

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In re:

Complaint against

Case No. 2019-016

**Barbara Porzio
Attorney Reg. No. 0003203**

**Findings of Fact,
Conclusions of Law, and
Recommendation of the
Board of Professional Conduct**

Respondent

Disciplinary Counsel

Relator

OVERVIEW

{¶1} This matter was heard on August 29, 2019 before a panel consisting of George Brinkman, Lisa Eliason and Hon. John Wise, panel chair. None of the panel members reside in the district from which the complaint arose or served as a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing and represented by Jacob Kronenberg. Relator was represented by Joseph M. Caligiuri.

{¶3} This case involved *ex parte* communications by the Respondent while acting as a magistrate for the Lake County Common Pleas Court. Following a hearing on a civil stalking protection order, Respondent ordered one party to leave the courthouse and had the other party remain in the courtroom as a safety measure. After one party had apparently left the courthouse, Respondent engaged in a lengthy conversation with the remaining party. The content of the conversation included Respondent's thoughts on the case, her personal views or opinions of the parties, how she viewed the evidence, and how she would rule on the matter. Respondent indicated to the party remaining in the courtroom that neither party had met their burden of proof.

Subsequent to the conversations, when the Respondent wrote her magistrate's decision, she found on behalf of the party with whom she had the *ex parte* communications. Respondent was charged with violating Jud. Cond. R. 1.2, 2.9(A) and 2.11(A).

{¶4} Based upon the parties' stipulations attached hereto, and evidence presented at the hearing, the panel finds by clear and convincing evidence that Respondent engaged in judicial misconduct, as outlined below. Upon consideration of the applicable aggravating and mitigating factors and case precedent, the panel recommends that Respondent be suspended from the practice of law for a period of six months, stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to the practice of law in Ohio on November 2, 1979 and is subject to the Rules of Professional Conduct, the Rules for the Government of the Bar of Ohio, the Code of Judicial Conduct, and the Rules for the Government of the Judiciary of Ohio.

{¶6} Respondent has not been the subject of prior disciplinary action in Ohio.

Jud. Cond. R. 1.2

{¶7} Jud. Cond. R. 1.2 states, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

{¶8} Respondent presided over a civil stalking protection order hearing on August 16, 2017. Stipulations ¶4. The parties, Paul Fish and Walter Gerino, had filed separate and competing civil protection petitions. Stipulations ¶6. At the conclusion of the hearing, Respondent asked the parties to leave separately. She indicated that Fish should leave first and that Gerino should remain in the courtroom. Stipulations ¶7. Both parties appeared to comply. Stipulations ¶8. However,

Fish left the courtroom but not the courthouse. He remained on a bench in the hallway outside the courtroom. Gerino did as instructed and remained in the courtroom. *Id.*

{¶9} At this point, the misconduct of Respondent begins. After Fish left the courtroom, Respondent brought Gerino’s witnesses into the courtroom and proceeded to engage in a lengthy *ex parte* communication with Gerino and his witnesses. During the 23-minute *ex parte* communication, Respondent, among other things, criticized Fish, commented on his credibility, discussed the evidence, explained the legal standard for a civil stalking protection order, and indicated how she intended to decide the case. Stipulations ¶10.

{¶10} The stipulations also evidence Respondent’s lack of judicial demeanor. Respondent made offhand comments about the parties’ religions, ethnic backgrounds, their personal integrity, and used slang vulgarity before the parties. Those comments do not “promote public confidence in the independence, integrity, and impartiality of the judiciary,” as required by Jud.Cond.R. 1.2.

{¶11} Examples of Respondent’s inappropriate comments are set forth in ¶¶10 and 12 of the Stipulations. Respondent tells Gerino;

- “Mr. Fish was such a liar I wanted to. Did you pick up on that?”
- “He did it to himself. He made himself look foolish.”
- “Some conversation that Walter had was walking outside to a third party that such, such bullshit.”
- “I made some thing about that neither one of them are walking around with halos and I thought, Do Jewish people have halos? I think they have angels though, right?”
- “The Catholics got lots of angels or uh. Halos.”
- “He keeps acting like he’s 10-year old.”

{¶12} Evidence that her comments gave the appearance that Respondent was biased toward Fish is set forth in the statements of a witness who stated when Respondent left the room, “She don’t like him, does she?” Stipulations ¶11, p. 19.

{¶13} A review of Stipulations ¶¶10-12 shows a magistrate who does not comprehend her ethical duties as set forth in Jud. Cond. R. 1.2. She disclosed to only one side how she would decide the case and did so prior to her writing the order. To make the situation worse, after the lengthy *ex parte* communications and indicating that neither side had met their burden of proof, Respondent ultimately found that Gerino had met his burden of proof and ruled in favor of granting Gerino’s petition for a civil stalking protection order and denied Fish’s petition outright. Stipulations ¶13.

{¶14} Respondent explained why she changed her decision from what she had stated to Gerino in her *ex parte* conversation:

Q: Okay. So what I’d like you to explain to the panel is what changed between the time that you had this *ex parte* communication in which you indicated to Mr. Gerino that neither he nor Mr. Fish proved their case to the point in Exhibit 6 where you found that Mr. Gerino did, in fact, suffer mental distress.

A: Firstly, I calmed down. I was agitated. I’m not sure of the right adverb. I knew that I was not acting properly that day after the hearing was over, so I gave myself some time, and then I had -- I listened to the transcript.

I wrote a draft with findings without a conclusion, and then I listened to the transcript again. I reviewed everything in the file, and attached the petitions in the file, and then I reached a conclusion.

So it was two things. One is, there was a lapse of time; and, secondly is, I reviewed the evidence on two separate occasions.

Q: Did the 23-minute *ex parte* communication that you had with Mr. Gerino and his two companions influence your decision that you issued on October 16th?

A: It certainly didn’t influence my ultimate recommendation to the court that the protection order be put in -- or kept in place.

* * *

Q: Okay. And you would agree with me that, again, someone in Mr. Fish's situation would--could assume that the *ex parte* communications that you had had while he was outside the courtroom may have influenced your decision?

A: I agree with that statement. I understand how he could have reached that conclusion.

Hearing Tr. 24-26.

{¶15} Whether Respondent's *ex parte* communications influenced her ultimate decision or not, the appearance of impropriety created by those comments is enough, standing alone, to support a finding of a violation of Jud. Cond. R. 1.2.

{¶16} The panel finds upon a review of the evidence contained in the transcript, the stipulations and the exhibits, that relator proved by clear and convincing evidence that Respondent violated Jud. Cond. R. 1.2.

Jud. Cond. R. 2.9(A)

{¶17} Jud. Cond. R. 2.9(A) states, "[a] judge shall not initiate, receive, permit, or consider *ex parte* communications except as follows * * *." None of the exceptions set forth in Jud. Cond. R. 2.9(A) is alleged by the parties, and none would be appropriate under the facts of this case.

{¶18} The testimony at trial and Stipulations ¶¶10 and 12 show that Respondent, following the conclusion of the hearing, separated the parties. Respondent then initiated a conversation with one party after the other party had been excused and absent from the courtroom. The conversation went beyond the bounds of friendly conversation and into Respondent's views of the case, the parties' personal lives, and legal concepts such as burden of proof surrounding the hearing over which she presided.

{¶19} The panel finds, upon review of the evidence contained in the transcript, stipulations, and exhibits, Relator has proven by clear and convincing evidence that Respondent violated Jud. Cond. R. 2.9(A).

Jud. Cond. R. 2.11(A)

{¶20} Jud. Cond. R. 2.11(A) states that, “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”

{¶21} As more fully detailed in the analysis of the violations set forth above, Respondent, after communicating with Gerino, continued to exercise her judicial authority. Instead of immediately removing herself from the case as required by Jud. Cond. R. 2.11(A), Respondent continued to exercise her authority as a magistrate and wrote her decision on the matter. Again, Respondent exacerbated the problem of the *ex parte* communication by discussing the evidence in the case, her personal views on a party’s integrity, and how she would rule on the case and ultimately ruling in favor of Gerino, despite her indication that neither party had met their burden of proof. Stipulations ¶¶10 and 13. Based upon those comments, Respondent’s impartiality most certainly could be reasonably questioned.

{¶22} The panel, upon review of the evidence contained in the transcript, the stipulations and the exhibits, finds relator has proven by clear and convincing evidence that Respondent violated Jud. Cond. R. 2.11(A).

AGGRAVATION, MITIGATION, AND SANCTIONS

{¶23} The panel finds no aggravating factors. There are multiple violations of the Code of Judicial Conduct, but they arise from the same course of conduct.

{¶24} Although the panel finds no aggravating factors, it does seriously consider the nature and content of her *ex parte* comments. The fact that Respondent so casually comments on

a party's religion and in a manner that could be construed as derogatory cannot be ignored. Coupling those statements with her other off-hand comments set forth above, the panel believes that Respondent needs to better understand the place actual bias or inherent bias plays in both her position as a magistrate and as a licensed, practicing attorney. This issue will be addressed in the panel's recommended sanctions.

{¶25} The panel finds the following mitigating factors.

- Respondent was admitted to the practice of law in 1979 and served as a magistrate for approximately 30 years prior to this matter without prior disciplinary action.
- There is an absence of a dishonest or selfish motive.
- Respondent made a full and free disclosure to the Board and had a cooperative attitude toward the proceedings.
- Respondent presented 10 letters testifying, from personal observations, as to her legal competence, commitment to her profession and her personal integrity. The theme of most of these letters is the writers are surprised by the alleged conduct and find it to be an aberration from her normal conduct. They believe she has been a model for what a magistrate should be. Many of the letters are from magistrates who either worked with Respondent at some point in their careers, or were attendees at one of the magistrates' continuing legal education seminars that Respondent presented. They all point to the amount of time she has devoted to educating magistrates.
- Retired Judge James Kimbler, formerly of the Medina Common Pleas Court, testified as to Respondent's professionalism, good character, and high quality of work as a magistrate in his court.
- Respondent expressed remorse at the hearing. Respondent testified: "Frankly, I'm horrified at how I acted that day. What I did was wrong. I should have talked to the judge about whether he wanted me to recuse myself. Ultimately magistrates do whatever the judges want, so I probably shouldn't have even done that. I probably should have just recused myself. I know how important it is to have - to remain impartial and to avoid having people have a perception that I'm - - that the court is not favoring one party over the other. It was - it was wrong all the way around." Hearing Tr. 59-60. Not all of the panel members were convinced of the sincerity of the statement.

- Respondent has suffered additional penalties. Respondent was terminated from her position as a magistrate with the Lake County Common Pleas Court.

{¶26} When recommending sanctions for judicial misconduct, the panel must consider relevant factors, including the ethical duties violated by Respondent and the sanctions imposed in similar cases.

{¶27} “The primary purpose of judicial discipline is to protect the public, guarantee the evenhanded administration of justice, and maintain and enhance public confidence in the integrity of this institution.” *Disciplinary Counsel v. Salerno*, 156 Ohio St.3d 244, 2019-Ohio-435, ¶21, citing *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605, ¶14, citing *Kloepfer v. Comm. on Judicial Performance*, 49 Cal.3d 826, 864-865, 264 Cal.Rptr. 100, 782 P.2d 239 (1989).

{¶28} The parties offer a joint recommendation of a public reprimand as the proper sanction for Respondent’s misconduct.

{¶29} In support of the joint recommendation of a public reprimand, the parties submit the following cases for the panel’s consideration: *Disciplinary Counsel v. Holben*, 155 Ohio St.3d 618, 2018-Ohio-5097; *Disciplinary Counsel v. Stuard*, 121 Ohio St.3d 29, 2009-Ohio-261; *Disciplinary Counsel v. Salerno*, 156 Ohio St.3d 244, 2019-Ohio-435; *Disciplinary Counsel v. Burge*, Slip. Op. No. 2019-Ohio-3205; and *Disciplinary Counsel v. Ferreri* (2000), 88 Ohio St.3d 456.

{¶30} Holben failed to recuse herself from presiding over three separate child custody proceedings, despite her personal and substantial involvement in the proceedings as a lawyer for Franklin County Children Services before becoming a magistrate. Despite the presence of two aggravating factors, multiple offenses and harm to a vulnerable victim, the Court imposed a public

reprimand. In addition to finding that Holben violated Jud. Cond. R. 2.11(A)(7)(b) for failing to recuse herself, the court found that her conduct, like Respondent's, ran afoul of Jud. Cond. R. 1.2.

{¶31} Stuard was publicly reprimanded for engaging in four separate *ex parte* communications with the prosecutor prior to the sentencing phase of a capital case. Stuard asked the assistant prosecutor who prosecuted the defendant to prepare a sentencing opinion based upon Stuard's notes. After the assistant prosecutor drafted a 17-page opinion, Stuard reviewed the draft opinion and instructed the assistant prosecutor to make corrections. The assistant prosecutor made the corrections and incorporated editorial suggestions from his co-counsel into the final document. Stuard adopted the opinion sentencing the defendant to death, but he never disclosed the improper *ex parte* communications to defense counsel. In fact, the defense attorney, who did not have a copy of the opinion at sentencing, noticed that the assistant prosecutor appeared to be "reading along" while Stuard read the opinion from the bench. In imposing a public reprimand, the Court found that Stuard violated former Canon 2, the predecessor to Jud. Cond. R. 1.2, and former Canon 3(B)(7), the predecessor to Jud. Cond. R. 2.9(A). Furthermore, unlike the case at bar, Stuard's misconduct formed the basis of an appeal, which ultimately resulted in the court vacating the death sentence and remanding the matter for Stuard to personally evaluate the appropriateness of the death penalty.

{¶32} In *Salerno*, the Court imposed a one-year, stayed suspension upon a previously disciplined judge for, among other things, engaging in improper *ex parte* communications with a defense attorney, through her bailiff, which resulted in the judge lowering a defendant's bond without the prosecutor's knowledge or consent.

{¶33} Burge, received a six-month suspension with credit for time served under an interim felony suspension for, among other things, engaging in an *ex parte* communication with

a criminal defendant who had pled guilty before Burge, but had yet to be sentenced. In addition to the *ex parte* communication, Burge engaged in a multitude of misconduct, including criminal conduct for filing false financial disclosure forms, failing to recuse, intemperate behavior, and failing to uphold the law.

{¶34} Ferreri engaged in an improper *ex parte* communication when he appeared unannounced at the Cuyahoga County Department of Children and Family Services and demanded that a lawyer for the agency terminate its opposition to certain cases that were pending in his court. In suspending Ferreri for six months, the Court noted that he was under suspension for unrelated judicial misconduct.

{¶35} Here, Respondent's improper *ex parte* communications, coupled with her failure to recuse herself, negatively impacted the public's confidence in the independence, integrity, and impartiality of the judiciary. Given Respondent's lack of previous discipline, the fact that she is no longer serving in a judicial capacity, and her cooperation throughout these proceedings, the parties jointly recommend a public reprimand.

{¶36} The panel, after a review of all the evidence, stipulations, and the joint recommendation for a sanction of a public reprimand, finds that the proper sanction in this matter is a six-month suspension from the practice of law, with all of the time stayed. The panel finds that Respondent's conduct in announcing a decision *ex parte* to one party prior to writing her decision to be a strong factor requiring some period of suspension from the practice of law. However, in consideration of her lengthy service as a magistrate without prior disciplinary action, her voluntary service to her profession in providing years of continuing legal education courses to other magistrates, and the strong letters of reference presented from those who worked with her, the panel believes the suspension should be stayed upon conditions.

{¶37} The panel recommends that Respondent be suspended from the practice of law for a period of six months with the suspension stayed in its entirety on conditions of good behavior and completion of four hours of continuing judicial or legal education in the area of judicial ethics, with at least two hours in the specific area of inherent or actual bias. Respondent shall complete such continuing legal education within six months of the final entry in this matter.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on December 13, 2019. The Board voted to adopt findings of fact, conclusions of law, and recommendation of the hearing panel and recommends that Respondent, Barbara Porzio, be suspended from the practice of law in Ohio for six months, with the suspension stayed in its entirety on the conditions that Respondent (1) completes four hours of continuing legal education in the area of judicial ethics, two of which shall be specific to the topic of implicit or actual bias, with the four hours in addition to the requirements of Gov. Bar R. X and completed within six months of the final disciplinary order issued by the Supreme Court, and (2) refrains from further misconduct. The Board also recommends that Respondent be ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct, I hereby certify the forgoing findings of fact, conclusions of law, and recommendation as that of the Board.



RICHARD A. DOVE, Director