciplinary Counsel v. Kaup*, 102 Ohio St.3d 29, 2004-Ohio-1525, 806 N.E.2d 513, involved a judicial candidate, rather than a judge, this Court stressed the importance of accepting responsibility for one's actions. In *Kaup*, the judicial candidate issued false and misleading campaign materials while running for election to the common pleas court. Relator, the panel, and the board recommended a public reprimand; however, the Court imposed a six-month, stayed suspension, stating, "In this case, we find, as in *Evans*, that a stayed suspension is the appropriate penalty to impose upon respondent. 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] misconduct.'" *Id.* at ¶12. In the case at bar, respondent insists that he did nothing wrong and boasts that his actions enhanced the public's perception of the judiciary.

In *Disciplinary Counsel v. Hoague*, 88 Ohio St.3d 321, 2000-Ohio-340, 725 N.E.2d 1108, this Court imposed a six-month stayed suspension based upon a single Canon 2 violation, finding that "[Judge Hoague] misused the authority of his judicial office in an attempt to achieve his personal goal of reprimanding persons he believed were guilty of reckless driving." *Id.* at 323, 2000-Ohio-340, 725 N.E.2d 1108. After personally observing a vehicle being driven recklessly, Judge Hoague used the license plate number to determine the vehicle's owner, sent the owner a letter on court letterhead, and threatened the owner with prosecution unless she appeared in court. When the driver appeared in court, Judge Hoague used intemperate language and again threatened the driver with prosecution. *Id.* The Court stated, "As we recently noted in *Disciplinary Counsel v. Ferreri* (1999), 85 Ohio St.3d 649, 654, 710 N.E.2d 1107, 1111, although a judge may feel strongly about violations of the law, 'strong feelings do not excuse a

judge from complying with the judicial canons and the Disciplinary Rules.” Id. at 324, 2000-Ohio-340, 725 N.E.2d 1108, 1110.

Like Judge Hoague, respondent misused the authority of the judiciary to further his personal agenda. Despite the isolated nature of Judge Hoague’s misconduct and his apology, the Court imposed a six-month, stayed suspension. In contrast, in the case at bar, respondent not only refused to acknowledge the wrongful nature of his misconduct, but he disparaged others—including members of this Court—in an attempt to deflect scrutiny away from himself. At the hearing, when asked if respondent had any remorse, he boasted, “You know, I do not. I think if I am known for this and only this, that I’m okay with that.” [Tr. Vol.3, p. 109]

Respondent’s misconduct, coupled with his refusal to acknowledge the wrongful nature of his misconduct warrants a one-year, stayed suspension.

CONCLUSION

Respondent's misconduct was calculated, unfair, and prejudicial. His inability to remain neutral coupled with his desire to assume the role of an advocate tarnished the public's perception of the judiciary and prejudiced the administration of justice.

Judges, by contrast, cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law who apply the law uniformly and consistently. Because judges are both 'highly visible member[s] of government' and neutral decision makers in all court proceedings, their public comments will be received by the public as more authoritative than those of lawyers. And because judges have this greater influence over public opinion, inappropriate public comment by judges poses a much greater threat to the fairness of judicial proceedings than improper public comment by lawyers.

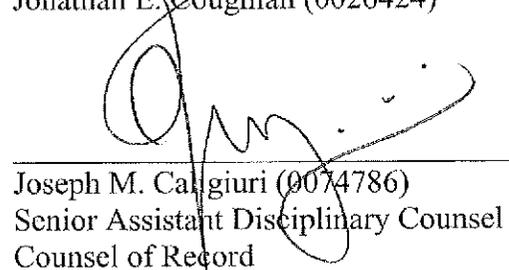
Boardman v. Commn. on Judicial Performance (1998), 18 Cal.4th 1079.

Relator respectfully requests this Court accept the board's recommendation of a one-year, stayed suspension.

Respectfully submitted,



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CERTIFICATE OF SERVICE

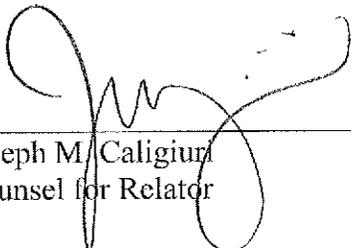
I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel,

Richard Charles Alkire, Esq.
250 Spectrum Office Building
6060 Rockside Woods Blvd.
Independence, OH 44131-7300

and upon

Jonathan W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline
41 S. High Street, Suite 2320
Columbus, Ohio 43215

this 5th day of April, 2010.



Joseph M. Caligiuri
Counsel for Relator

APPENDIX A

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,

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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*