Rules of Law:

Custody of Evidence Rule, How it Affects Your Courtroom and Avoiding Improprieties

Friday June 14, 2024, 11:45 a.m.

1 CJE Ethics credit

Seasons 1 and 2

Presented by the ACBA Bench-Bar Conference Committee

Agenda

Welcome and introductions

State Rules Committees & Rulemaking

Recent State Rule mandate re: Custody of Exhibits

- Division Presentations
  - Criminal
  - Family
  - Civil
  - Orphan’s Court

Rules Compliance and your Courtrooms

State Rules Committees

7 Procedural Rules Committees

1 Evidentiary Rules Committee

The Committees provide advice and make recommendations for rules governing particular substantive areas.

The Committees are comprised of judges and attorneys.

Rules Committees

Appellate Court Procedural Rules
Criminal Procedural Rules
Civil Procedural Rules
Domestic Relations Procedural Rules
Orphans' Court Procedural Rules
Juvenile Court Procedural Rules
Minor Court Rules Committee
Committee on Rules of Evidence

Rules Committees

Meet generally 3 to 4 times per year to examine issues brought forward by:

- the Supreme Court,
- **Judges (that's right! Do you see an issue?),**
- Attorneys (PBA, ACBA, & other legal organizations),
- Members of the legislative and executive branches,
- Citizens, and
- Unified Judicial System employees.

The public may submit written comments about rules.

* The Committees often use subcommittees for drafting, and research.

Pa. Rule of Judicial Administration 103

(a.k.a The Rulemaking Rule)

Subdivision (a) & (b) = Statewide rulemaking

Subdivision (c) = Local rules of Judicial Administration

Subdivision (d) = Local rules of procedure

Pa. Rule of Judicial Administration 103

(a.k.a The Rulemaking Rule)

Pa. R.J.A. 103 provides for the publication of proposed new rules and/or amendments to existing rules.

If you have a comment or suggestion, the Pa. Bulletin provides information so that you can share your comment with the State Rules Committees.

The State Rules Committees welcomes your comments.

The Local Rules Committees also welcome your comments.

Why may Judges be interested in Rule Making and New Rules?

1. Judges may encounter current rules and practice areas where slight amendments and changes will improve the practice for litigants and the Court.

2. Judges have a strong interest in how changes to both State and Local Rules will impact their Courtrooms.

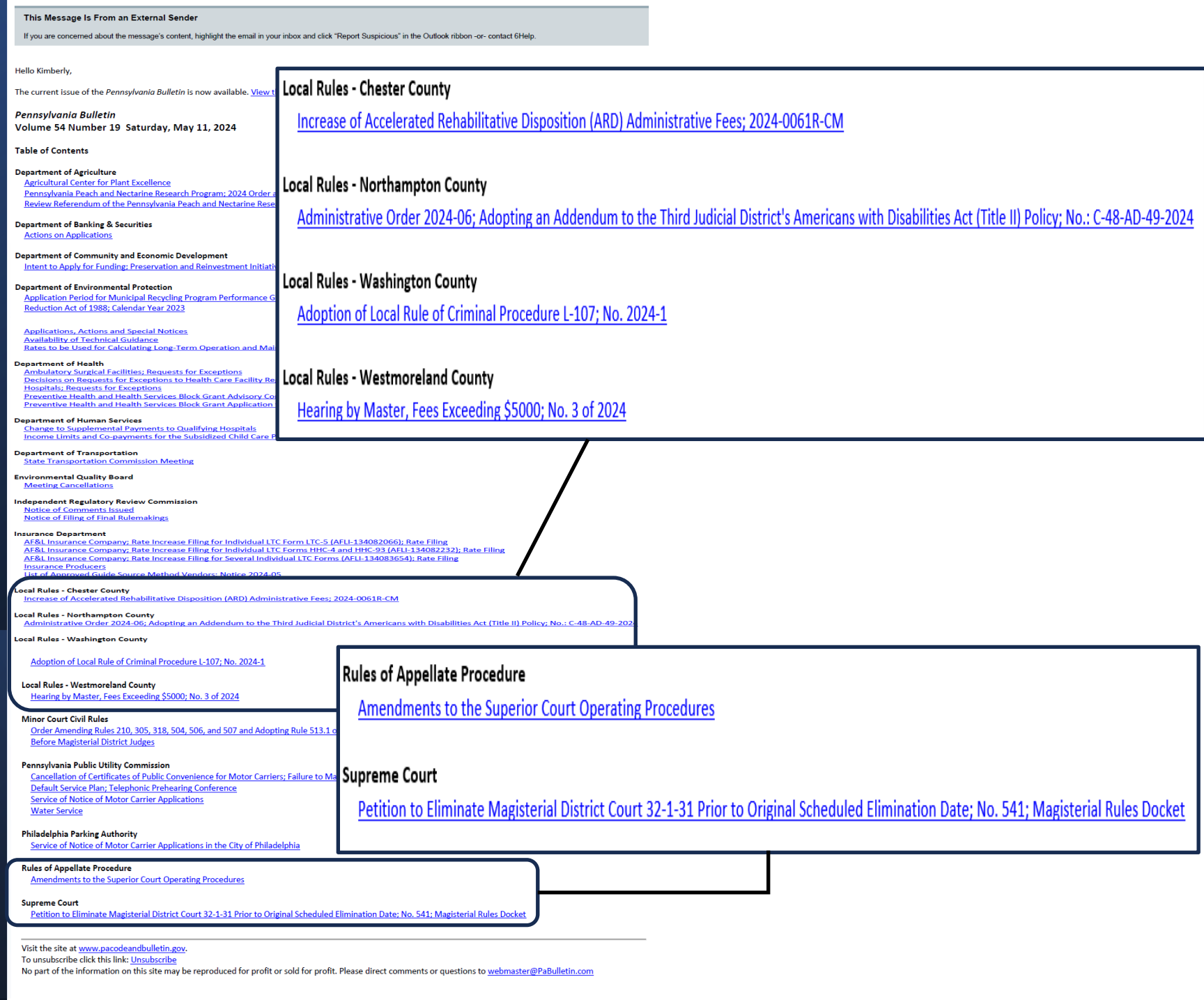
Why may Judges be interested in Rule Making and New Rules?

3. Comments from Judges are important to the State Rules Committees and to the Local Rules Committees.

4. Judges will be responsible to implement the new State and Local Rules, and/or the amendments to State and Local Rules.

Pennsylvania Bulletin Email Updates

https://www.pacodeandbulletin.gov/Account/PARegister



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Hello Kimberly,

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Recently implemented State Rule of Judicial Administration: Custody of Exhibits

Pennsylvania Supreme Court Order No. 596 of the Judicial Administration Docket -- September 11, 2023

Adopted Rules of Judicial Administration 5101- 5105

Required Judicial Districts to promulgate Local Rules of Judicial Administration deemed necessary to comply with the new Pa. R.J.A. 5101- 5105 no later than April 1, 2024

Recently Implemented
Pa. R.J.A. 5101–5105

The new Custody of Exhibit Rule represents Statewide Rulemaking.

The Criminal Procedural Rules Committee examined the custody of exhibits issue following reports of misuse of trial exhibits.

A statewide survey revealed great divergence in how exhibits were handled during court proceedings.

The Supreme Court directed the formation of a workgroup of stakeholders to study local practices and advise whether statewide rules should be promulgated.

The Custody of Exhibits Workgroup

1. Conference of State Trial Court Judges
2. State Association of Prothonotaries/Clerks of Court
3. Pennsylvania Association of Court Managers
4. Administrative Office of Pennsylvania Courts, and
5. Supreme Court Rules Committees

The Custody of Exhibits Workgroup

What did they do?

The Workgroup met several times.

Developed and circulated draft rules to stakeholder groups for review and comment.

The Workgroup published the proposal for public comment on April 6, 2019.

The comment period ran through June 5, 2019.

Following the comment period, the Workgroup further revised.

All Judicial Districts required to implement new Local Rules to comply with Pa. R.J.A. 5101-5105 by April 1, 2024

Local Rule Presentations by the 5th Judicial District Representatives for each Division:

1. Criminal Division
2. Family Division
3. Civil Division
4. Orphan’s Court

Rules of Judicial Administration and The Courtroom

Rule Violations Most Often Problems:

1. Administrative responsibilities
2. Appearance of impropriety
3. Integrity and independence

Code of Judicial Conduct

Canon 1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 1.1. Compliance with the Law.

A judge shall comply with the law, including the Code of Judicial Conduct.

Code of Judicial Conduct

Canon 2. A judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 2.2. Impartiality and Fairness.

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Comments to Rule 2.2

(3) When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

(4) It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters heard fairly and impartially.

Rule 2.5. Competence, Diligence and Cooperation.

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

Comments to Rule 2.5

(2) A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

(3) Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end. The obligation of this Rule includes, for example, the accurate, timely and complete compliance with the requirements of Pa.R.J.A. No. 703 (Reports of Judges) where applicable.

How Does This Work In Practice In The Courtroom?

Respondent failed to follow the correct procedure to modify a court rule, thereby violating Rule 2.5(A) of the Code of Judicial Conduct. By adding an [additional] requirement to XXXX County Rule 1920.51, Respondent substantially modified the rule. The modification of the rule was such that it entirely changed the rule. Unfortunately, when Respondent decided to change Rule 1920.51, he failed to follow proper procedure. The Pennsylvania Rules of Judicial Administration set forth a specific, detailed procedure to be used by courts of common pleas when adopting a court rule. In accordance with Pa.R.J.A. 103(d), all proposed local rules are to be submitted to the appropriate Supreme Court Rules Committee prior to enactment.

Pa.R.J.A. 103(d)(4). After the Rules Committee has completed its review, the proposed rule is required to be published in the Pennsylvania Bulletin and cannot become effective for at least 30 days following the publication. Pa.R.J.A. 103(d)(5).

Respondent made no effort to adhere to the Rules of Judicial Administration when he interpreted XXXX County Rule 1920.51 in a manner that substantially changed it.

By failing to adhere to Pa.R.J,A. 103, Respondent exhibited a lack of competence in performing his administrative duties and provided this court with clear and convincing evidence of a violation of Rule 2.5(A) of the Code of Judicial Conduct.

Handling of Evidence in the Courtroom Gone Really Wrong

SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner v. PAUL MICHAEL POZONSKY, Respondent

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No. 2195 DD3 No. 123 DB 2015

April 4, 2017, Argued

January 18, 2018, Decided

Failing to follow administrative rules gone wrong

"In addition to the constitutional and ethical provisions which compel the prompt disposition of all civil actions, it should be noted that our rules of civil procedure anticipate that judges will act in a timely fashion. In this respect, the fundamental rule of construction governing our rules of civil procedure is that "They shall be construed to secure the just, speedy, and inexpensive determination of every action." W.VA.R.CIV.P. 1 (1982 Replacement Vol.). Finally, we note that several states have enacted constitutional or statutory provisions requiring judicial officers to dispose of court business within certain time frames. *See, e.g.* IDAHO CONST. art. 5, § 17 (1980) (thirty days); ARIZ.REV.STAT.ANN. § 11–424.02 (1983 Supp.) (sixty days); KY.REV.STAT.ANN. § 454.350 (Bobbs-Merrill 1983 Supp.) (ninety days); TENN.CODE ANN. § 20–9–506 (1980) (sixty days)."

***State ex rel. Patterson v. Aldredge*, 317 S.E.2d 805, 807 (W. Va. 1984)**

Failing to follow administrative rules or rules of procedure

"The Respondent failed in discharging his administrative oversight responsibilities by permitting Constable Metzger to operate in a manner contradictory to the law and established procedures."

***In re Davis*, 954 A.2d 118, 120 (Pa. Ct. Jud. Disc. 2007)**

Failing to follow administrative rules or rules of procedure

It is easy to see that from the time the State Police citation came into her office Respondent engaged in a course of conduct which violated both Rule 5 and Rule 13. She failed to docket the citation when it was filed as it was her duty and responsibility to do and instructed her office manager to "hold on to it" and not to docket it until Respondent told her to docket it (Findings of Fact Nos. 9, 14, 16, 17, 18). This was an obvious violation of her personal administrative responsibilities and overtly contrary to her obligation to "facilitate the performance of the administrative responsibilities of [her] staff" (Rule 5) (Count 1); and was just as obviously "incompatible with the expeditious, proper and impartial discharge of her duties" (Rule 13) (Count 2).

***In re Arnold*, 51 A.3d 931, 938 (Pa. Ct. Jud. Disc. 2012)**

Failing to follow administrative rules or rules of procedure

Because it violated those two Rules, the same conduct was also an automatic, derivative violation of Article V, § 17(b) of the Pennsylvania Constitution, which provides in part that:

Magisterial district judges shall be governed by rules or canons which shall be prescribed by the Supreme Court.

***In re Arnold*, 51 A.3d 931, 938 (Pa. Ct. Jud. Disc. 2012)**

Purdon's Pennsylvania Statutes and Consolidated Statutes
Pennsylvania Rules of Judicial Administration (Refs & Annos)
General Provisions

PA.R.J.A. No. 103, 42 Pa.C.S.A.

Rule 103. Procedure for Adopting, Filing, and Publishing Rules

Effective: October 1, 2021
Currentness

(a) Notice of proposed rulemaking.

(1) Except as provided in subdivision (a)(3), the initial proposal of a new or amended rule, including any commentary that is to accompany the rule text, shall be distributed by the proposing Rules Committee to the Pennsylvania Bulletin for publication therein. The proposal shall include a publication notice containing a statement to the effect that written responses regarding the proposed rule or amendment are invited and should be sent directly to the proposing Rules Committee within a specified period of time, and a publication report from the Rules Committee containing the rationale for the proposed rulemaking.

(2) Written responses relating to the proposal shall be sent directly to the proposing Rules Committee within a specified number of days after the publication of the rule or amendment in the Pennsylvania Bulletin, and any written responses shall be reviewed by the said Committee prior to action on the proposal by the Supreme Court. Any further proposals which are based upon the written responses so received need not be, but may be, published in the manner prescribed in subdivision (a)(1).

(3) A proposed rule or amendment may be promulgated even though it has not been previously distributed and published in the manner required by subdivisions (a)(1) and (a)(2), where exigent circumstances require the immediate adoption of the proposal; or where the proposed amendment is of a typographical or perfunctory nature; or where in the discretion of the Supreme Court such action is otherwise required in the interests of justice or efficient administration.

(b) Rules adopted or amended by the Supreme Court.

(1) Rules adopted or amended by the Supreme Court, and any adoption report of the Rules Committee, shall be filed in the office of the Prothonotary of the Supreme Court.

(2) After an order adopting a rule or amendment has been filed with the Prothonotary of the Supreme Court, the Prothonotary shall forward a certified copy of the order, rule or amendment, and any adoption report to:

(i) The publisher of the official version of Supreme Court decisions and opinions who shall cause it to be printed in the first available volume of the State Reports.

(ii) The Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

(iii) The Administrative Office.

(c) Rules of judicial administration adopted by other courts and by agencies of the System.

(1) As used in this subdivision, "local rule" shall include every rule, administrative order, regulation, directive, policy, custom, usage, form, or order of general application, however labeled or promulgated, which is adopted or enforced by a court, council, committee, board, commission or other agency of the unified judicial system to govern judicial administration. This subdivision shall also apply to any amendment of a local rule.

(2) Local rules shall not be inconsistent with any general rule of the Supreme Court or any Act of Assembly.

(3) When a local rule under this subdivision corresponds to a general rule, the local rule shall be given a number that is keyed to the number of the general rule.

(4) Reserved.

(5) All local rules shall be published in the *Pennsylvania Bulletin* to be effective and enforceable.

(i) Reserved.

(ii) The adopting court or agency shall distribute two paper copies of the local rule to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. The adopting court or agency also shall distribute to the Legislative Reference Bureau a copy of the local rule on a computer diskette, CD-ROM, or other agreed upon alternate format that complies with the requirements of 1 Pa. Code § 13.11(b).

(iii) The effective date of the local rule shall not be less than 30 days after the date of publication of the local rule in the *Pennsylvania Bulletin*.

(6) Contemporaneously with publishing the local rule in the *Pennsylvania Bulletin*, the adopting court or agency shall:

(i) file one copy of the local rule with the Administrative Office;

(ii) publish a copy of the local rule on the website of the court or county in which the adopting court has jurisdiction; and

(iii) thereafter compile the local rule within the complete set of local rules no later than 30 days following publication in the *Pennsylvania Bulletin*.

(7) A compilation of local rules shall be kept continuously available for public inspection and copying in the respective filing office and on the website of the adopting court or county in which the adopting court has jurisdiction. Upon request and payment of reasonable costs of reproduction and mailing, the respective court office shall furnish a person with a copy of any local rule.

(8) No pleading or other legal paper shall be refused for filing by the prothonotary or clerk of courts based on a requirement of a local rule unrelated to the payment of filing fees. No case shall be dismissed nor request for relief granted or denied because of failure to initially comply with a local rule. In any case of noncompliance with a local rule, the court shall alert the party to the specific provision at issue and provide a reasonable time for the party to comply with the local rule.

(d) Rules of procedure adopted by other courts of the System.

(1) For the purpose of this subdivision, the term "local rule" shall include every rule, administrative order, regulation, directive, policy, custom, usage, form or order of general application, however labeled or promulgated, which is adopted by a court of common pleas and the Philadelphia Municipal Court to govern practice and procedure. This subdivision shall also apply to any amendment of a local rule.

(2) Local rules shall not be inconsistent with any general rule of the Supreme Court or any Act of Assembly. A Rules Committee, at any time, may recommend that the Supreme Court suspend, vacate, or require amendment of a local rule.

(3) Local rules shall be given numbers that are either keyed to the number of the general rules to which the local rules correspond or assigned by the general rules.

(4) All proposed local rules shall be submitted in writing to the appropriate Rules Committee for review. The adopting court shall not proceed with the proposed local rule until it receives written notification from the appropriate Rules Committee that the proposed local rule is not inconsistent with any general rule of the Supreme Court.

(5) All local rules shall be published in the *Pennsylvania Bulletin* to be effective and enforceable.

(i) The adopting court shall not publish the local rule in the *Pennsylvania Bulletin* until it has received the written notification pursuant to subdivision (d)(4).

(ii) The adopting court shall distribute two paper copies of the local rule to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. The adopting court also shall distribute to the Legislative Reference Bureau a copy of the local rule on a computer diskette, CD-ROM, or other agreed upon alternate format that complies with the requirements of 1 Pa. Code § 13.11(b).

(iii) The effective date of the local rule shall not be less than 30 days after the date of publication of the local rule in the *Pennsylvania Bulletin*.

(6) Contemporaneously with publishing the local rule in the *Pennsylvania Bulletin*, the adopting court shall:

(i) file one copy of the local rule with the Administrative Office;

(ii) publish a copy of the local rule on the website of the court or county in which the adopting court has jurisdiction; and

(iii) incorporate the local rule in the complete set of local rules no later than 30 days following publication in the *Pennsylvania Bulletin*.

(7) A compilation of local rules shall be kept continuously available for public inspection and copying in the respective filing office and on the website of the adopting court or county in which the adopting court has jurisdiction. Upon request and payment of reasonable costs of reproduction and mailing, the respective court office shall furnish a person with a copy of any local rule.

(8) No pleading or other legal paper shall be refused for filing based upon a requirement of a local rule. No case shall be dismissed nor request for relief granted or denied because of failure to initially comply with a local rule. In any case of noncompliance with a local rule, the court shall alert the party to the specific provision at issue and provide a reasonable time for the party to comply with the local rule.

Comment: Effective October 1, 2021, "rule" includes the rule text and any accompanying commentary such as a note or comment. Such commentary, while not binding, may be used to construe or apply the rule text. Pursuant to subdivision (a), rulemaking proposals published seeking written responses shall be accompanied by a publication report from the Rules Committee. A Rules Committee may also submit a report pursuant to subdivision (b) when the Supreme Court adopts a rulemaking proposal. Any statements contained in Rules Committees' publication or adoption reports permitted by either subdivision (a) or (b) are neither part of the rule nor adopted by the Supreme Court.

The purpose of subdivisions (c) and (d) is to further the policy of the Supreme Court to implement the Unified Judicial System under the Constitution of 1968 and to facilitate the statewide practice of law under the Court's general rules. Local rules of judicial administration and local rules of procedure should not repeat general rules or statutory provisions verbatim or substantially verbatim nor should local rules make it difficult for attorneys to practice law in several counties. The provisions of subdivision (d) apply to local rules of procedure, but not to case-specific orders.

The caption or other words used as a label or designation shall not determine whether something is or establishes a rule; if the definition in subdivisions (c)(1) or (d)(1) is satisfied, the matter is a rule regardless of what it may be called. Local rules "adopted by a court of common pleas" in subdivision (d)(1) is intended to include those local rules of procedure for proceedings before a magisterial district judge.

To simplify the use of rules, local rules are to be given numbers that are keyed to the number of the general rules to which the rules correspond unless numbers are specifically assigned. *See, e.g.*, Pa.R.C.P. No. 239.1-239.7. This requirement is not intended to apply to local rules that govern general business of the court or agency and which do not correspond to a statewide rule.

Subdivision (d)(4) requires that, before publishing a local rule of procedure or proceeding with any of the other requirements, the adopting court must submit all proposed local rules of procedure to the appropriate Rules Committee. For administrative convenience, proposed local rules of procedure may be sent to one email address (rulescommittees@pacourts.us) where the proposal will be distributed to the appropriate Rules Committee. Subdivision (d)(4) emphasizes that the adopting court must comply with all the provisions of this subdivision before any local rule will be effective and enforceable.

To be effective, all local rules shall be published in the *Pennsylvania Bulletin*. Pursuant to 1 Pa. Code § 13.11(b)--(f), any documents that are submitted for publication must be accompanied by a diskette or CD-ROM formatted in MS-DOS, ASCII, Microsoft Word, or WordPerfect. The diskette or CD-ROM must be labeled with the court's or agency's name and address and the rule's computer file name. Section 13.11(e) provides that documents may be accepted in an alternate format if it is requested by the court or agency and agreed upon by the Legislative Reference Bureau.

Although a local rule shall not be effective until at least 30 days after the date of publication in the *Pennsylvania Bulletin*, when a situation arises that requires immediate action, the court or agency may act by specific orders governing particular matters in the interim before an applicable local rule becomes effective.

One copy of the local rule must also be filed with the Administrative Office. When rules are forwarded to the Administrative Office, the adopting court or agency should indicate whether the rules have been distributed to the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*. For administrative convenience, local rules of procedure and judicial administration may be sent to adminrules@pacourts.us for filing.

New or amended local rules shall be timely compiled into the set of local rules to further facilitate the statewide practice of law, increase accessibility by the public, and maintain the currency of the requirement set forth in subdivisions (c)(7) and (d)(7).

Subdivisions (c)(7) and (d)(7) require that a separate consolidated set of local rules be maintained in the filing office, which may be the prothonotary, clerk of courts, clerk of orphans' court, or domestic relations section depending on the type of proceeding, and on the website of the adopting court or the county in which the adopting court has jurisdiction. It is intended that a complete and up-to-date set of local rules will be maintained on the website of the adopting court or the county in which the adopting court has jurisdiction.

The Administrative Office maintains a web page linking to the websites of the courts of common pleas. That web page is located at http://www.pacourts.us/courts/courts-of-common-pleas/individual-county-courts.

Under subdivision (c)(8) a filing may be rejected if it is not accompanied by the necessary filing fee unless a fee waiver request is pending or granted. *See, e.g.*, Pa.R.C.P. No. 240.

Credits

Adopted effective Jan. 13, 1972. Renumbered from Supreme Court Rule 85 March 15, 1972. Amended effective May 10, 1973; April 21, 1978; Oct. 10, 1979, effective Oct. 20, 1979; Jan. 28, 1983, effective July 1, 1983; Feb. 20, 2001, effective April 1, 2001; amended May 14, 2013, effective in 30 days; June 28, 2016, effective Aug. 1, 2016; Feb. 3, 2017, imd. effective; June 10, 2021, effective Oct. 1, 2021.

PA. R. J. A. No. 103, 42 Pa.C.S.A., PA ST J ADMIN Rule 103

Current with amendments received through March 1, 2024. Some rules may be more current; see credits for details.

Local Rule of Judicial Administration 5101 Custody of Exhibits. Definitions

(a) The following words and phrases when used in these rules shall have the following meanings, unless the context clearly indicates otherwise, or the particular word or phrase is expressly defined in the chapter in which the particular rule is included:

1. "Court proceeding." Any trial, hearing, argument or similar event before a judge, panel, or hearing officer where evidence, if entered, is on the record. It does not include a proceeding before a Magisterial District Court, a non-record proceeding before a judicial arbitration matter pursuant to Pa.R.Civ.P. 1301 et sec., or any other proceeding excluded by Local Rule of Judicial Administration 5103(e).

2. "Custodian." The person or persons designated by local rule of judicial administration to safeguard and maintain exhibits offered into evidence in a court proceeding. The custodian shall be the proponent of the exhibit. Custodian shall also include the custodian's designee. However, where circumstances occur that the proponent is unable to serve as custodian, either be a member of court staff, court reporter, clerk of court, and/or hearing officer may serve as custodian.

3. "Exhibit." A document, record, object, photograph, model or similar item offered into evidence whether or not admitted, in a court proceeding;

4. "Proponent." A party seeking the admission of an exhibit into the record in a court proceeding, and

5. "Records office." the Allegheny County, Department of Court Records, Civil/Family Division ("Department of Court Records") will serve as the records office for the Allegheny County Court of Common Pleas Civil Division.

(b) For any words and phrases not defined by these rules, meaning may be discerned through examination of its dictionary definition and its legal meaning may be gleaned from its use in an application body of law.

Local Rule of Judicial Administration 5102 Custody of Exhibits. General Provisions

(a) In all Civil Division court proceedings, all parties must designate an individual who shall serve as that party's custodian of exhibits throughout the court proceeding and until which time as the court proceeding concludes.

1. The custodian of exhibits shall be identified at the outset of the court proceedings, and all parties' custodian's names shall be placed on the record.

2. The Court shall identify a Court custodian whose role during the court proceedings shall be limited to locking the Courtroom at the conclusion of each day of the court proceeding and opening the Courtroom at the beginning of each day of the court proceeding.

3. If the Court determines that a *pro se* party is unable to perform the duties of a custodian, the Court custodian shall assume the duties of the custodian during and after the trial, including all duties identified in this local rule.

(b) During and throughout the court proceeding(s), the custodian(s) shall secure and maintain all exhibits, including breaks and recesses, unless otherwise provided in Pa. R.J.A. 5103(c)-(d).

(c) After court proceedings the custodian(s) shall:

1. Retain or take custody of all documentary exhibits, photographs, and photographs of non-documentary exhibits accepted or rejected during the court proceedings;

2. File all documentary exhibits, photographs, and photographs of non-documentary exhibits with the Department of Court Records office within five (5) business days of the conclusion of the court proceeding unless otherwise directed by the court;

    a. The custodians filing exhibits shall include an index of exhibits;

    b. The index shall identify the exhibit using the number or letter used by the proponent during the court proceeding to refer to that exhibit, whether the exhibit was admitted or rejected from evidence, and a description or identification of the exhibit.

3. Secure and maintain all other non-documentary exhibits as Directed by the court, or as agreed by the parties.

4. After the court proceedings the Court custodian shall confirm that the proponent-custodian(s) filed all exhibits with the Department of Court Records.

    a. If a proponent-custodian determines that another party's proponent-custodian has not filed the exhibits pursuant to this rule within five (5) business days, the complying party or parties may seek appropriate relief with the court regarding the non-compliant proponent-custodian's failure to file their exhibits.

Comment: The Parties may benefit from working collaboratively to stipulate to those unobjectionable trial exhibits, prior to trial, and file said stipulation(s) with accompanying index of exhibits, and exhibits, with the Department of Court Records.

Local Rule of Judicial Administration 5103 Custody of Exhibits. Special Provisions

(a) Oversized exhibits and large photographs exceeding 8 ½ x 11 inches shall be reduced in size and/or photographed so that the copy or photograph of the physical exhibit can be photocopied/scanned on to 8 ½" x 11" inch paper for filing.

1. In addition to photocopying the oversized physical exhibit, (e.g. medical device, tire, axel, blue print, map, large photograph etc.) the party seeking to admit said

physical exhibit shall be responsible for maintaining said physical exhibit until the conclusion/completion of the trial, all post-trial events, appeals and appellate procedures.

2. A proponent who provides a reduced copy of an oversized exhibit shall ensure that the reproduced document is clear and capable of further reproduction to transfer to digital media.

(b) Use of Digital Media. A proponent shall ensure that an exhibit in digital format entered into the record is in a format acceptable to the court.

(c) Duplicates. The court may direct that the original item and not a duplicate, be entered into the record.

(d) Exhibits Under Seal. If an exhibit offered into evidence contains confidential information or confidential documents as defined by the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* ("Policy"), the proponent shall file a copy of the exhibit and a certification prepared in compliance with the Policy, and the Department of Court Records requirement, with the Department of Court Records.

1. Any exhibit sealed by the court during the court proceeding(s) shall not be accessible to the public.

(e) Exclusion. This rule does not apply to record hearings that may be appealed *de novo* to the court of common pleas or upon which exceptions or objections can be filed to a court of common pleas, such as hearings before the Board of Viewers and/or arbitration hearings where a party elects to have the arbitration hearing recorded.

(f) Parties shall provide copies of exhibits to the trial Judge, at the time of the trial;

1. However, neither the Court custodian of the exhibits, nor the trial Judge shall be responsible to file exhibits.

(g) The Court of Common Pleas, Civil Division will not store or maintain exhibits following the conclusion of the trial or Court proceeding for which the exhibits were used.

SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner v. PAUL MICHAEL POZONSKY, Respondent

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No. 2195 DD3 No. 123 DB 2015

April 4, 2017, Argued

January 18, 2018, Decided

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ. Chief Justice Saylor and Justices Dougherty, Wecht and Mundy join the opinion. Justice Baer files a concurring opinion in which Justice Donohue joins.

TODD

[*540] [831] JUSTICE TODD** [1]

In this matter, we consider the request of Petitioner, the Office of Disciplinary Counsel ("ODC"), to disbar Respondent, Paul Michael Pozonsky, from the practice **[**832]** of law in this Commonwealth. Pozonsky was a commissioned judge of the Court of Common Pleas of Washington County who presided over criminal trials, juvenile delinquency hearings, and also directed the rehabilitative disposition of drug offenders in that county's Drug Court, which he founded. Using his position as a jurist, he directed police officers and court personnel to bring cocaine, which was evidence in the cases over which he was presiding, to an evidence locker in his courtroom; whereupon, **[*541]** for over a year, he stole quantities of this illegal drug from that locker and used it for his own recreational purposes, all while continuing to preside over criminal prosecutions and imposing sentences on defendants for committing crimes which he himself was contemporaneously engaging in. After Pozonsky's illicit activities were discovered, he resigned his judicial commission and was convicted for his

crimes. After considering all the relevant facts and circumstances surrounding Pozonsky's egregious misconduct while a commissioned judge, and taking into account the mitigating evidence he offered, the Disciplinary Board of the Supreme Court of Pennsylvania ("Disciplinary Board" or "Board") issued a unanimous report detailing its factual findings and its recommendation that he be disbarred. Because the evidence of record amply supports the Board's findings and corresponding recommendation of disbarment, we order Pozonsky's disbarment to both protect the public and to preserve the integrity of the legal profession.

I. Facts and Procedural History

Pozonsky was admitted to the bar of this Commonwealth in 1980. Thereafter, he maintained a private law practice, and, in 1984, he was elected to the position of magisterial district judge, a position he held for the next 13 years, while he also continued to practice law part-time. In 1997, the people of Washington County elected him a judge of the Court of Common Pleas of that county, and he assumed the bench in January 1998. For nearly all of the subsequent 14 years, while holding this judicial position, Pozonsky presided over the criminal trials of individuals alleged to have committed criminal offenses, including drug crimes, and, thus, was responsible for fashioning sentences for those found guilty of such offenses, as he deemed appropriate.

During his tenure as a jurist, Respondent also adjudicated juvenile delinquency cases, a number of which involved drugs. For the juveniles he adjudicated delinquent, he was required **[***2]** to tailor programs of supervision, care, and rehabilitation so that they could compensate the victim and community for the **[*542]** harm which they caused, while also ensuring that they received necessary treatment services to overcome behavioral and substance abuse issues and developed sufficient competencies to become responsible and productive members of society.

Significantly, in 2005, Pozonsky created the Drug Court of Washington County, which he later supervised, and he presided over all cases processed through that court. By way of background, drug courts are used as an alternative to the conventional criminal prosecution process in appropriate cases involving drug-related crimes, or where offenders are coping with a drug addiction, in order to achieve the twin goals of reducing the incidence of drug-related crimes, and preventing recidivism by offenders. Employing principles of "therapeutic jurisprudence," these courts combine intensive judicial supervision, drug testing, and comprehensive treatment to assist offenders in overcoming the substance abuse problems that enmeshed them in the criminal justice system. *See generally* The Honorable Peggy Fulton Hora**[**833]** *et. al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, *74 Notre Dame L. Rev. 439* (1999). In Pennsylvania, drug courts comprise an integral part of the Commonwealth's multi-faceted system of problem-solving courts, a program which this Court has taken great pride in establishing and fostering.

Judge Pozonsky's role in the cases he handled in the Washington County Drug Court program was to lead a team of professionals, which included a prosecutor, defense counsel, a treatment provider, a probation officer, a member of law enforcement, and a court coordinator, in cooperatively supporting and monitoring the progress of an offender afflicted with a substance abuse problem to ensure that he or she successfully overcame it. *See* Administrative Office of Pennsylvania Courts, "Drug Courts," *available at* http://www.pacourts.us/judicial-administration/court-programs/drug-courts (explaining the fundamentals of the

operation of Pennsylvania drug courts). This process relies on a tightly structured treatment program tailored to the particular circumstances of the **[*543]** offender, and concomitantly necessitates strict adherence by the offender to the program requirements. Accordingly, Pozonsky was required, in some instances, to enforce compliance by imposing sanctions on the offender, or, when those sanctions failed to alter the offender's behavior, removing him or her from the program and reinstituting regular criminal proceedings. *Id.*

Beginning sometime in late October or early November 2010, and continuing through January 2012, Pozonsky exploited his position as a judge to steal powdered cocaine — an illegal controlled substance — that was the principal evidence in criminal or delinquency hearings held in his courtroom.[2] Specifically, he **[***3]** ordered state troopers who had seized cocaine which was to be used in the criminal prosecutions or juvenile adjudications over which he was scheduled to preside, as well as a court employee — his law clerk — to bring that evidence to his courtroom, where he stored it in an evidence locker in his chambers. He then surreptitiously and regularly removed quantities of this illicit substance from that locker when courtroom staff was not present, smuggled it out of the courthouse, and used it at his home. Pozonsky attempted to conceal his thefts by substituting baking powder and other substances for the cocaine he had stolen and used.

In early 2012, Pozonsky issued an order directing the destruction of evidence from closed criminal cases he had presided over. That, and the manner in which other evidence stored in the evidence locker was being handled, generated suspicion and concern from the Washington County District Attorney, Eugene Vittone, and the then-President Judge of that county, Debbie O'Dell Seneca. These matters were referred to the Office of the Attorney General which began a formal criminal investigation of Pozonsky. The investigation resulted, *inter alia*, in the search of Pozonsky's chambers by the Pennsylvania State Police who retrieved all remaining evidence stored there on May 9, 2012. Pozonsky resigned from the bench in June 2012, and resumed active status as an **[*544]** attorney; whereupon, he moved with his family to Alaska. While in Alaska, Pozonsky secured a job as a workers' compensation hearing judge, which he held from **[**834]** October 8, 2012, until he resigned on December 7, 2012.

On October 13, 2013, the Attorney General filed a criminal information against Pozonsky in the Court of Common Pleas of Washington County charging him with six separate criminal offenses related to his cocaine theft: violating the Public Official and Employee Ethics Act, 65 Pa.C.S. § 1103(a) , an ungraded felony; committing theft by unlawful taking, 18 Pa.C.S. § 3921(a) , graded as a first-degree misdemeanor; theft by failure to make required disposition of property, 18 Pa.C.S. § 3927(a) , graded as a first-degree misdemeanor; obstructing the administration of law, 18 Pa.C.S. § 5101 , graded as a first-degree misdemeanor; misapplication of entrusted property, 18 Pa.C.S. § 4113 , graded as a first-degree misdemeanor; and possession of a controlled substance, 35 P.S. § 780-113(a)(15) , an ungraded misdemeanor.

On March 20, 2015, Pozonsky pleaded guilty to one count of theft by unlawful taking, obstructing administration of law, and misapplication of entrusted property and property of a government institution, all graded as second-degree misdemeanors. Four months later, on July 13, 2015, he was sentenced to 1 to 23 1/2 months incarceration, followed by two years probation. Pozonsky ultimately served the minimum term of incarceration — one month — and successfully completed his term of probation.

Our Court issued an order on August 19, 2015 temporarily suspending Pozonsky's law license, in accordance

with Pa.R.D.E. 214(d)(2) . Following that action, ODC filed a Petition for Discipline, to which Pozonsky filed a counseled answer. A disciplinary hearing was held on March 15, 2016 before **[***4]** a Hearing Committee comprised of three members of the Board. At this hearing, the ODC presented as evidence the aforementioned criminal information filed against Pozonsky, his plea agreement, his written and oral plea colloquies, the transcript of his sentencing hearing, and the order imposing his criminal sentence.

[*545] Pozonsky testified on his own behalf and recounted the details of his legal career, during which he was never subject to disciplinary proceedings. He acknowledged that he had used cocaine recreationally since the 1980s, including during his prior service as a magisterial district judge and during his tenure on the bench of the Court of Common Pleas, but he denied that he ever took the bench or adjudicated cases while under the influence of cocaine. Pozonsky further denied that he was addicted to cocaine at the time he began stealing from the evidence locker. But he admitted that he knew that the theft constituted a crime.

Pozonsky related that he first sought treatment for his cocaine use in May 2011; that he ceased using any controlled substances as of January 24, 2012; and that he remained drug free as of the date of the disciplinary hearing. Pozonsky additionally detailed his post-conviction community service activities, which included volunteering at a homeless shelter and various community drug abuse rehabilitation centers. Pozonsky also testified that he was completing a nine-week program to become a certified rehabilitation specialist.

Pozonsky characterized his conduct as "not appropriate," N.T. Disciplinary Hearing, 3/15/2016, at 32, and he admitted that he had besmirched the reputation of the Washington County Court of Common Pleas, the Commonwealth's judicial system, and his own reputation as a judge and a lawyer, as well as the reputation of other members of the bar. Pozonsky additionally introduced as exhibits 68 character letters from fellow attorneys, friends, coworkers, and members of the community which had **[**835]** been presented to the sentencing judge in the criminal proceedings against him. In these letters, the authors attested to Pozonsky's good character in the community and as a judge. Pozonsky also submitted as mitigating evidence letters from three professional substance abuse counselors with whom he had received treatment, two from Washington County — Timothy Grealish and Rocco Ferri — and one from Alaska — Deborah Stamm. These letters detailed, *inter alia*, their observations regarding Pozonsky's addiction and his progress towards recovery. Pozonsky also introduced as an **[*546]** exhibit a newspaper article from the Pittsburgh Post-Gazette in which District Attorney Vittone is quoted as saying that no cases were affected because of Pozonsky's theft of the cocaine, as well as a portion of the transcript of Pozonsky's sentencing hearing in which the Office of the Attorney General did not dispute that assessment.

After the March 16, 2016 Committee hearing had concluded, at which neither party brought Pozonsky's employment in Alaska as a workers' compensation **[***5]** judge to the Committee's attention, the Committee discovered this fact via its own independent internet search. The Committee then held a second hearing to explore this matter further, at which Pozonsky offered testimony to explain the circumstances of his application for that quasi-judicial position and his subsequent resignation. Although Pozonsky recalled that he disclosed the then-active criminal investigation to the officials in Alaska's Department of Labor who hired him, he stated that that investigation was not the reason for his resignation, but, rather, averred that he was asked to resign because his employer discovered that he was not deemed domiciled in Alaska at the time of his application.[3] Pozonsky also presented evidence that he had passed the test required by the Pennsylvania Certification

Board and was now a certified recovery specialist. Both parties filed briefs, and the Hearing Committee issued a report on August 24, 2016 recommending Pozonsky's disbarment from the practice of law.

The Committee observed that, because Pozonsky had pled guilty to multiple criminal offenses, grounds for discipline manifestly existed under Pa.R.D.E. 203(b)(1) (stating that conviction of a crime shall be grounds for discipline); thus, the only question it was required to determine was the appropriate discipline to impose. The Committee highlighted as mitigating factors in its choice of discipline the fact that Pozonsky **[*547]** had no prior record of misconduct as an attorney, and that he acknowledged his wrongdoing and demonstrated remorse. However, the Committee rejected Pozonsky's assertion that his addiction to cocaine should be considered as a mitigating factor under our Court's decision in *Office of Disciplinary Counsel v. Braun*, 520 Pa. 157 , 553 A.2d 894 (Pa. 1989), in which we determined that expert psychiatric testimony establishing that an attorney's psychological condition was a causal factor in his misconduct was properly considered as mitigating evidence.

The Committee noted that Pozonsky did not introduce any evidence, either via expert testimony or through the character letters written on his behalf, which met the *Braun* standard for mitigation — i.e., he failed to demonstrate a causal connection between his addiction and his actions. Because **[**836]** of the dearth of evidence establishing this requisite causal link, the Committee did not consider Pozonsky's addiction to be a mitigating factor.

The Committee thus proceeded to examine other non-*Braun* mitigating evidence such as Pozonsky's lack of prior discipline, his efforts at addiction rehabilitation, his appearance at all disciplinary hearings, his involvement in the community, and the breadth of the character evidence reflected in the letters written on his behalf. While recognizing this evidence, the Committee found that it did not mitigate the imposition of discipline given what it considered to be Pozonsky's "egregious conduct." Disciplinary Board Hearing Committee Report, 8/24/16, at 7.

Specifically, the Committee found that the dishonesty exhibited by **[***6]** Pozonsky, both in stealing and using the cocaine evidence while a sitting judge, and then failing to disclose his employment in Alaska during the disciplinary proceedings, was so serious in nature that it constituted an aggravating factor which weighed heavily against him. Regarding his theft and use of the cocaine, which as noted was evidence in the very proceedings over which he continued to preside, the Committee opined:

> **[*548]** This was not a situation where [Pozonsky] bought drugs on the street or anywhere else on his own personal time, with regular clothes on, giving the appearance that he is a drug buyer/user like the next person. This is a situation where [Pozonsky] was dressed in his black robe, being addressed as "Judge" or "Your Honor" on a daily basis in the Criminal Division of the Court of Common Pleas. Appearing in this manner, he addressed other like-minded individuals who were addicted to drugs in the Drug Court program, since he was the sitting judge and, after looking upon them in judgment and sentencing them to a term of imprisonment or probation, took their drugs that were submitted into evidence and used them himself. The hypocrisy is astounding.

Disciplinary Board Hearing Committee Report, 8/24/16, at 8. The Committee found that the level of dishonesty evidenced by this conduct negated what Pozonsky had accomplished over the course of his legal career and undermined the integrity of the legal system. The Committee noted that Pozonsky's acceptance of the judicial

position in Alaska, while he knew he was being criminally investigated, was another example of his dishonest conduct that further undermined the integrity of the legal system. The Committee unanimously recommended his disbarment.

Pozonsky filed exceptions to the Hearing Committee's report and recommendation and a brief in support thereof, to which ODC responded. After review, the Board adjudicated the matter at its regular meeting and unanimously recommended Pozonsky's disbarment.

Because Pozonsky's criminal convictions were "incontrovertible evidence of his professional misconduct," the Board viewed its sole task to be to recommend to our Court the appropriate discipline, recognizing that the "recommended discipline must reflect facts and circumstances unique to the case, including circumstances that are aggravating or mitigating." Disciplinary Board Report and Recommendations, 12/21/2016, at 7. The Board reviewed the mitigating evidence offered by Pozonsky at the disciplinary hearing, which, as **[*549]** indicated above, included his lack of prior discipline, his denial of using drugs while on the bench, his assertion that his drug use did not compromise the cases he was adjudicating, his treatment efforts, his community service, his cooperation with the ODC, **[**837]** and the many character letters from community members.

The Board found, however, that this mitigating evidence had to be weighed against the following aggravating circumstance:

> [A]t the time of the misconduct, [Pozonsky], held a position of responsibility and authority **[***7]** and had a high public profile. It is disturbing irony that [Pozonsky], who was the creator, supervisor and sitting judge of the Washington County drug court, sat in judgment of and imposed sentence on individuals who engaged in drug-related criminal acts, after which [Pozonsky] took the drugs that were submitted into evidence and used them himself.

Id. at 9.

The Board found significant Pozonsky's status as an elected judge at the time of his crimes, a position the Board viewed as creating a high expectation of his integrity as an attorney because he was entrusted with the task of protecting the public. Significantly, the Board noted that, in *In re Cappuccio*, 616 Pa. 439 , 48 A.3d 1231 , 1240 (Pa. 2012), discussed at greater length *infra*, our Court emphasized that an attorney's status as a public official may properly be regarded as aggravating any misconduct he or she engages in while holding that position.

Although acknowledging that the Hearing Committee found that Pozonsky's action in taking the position in Alaska was a further demonstration of his dishonesty, and, thus, an aggravating factor warranting discipline, the Board determined that it was not necessary to consider this evidence. The Board reasoned that Pozonsky's criminal conduct while serving as judge was so egregious that, standing alone, it warranted his disbarment, as "[a] judge's misconduct speaks directly to the integrity of the legal system by placing the reputation of those **[*550]** tasked with serving and protecting the public at issue."[4] Disciplinary Board Report and Recommendations, 12/21/2016, at 10.

The Board also considered persuasive the fact that other attorneys had been disbarred for committing criminal acts while holding judicial office. *See* Disciplinary Board Report at 11-12 (citing *Office of Disciplinary Counsel*

v. Rolf Larsen, 19 DB 2003 (Disciplinary Board Report filed 6/23/2005; Supreme Court order filed 11/30/2006) (disbarring former Supreme Court Justice for obtaining prescription medication for his depression using the names of other individuals, even though Disciplinary Board recommended a three-year suspension); *Office of Disciplinary Counsel v. Michael Joyce*, 47 DB 2009 (Disciplinary Board Report filed 2/10/2012; Supreme Court order filed 6/14/2012) (disbarring former Superior Court judge for federal convictions of mail fraud and related offenses arising out of an automobile accident); *Office of Disciplinary Counsel v. David Murphy*, 188 DB 2010 (Disciplinary Board Report filed 5/4/2012; Supreme Court Order filed 1/30/2013) (disbarring former magisterial district judge for forging 64 signatures on nominating petitions in his reelection campaign); *Office of Disciplinary Counsel v. Thomas Nocella*, 152 DB 2013 (Disciplinary Board Report filed 6/5/2015; Supreme Court Order filed 10/20/2015) (disbarring attorney for ethical **[**838]** violations committed while a candidate for judicial office, which included concealing prior court sanctions and disciplinary actions taken against him from the judicial evaluation commission which was rating him for judicial office)).

By **[***8]** contrast, the Board found inapposite cases in which other public officials holding non-judicial offices were not disbarred for criminal acts they engaged in while holding **[*551]** those positions. *See* Disciplinary Board Report at 12-13 (discussing *Office of Disciplinary Counsel v. Preate*, 557 Pa. 4 , 731 A.2d 129 (Pa. 1999) (attorney received five-year suspension for accepting illegal campaign contributions while district attorney and later as Pennsylvania Attorney General and filing false election reports to conceal that behavior), and *Office of Disciplinary Counsel v. Eilberg*, 497 Pa. 388 , 441 A.2d 1193 (Pa. 1982) (suspension imposed on attorney who received proceeds from his law firm's representation of a client in a matter before a federal agency while the attorney was a sitting U.S. Congressman, a violation of federal law for which he was convicted)). The Board distinguished these cases on the basis that the public officials therein, while having a high public profile, were not judges, who, by contrast, are "held to a heightened standard." Disciplinary Board Report and Recommendations, 12/21/2016, at 13. The Board thus concluded with respect to Pozonsky that only disbarment would maintain the integrity of the legal profession.

After the Board's Report and Recommendation was transmitted to our Court, Pozonsky requested oral argument, which our Court granted and held on April 4, 2017. Neither party has submitted new briefs to our Court, but, instead, both parties presently rely on their briefs submitted to the Disciplinary Board.

II. Analysis

Our Court conducts *de novo* review of all attorney disciplinary matters; however, "the findings of the Hearing Committee and the Board are guidelines for judging the credibility of witnesses and should be given substantial deference." *Cappuccio*, 48 A.3d at 1236 . In attorney disciplinary proceedings, the ODC bears the burden of proof of establishing an attorney's misconduct by a preponderance of the evidence. *Office of Disciplinary Counsel v. Preski*, 635 Pa. 220 , 134 A.3d 1027 , 1031 (Pa. 2014). Because discipline "is imposed on a case-by-case basis, we must consider the totality of facts presented, including any aggravating or mitigating factors." *Id.* However, even though each attorney disciplinary matter **[*552]** must be resolved according to its unique facts and circumstances, our Court nevertheless endeavors to maintain consistency in disciplinary matters "so that similar misconduct is not punished in radically different ways." *Id.* (quoting *Office of Disciplinary Counsel v. Lucarini*, 504 Pa. 271 , 472 A.2d 186 , 190 (Pa. 1983) (internal quotation marks omitted)).

Under our Rules of Disciplinary Enforcement, an attorney's criminal conviction furnishes a basis for the imposition of discipline. Pa.R.D.E. 203(b)(1) . However, our Court has not adopted a *per se* rule that requires automatic disbarment for every instance of attorney misconduct which results in a criminal conviction. *In re Melograne*, 585 Pa. 357 , 888 A.2d 753 , 757 (Pa. 2005). Instead, in determining the proper measure of discipline, which is not intended to be punitive in nature, we consider whether the discipline imposed will fulfill the primary purpose of the disciplinary process, which is the protection **[***9]** of the public, the preservation of the integrity of the courts, and the deterrence of unethical conduct. *Office of Disciplinary Counsel v. **[**839]** Czmus*, 586 Pa. 22 , 889 A.2d 1197 , 1203 (Pa. 2005).

Pozonsky's first and central claim is that disbarment is not the appropriate sanction for his conduct, and he requests the imposition of a retroactive suspension "for an appropriate period."[5] Respondent's Brief at 30. Principally, Pozonsky claims that his disbarment is not warranted in light of the mitigation evidence which he presented, focusing primarily on what he characterizes as the "overwhelming" character evidence introduced through the numerous letters submitted **[*553]** on his behalf. Id. at 23. Pozonsky contends that this character evidence, when considered in conjunction with other mitigating factors such as his lack of prior discipline, and his record of community and public service, which he maintains is more significant than that which was presented in *Eilberg* and *Preate*, establishes that he is not wholly unfit to practice law, and, thus, should not be disbarred.

ODC counters by emphasizing that criminal conduct by a judicial official warrants the sanction of disbarment because a judge plays such an integral role in the process of the administration of justice that misbehavior while acting in a judicial capacity negatively reflects on his or her qualifications to practice law. ODC also highlights that, even in *Nocella*, a case where an attorney committed election law violations associated with *running* for election to judicial office, our Court imposed the sanction of disbarment, despite the Board's recommendation of a suspension due to weighty mitigating factors. *See* ODC Brief at 7 (enumerating Nocella's litany of mitigating circumstances, including his wife's sudden affliction with paraplegia and blindness necessitating that he become her primary caregiver, his daughters' resultant development of psychiatric and physical problems, his father's placement in hospice care, and his mother's diagnosis of breast cancer). ODC avers that Pozonsky presented no mitigation evidence of equivalent magnitude.

ODC also contrasts the circumstances of *Larsen* with the present matter, noting that our Court ordered disbarment in that case, disregarding the recommendation of the Disciplinary Board that he receive a three-year suspension, for Larsen's act of obtaining prescription drugs from his physician to treat his medical condition by having them prescribed to others in an effort to protect his privacy. ODC stresses that Pozonsky, on the other hand, had no legitimate claim to use the cocaine which he stole, and that he additionally knew he was breaking the law at the time he took it. Thus, ODC characterizes Pozonsky's act of breaking the law as being solely motivated by his desire to use cocaine.

[*554] It is well settled that, when an attorney holds a judicial or other public office, misconduct that he or she engages in which compromises the proper function of that office requires this Court to strongly consider disbarment as an appropriate disciplinary **[***10]** action. *Melograne*, 888 A.2d at **[**840]** 757. Misconduct of a lawyer "acting in an official capacity as a judge may constitute grounds for disbarment because untrustworthiness or infidelity in one office shows untrustworthiness or infidelity in the other." Id. at 756; *see*

also Rule of Professional Conduct 8.4, comment ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.").

Upon review, we find Pozonsky's grievous conduct far outweighs the mitigation evidence he offered. As a commissioned judge of the Court of Common Pleas of Washington County, Pozonsky swore an oath to the people of the Commonwealth that he would discharge the duties of his office "with fidelity."[6] The most sacrosanct of his many duties was to obey the Constitution and the laws of this Commonwealth. Instead of adhering to his oath and faithfully upholding the law, however, Pozonsky flouted this paramount duty and used both the great powers of his judicial office, and the processes of the criminal justice system itself, to perpetrate serious drug-related crimes.

For over a year, Pozonsky willfully exploited his position as a judge to effectuate the theft of cocaine that was the principal evidence in criminal or delinquency hearings held in his courtroom by ordering law enforcement and court personnel to bring that cocaine to a repository under his control so that he could easily and secretively plunder it at will. As the deputy attorney general who prosecuted this case noted, Pozonsky "turned the courthouse or courtroom into his stash house, and, basically made law enforcement his private suppliers of cocaine." N.T. Sentencing Hearing, 7/13/15, at 5 (Petitioner's Exhibit 4 to Disciplinary Board Hearing, 3/15/2016). This **[*555]** shocking and willful abuse of his office demonstrates Pozonsky's contemptuous disrespect for the very rule of law itself.

The opprobrious nature of Pozonsky's behavior was compounded by the fact that he was the sole jurist responsible for the operation and administration of Washington County's Drug Court program, which, paradoxically, he founded and implemented. That responsibility required Pozonsky, in conjunction with other professionals who treat and supervise drug offenders, to make a careful assessment of defendants who were accused of crimes related to their drug use or dependency, and to tailor an appropriate sentence which incorporated an appropriate therapeutic regimen to help them overcome their substance abuse problems. The linchpin of this evaluation and sentencing process is the capacity of the jurist to undertake an honest assessment of the depth of a defendant's drug addiction and make a reasoned determination of what rehabilitative and supervisory measures are necessary to assist the defendant in the recovery process, and to protect society from further criminal activity. However, Pozonsky's ongoing theft and use of illegal drugs, while simultaneously publicly **[***11]** pretending to honestly and conscientiously devise appropriate sentencing and treatment plans for those appearing before him, seriously damaged the integrity of this process, rendering it, in essence, a sham and a farce.

Pozonsky, through his arrant criminal behavior, also seriously transgressed the essential duty of a judge to conduct himself or herself "in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Code of Judicial Conduct 1.2. In our democratic society, public confidence in the judiciary is the cornerstone of the people's **[**841]** regard for the legitimacy of its decisions, and a high degree of public confidence in the integrity of the judicial process is therefore essential to ensure that court decisions will be respected by the people. *See In re Franciscus*, 471 Pa. 53 , 369 A.2d 1190 , 1194 (Pa. 1977) ("If the judicial system of this Commonwealth fails to maintain a high standard of professional ethics and propriety, then we can expect little faith and confidence to be placed in our proceedings by the members of **[*556]** the

practicing bar or the public."). When a judge's actions undermine the public's confidence in the honesty of the judiciary, it is not only that institution which suffers; indeed, our entire system of government, which depends upon the people's respect for the law, is damaged. *See In re Bruno*, 627 Pa. 505 , 101 A.3d 635 , 675-76 (Pa. 2014) (quoting *Summers v. Kramer*, 271 Pa. 189 , 114 A. 525 , 527 (Pa. 1921) ("Under our system of government by law, the business of the court should [] always be so conducted as to command the respect of the people . . . . [T]hese requirements are almost or quite as essential as the judicial system itself, if the stability of the government, under that system, is to be maintained.") (internal quotation marks omitted)); *Preski* , 134 A.3d at 1033 ("Public trust is an indispensable prerequisite to the effective administration of government. When a public official violates that trust, he or she undermines the integrity of the entire system.").

As the Hearing Committee and the Board both recognized, Pozonsky's conduct was of such an egregious nature that it could not help but severely diminish the public's confidence in our judiciary as an institution whose members scrupulously adhere to their sacred duty to ensure that the Constitution and the laws of this Commonwealth are faithfully applied. At the time he was committing his crimes, Pozonsky had served in the judicial system for 26 years, 14 years as a magisterial district judge and then 12 years as a judge of the Court of Common Pleas, and, therefore, he should have been keenly aware of his obligation to maintain the public's confidence in the judicial system and the rule of law, as well as the incontrovertible fact that his actions would serve to betray that confidence.

This impact on the public's confidence in the integrity of the judicial system must be accorded significant weight in evaluating Pozonsky's fitness to practice law. The public must be assured that an attorney licensed by our Court has the utmost respect for the public institutions which serve them and which they support through their tax dollars. **[***12]** The public must also have utter confidence that an attorney, when practicing law, will strive to have these institutions function as they were **[*557]** intended, so as to advance not only their individual interests, but also the general welfare. When an attorney holding public office has shown Pozonsky's extraordinary level of disrespect for the integrity of the judicial and legal systems, and the rule of law, the public cannot have any confidence that he is fit to represent their interests and carry out the duties of the legal profession. We, therefore, conclude that Pozonsky's wanton disregard for the law, the judicial system, and the public, while holding judicial office, is, as the Hearing Committee and the Board found, a compelling aggravating factor warranting his disbarment.

The mitigating factors cited by Pozonsky — his lack of prior disciplinary history and community service; his expressions of remorse; the contention that none of the cases before him were affected by his crimes; the numerous character letters presented at his criminal sentencing hearing, as well as our recognition of Pozonsky's establishment of the Drug Court program **[**842]** and its positive effects on individuals' lives who successfully completed treatment in that program — must, of course, be taken into account by our Court as they were by the lower tribunals. Moreover, we take notice of Pozonsky's commendable efforts to address his addiction during the pendency of his criminal and disciplinary proceedings, as well as his current plans to assist others afflicted with similar substance abuse addictions as a certified recovery specialist. However, we find these factors, though laudatory, simply do not outweigh the momentous gravity of Pozonsky's use of his judicial office to commit crimes.

Specifically regarding Pozonsky's contention that none of the cases before him were affected by his conduct, it

is precisely because he used his position as a judge to perpetrate his crimes, and then chose to continue to preside over the cases of the people being prosecuted for possessing and using the very drugs he, in turn, stole, that we accord it little significance. *See* Rule of Judicial Conduct 2.3 ("A judge shall perform the duties of judicial office . . . without bias or prejudice."). Likewise, while Pozonsky deserves much credit for establishing the Drug Court program in Washington County, **[*558]** as the jurist in charge of that program, he was uniquely situated to appreciate the connection between drug use and criminal behavior and, thus, he, more than most, should have recognized the harm his conduct would cause. Yet, rather than seek treatment for himself, as he ordered for the participants in the program, he elected to steal drug evidence and abuse it. In making this choice, he made a mockery of the very principles on which the program was founded, and severely undermined its efficacy and legitimacy in the eyes of the public, thereby undermining the objectives that he sought to accomplish with its founding. Having personally tarnished the impact of his prior **[***13]** good works in starting and implementing this program, we reject Pozonsky's status as its founder as mitigation.

Our Court has not hesitated to disbar attorneys when they have engaged in gross misconduct subverting the fair administration of justice, despite the presence of significant competent mitigating evidence, because of our recognition that this type of misconduct is of such corrupting magnitude that it is inimical to the proper functioning of our judicial system. In *Cappuccio* , we ordered the disbarment of an attorney who, while a chief county deputy district attorney, furnished alcohol and marijuana to minors, and had sexual relations with one of them on 12 separate occasions. We did so even though the attorney presented expert psychological testimony that he suffered from an adjustment disorder and sexual identity difficulties, as well as other evidence as to his good reputation, his expressions of remorse, and his rehabilitative efforts after his misconduct. While acknowledging this mitigation evidence, we discounted its impact on the appropriate discipline, particularly since the expert testimony did not meet the *Braun* standard. Further, even though the attorney had presented additional mitigating evidence such as a lack of prior disciplinary history, cooperation, acceptance of responsibility, expressions of remorse, and intensive counseling to address psychological problems, we nevertheless found the fact that the attorney's status as a public official enabled him to commit his **[*559]** crimes far eclipsed these mitigating factors and necessitated his disbarment:

> Respondent's position as a Chief Deputy District Attorney aggravates the misconduct, particularly in light of the facts here. At the time Respondent was engaging in his ongoing criminal conduct by endangering the welfare of minors **[**843]** and corrupting the morals, his public persona was that of a law enforcement figure in the county, prosecuting members of the public for similar crimes. In our view, any sanction short of disbarment in these circumstances threatens the integrity of the legal system, undermines our very serious duty to protect the public, and fails to give appropriate weight to Respondent's status as a public official.

Cappuccio, 48 A.3d at 1241 .

In *Czmus* , our Court disbarred an attorney who willfully concealed the fact that he had previously worked as a physician and committed acts of serious malpractice which led to his medical license revocation, as well as falsified his work history on his applications to the bar of both Pennsylvania and New Jersey. We did so despite his introduction of *Braun* mitigation evidence showing that he suffered from psychiatric disorders which were causally related to this misconduct, and character references from practicing attorneys. We determined that

such fraudulent conduct subverted the truth-determining process of the Board of Law Examiners by interfering with its ability to accurately determine if he possessed the character and fitness required to practice **[***14]** law. We considered this conduct to be so egregious that it warranted disbarment "to protect the integrity of the profession and judicial tribunals." *Czmus*, 889 A.2d at 1203-04 .

In *In the Matter of Renfroe*, we ordered the disbarment of an attorney because of his conviction for bribery of a witness, despite expert testimony that his "long term and 'severe' drug addiction caused his professional misconduct and criminal behavior," 695 A.2d at 402 , and evidence that he had undertaken significant rehabilitation efforts to address this addiction after his release from prison. We did so because the attorney's **[*560]** actions had undermined the ability of the judicial system to fairly render decisions:

> Fair adjudication is predicated upon the ability of courts to arrive at the truth. It is further predicated upon the confidence that courts will make their decisions based on that truth. If instead, courts are foreclosed from arriving at the truth because attorneys subvert the truth determining process, then justice cannot be administered.

Id. at 404 .

The imposition of the sanction of disbarment in this matter is further supported by our decision in *In re Melograne* , which involved the disbarment of a judge who also used his office to commit serious crimes which undermined the integrity of the judicial system. Attorney Melograne, who was a magisterial district judge, conspired with employees of the Allegheny County Court of Common Pleas to fix the outcome of cases in exchange for bribes. Our Court did not hesitate to disbar him, given that such reprehensible conduct "struck at the very core of the judicial system." *Melograne*, 888 A.2d at 757 . We took such action despite considerable mitigating evidence as to his prior lack of discipline, the completion of his criminal sentence, and letters from distinguished members of the legal profession recommending that he be permitted to practice law.

Herein, Pozonsky's criminal conduct, like the conduct of the attorneys in these cases, corrupted the most basic tenets and principles on which our judicial system is founded, and sabotaged its fundamental adjudicatory processes. The mitigation evidence in this case offered by Pozonsky is far outweighed by this aggravating factor.[7]

[*561] [844]** We next turn to Pozonsky's argument that the Hearing Committee erred by disregarding the evidence he presented which he claims established a causal connection between his drug addiction and his crimes. As examples of such evidence, Pozonsky quotes three letters written by attorneys and submitted on his behalf at the time of his sentencing in his criminal prosecution:

> I would like to state that I do not condone or excuse Paul's actions. However, I do know that the crimes Paul committed are a direct result of this disease and addiction and Paul not taking care of himself before all else. I do know first and foremost that this disease can take away our humanity, our ability to think and do the right thing, and, most of all take away everything we love and cherish. Clearly, this disease has taken its toll on Paul and his family.

Letter of Attorney Shawn Stevenson, **[***15]** Disciplinary Board Hearing, 3/15/2016 (Respondent's Exhibit 5).

> I don't believe the etiology of his problem was born in a desire to be dishonest or break the law. It is too contrary to his nature . . . . I do believe addiction is an illness and not a behavior born in criminality. It often leads to criminal behavior but only because of the intensity of the symptoms not a desire to be dishonest. As you know it is an illness that strikes at all walks of life without regard to economic or social status.

Letter of Attorney Bob Brady, Disciplinary Board Hearing, 3/15/2016 (Respondent's Exhibit 38).

> When the news first broke about Paul, like many of his friends and family members, I was in total shock and disbelief. This was not at all the same guy with whom we grew up, went to school or socialized, and for whom we had so much personal and professional respect. After the initial **[*562]** shock, I tried to rationalize Paul's behavior on the basis that it could only be done by someone who either had exhibited a total and wanton disregard for the law, or who was under the hellish grip of some terrible, uncontrollable addiction. I quickly concluded that Paul, despite his aberrant behavior, is clearly not a criminal, and that my immediate concern should be for his personal and spiritual well-being

Letter of Attorney Victor DiBattista, Disciplinary Board Hearing, 3/15/2016 (Respondent's Exhibit 33).

Pozonsky also quotes a letter from a family friend, David Vallina, who opined that "his actions were a direct result of a disease, a sickness, from which he is currently recuperating." Respondent's Brief at 26 (quoting Disciplinary Board Hearing, 3/15/2016 (Respondent's Exhibit 41)). Additionally, Pozonsky highlights the fact that he submitted letters from drug counselors **[**845]** engaged in his treatment process which also prove that he suffered from an addiction to cocaine. Pozonsky maintains that all of these letters demonstrate that his criminal actions were the result of his addiction and contrary to his character.

ODC responds that the Hearing Committee properly recognized that Pozonsky had the burden of proving a causal connection between his addiction and his misconduct pursuant to *Braun*. However, ODC points out that Pozonsky *himself* admitted he was not addicted to cocaine at the time he began stealing from the evidence locker, and he "provided no evidence either through his own testimony or in the evidence from any of those who treated him, that there was any connection between an addiction and his willful violation of the criminal law." ODC Brief at 8. Thus, ODC asserts that Pozonsky is not entitled to mitigation on this basis.

In evaluating this claim, we briefly review the standards our Court utilizes in determining whether evidence of a psychological or substance abuse problem constitutes mitigating evidence in a disciplinary proceeding. The seminal case in this area is *Braun* , wherein an attorney stole money from a client's estate which resulted in disciplinary proceedings. The attorney underwent an examination by a licensed psychiatrist who **[*563]** diagnosed **[***16]** him with neurotic depression. At his disciplinary hearing, the attorney presented the testimony of that psychiatrist as well as another who had treated him years earlier for the same condition. The Board found that the attorney's psychiatric condition was a factor in causing his misconduct.

After review of the evidence, our Court adopted the recommendation of the Board based on our conclusion that the expert psychiatric evidence supported the Board's finding that the attorney's neurotic condition "was a causal factor in producing the several elements of his professional misconduct," and, thus, was properly

considered by the Board as a mitigating factor in recommending a suspension, rather than recommending disbarment. *Braun*, 553 A.2d at 895 .

In *Office of Disciplinary Counsel v. Monsour*, 549 Pa. 482 , 701 A.2d 556 (Pa. 1997), our Court ruled that an attorney who was seeking mitigation from disbarment on the basis of his alcoholism was required under *Braun* to "establish by clear and convincing evidence that alcoholism was a causal factor in his misconduct." Id. at 559. Likewise, an attorney seeking mitigation under *Braun* for a mental illness must prove causation by clear and convincing evidence. *Office of Disciplinary Conduct v. Quigley*, 639 Pa. 600 , 161 A.3d 800 , 808 (Pa. 2017).

Our Court has never held that lay opinions alone, are sufficient to establish that an addiction or mental illness was the cause of an attorney's misconduct. Indeed, recent decisions of our Court have emphasized the critical role of expert testimony in establishing such a causal link. *See Czmus*, 889 A.2d at 1203 ("The Disciplinary Board may consider as potential mitigation an expert's opinion establishing a causal connection between the misconduct and an underlying mental infirmity."); *Cappuccio*, 48 A.3d at 1241 (refusing to consider attorney's psychiatric condition as causing the attorney's misconduct since he "did not present expert testimony meeting the *Braun* standard" for mitigation).

As Disciplinary Counsel highlights, Pozonsky presented *no* expert testimony to the Disciplinary Board establishing that he had an addiction to cocaine, or any other psychiatric **[*564]** disorder, which caused him to engage in his thefts and personal use of drug evidence. In a treatment "Progress Report" written by Counselor Stamm, who **[**846]** treated Pozonsky in Alaska after he had committed his crimes, she made a general diagnosis that, at the time she was treating him, Pozonsky had a prior cocaine addiction. However, nowhere therein did she express any opinion that Pozonsky's addiction caused him to engage in the criminal behavior for which he was being disciplined. *See* Progress Report, Disciplinary Board Hearing, 3/15/2016 (Respondent's Exhibit 72). Similarly, the letters from counselors Grealish and Ferri, who also treated Pozonsky, did not express any opinion that Pozonsky's cocaine addiction caused him to commit his crimes. In sum, because these letters did not establish a causal connection between Pozonsky's addiction to cocaine and his prior criminal acts, they did not meet the *Braun* standard, and, thus, they are not a competent basis to mitigate Pozonsky'**[***17]** s discipline. *Czmus; Cappuccio* .

In the letters from attorneys and friends submitted to the trial court at the time of Pozonsky's sentencing, the writers expressed their own personal opinions that Pozonsky's criminal acts were the result of his cocaine addiction because his actions were out of character. However, our Court has never endorsed the novel conclusion that letters from an attorney's personal friends or other attorneys, who are untrained in the fields of psychiatry, psychology, or substance abuse treatment, are in and of themselves, sufficient to meet the *Braun* standard. To the contrary, this Court has always relied on expert testimony under *Braun* to establish that a psychiatric condition or addiction caused the misconduct for which an attorney is being disciplined. Consequently, we will not draw the inference that Pozonsky's addiction to cocaine was the causal factor in his criminal conduct based solely on the bald, conclusory opinions provided by attorney acquaintances and friends who, though well meaning, are nevertheless manifestly unqualified to render such a professional opinion.

Moreover, and importantly, drawing such an inference in this instance is particularly inappropriate because

Pozonsky *himself* disclaimed during his disciplinary hearing that he was **[*565]** addicted when he began to steal drugs from the evidence locker, and he did not claim that any of his subsequent thefts of cocaine were caused by an addiction. In response to the question of whether he was addicted to cocaine at the time he began his thefts, Pozonsky answered, "I didn't think I was." N.T. Disciplinary Hearing, 3/15/16, at 53. We interpret this statement, made with hindsight and years after the events in question, as a straightforward disavowal that addiction was the motivating factor which caused him to begin stealing the cocaine. Additionally, Pozonsky admitted that he knew he was committing a theft of evidence at the time, indicating he was not laboring under any misapprehension as to the criminal nature of his conduct because of an addiction. *Id.* Pozonsky's own concessions resolve the question of causation.

III. Conclusion

In this matter, we find no basis to impose a sanction other than disbarment. There are few transgressions which more seriously undermine the public's confidence and trust in the integrity of their judicial system, and which are as offensive to the high standards and principles which other members of the bench and bar strive so faithfully to uphold in the performance of their duties, than those committed by Pozonsky. His conduct as a judge has demonstrated his unfitness for the practice of law, and only the sanction of disbarment — the most severe condemnation available to us — can fulfill our Court's duty to protect the public, as well as vindicate the compelling interest other members of the bench **[**847]** and bar have in ensuring that their peers maintain the public's respect and confidence in the legal profession through honorable conduct.

We order that Pozonsky be disbarred from the practice **[***18]** of law in this Commonwealth. Pozonsky shall comply with the provisions of Pa.R.D.E. 217 , and pay costs to the Board pursuant to Pa.R.D.E. 208(g) .

Chief Justice Saylor and Justices Dougherty, Wecht and Mundy join the opinion.

Justice Baer files a concurring opinion in which Justice Donohue joins.

BAER

CONCURRING OPINION

[*566] JUSTICE BAER

Without hesitation, the majority imposes the most severe sanction of disbarment, concluding that "[t]here are few transgressions which more seriously undermine the public's confidence and trust in the integrity of their judicial system, and which are as offensive to the high standards and principles which other members of the bench and bar strive so faithfully to uphold in the performance of their duties, than those committed by [Respondent, Former Judge Paul Michael Pozonsky]." Slip Op. at 28. While I in no way condone the actions of Respondent, who founded and supervised Washington County's Drug Court and subsequently stole cocaine from the courtroom's evidence locker for his personal use, I find this disciplinary case much more challenging to resolve.

My difficulty lies in Respondent's decision not to present mitigation evidence in the form of a mental health

expert to establish the causal connection between what I perceive to be his drug addiction and his misconduct. *See Office of Disciplinary Counsel v. Braun*, 520 Pa. 157 , 553 A.2d 894 , 895-96 (Pa. 1989) (requiring evidence of a causal connection between the psychiatric disorder and the attorney's misconduct to establish mental health mitigation evidence in a disciplinary case). As a result of this omission, neither the lower tribunals nor the majority opinion considered Respondent's cocaine addiction as a mitigating factor. Interpretation of the governing precedent of this Court compels me to join the majority's conclusion that to prove legally cognizable mental health mitigation evidence in a disciplinary case, a respondent must present a mental health expert to establish the causal link between the attorney's mental disability and his misconduct. Considering, as I believe I must, this evidentiary vacuum, I am constrained to agree with the majority that the delicate weighing of Respondent's transgressions against the other substantial evidence of mitigation, tips the scales towards imposition of the sanction of disbarment.

Initially, I find it imperative to dispel any notion that there is a *per se* rule requiring disbarment when a judicial officer is convicted of a crime. *See* Report and Recommendation of the **[*567]** Disciplinary Board, 12/21/2016, at 11 (stating that "[p]rior similar cases support the conclusion that criminal conduct by a judicial officer warrants disbarment"). Instead, it is well-settled that because this Court imposes attorney discipline on a case-by-case basis, we must consider the totality of the facts presented, including both aggravating and mitigating factors, *Office of Disciplinary Counsel v. Quigley*, 639 Pa. 600 , 161 A.3d 800 , 807 (Pa. 2017), rather than dispensing disciplinary sanctions by *per se* rule. An attorney's position as an elected judicial officer does not alter this Court'**[***19]** s individual assessment of all circumstances surrounding the attorney's criminal conviction. Moreover, application of a *per se* disbarment rule would eliminate the critical inquiry of whether the criminal conviction renders the particular judicial officer unfit **[**848]** to practice law. *See Office of Disciplinary Counsel v. Cappuccio*, 616 Pa. 439 , 48 A.3d 1231 , 1238-39 (Pa. 2012) (holding that "the primary function of the attorney disciplinary system is not punitive in nature, but is to determine the fitness of an attorney to continue the practice of law and maintain the integrity of the legal system[;]" the objective is to protect the public and the courts from attorneys who are unfit to practice law). Accordingly, while this Court strives for consistency in disciplinary sanctions so that sanctions for similar misconduct are not imposed in "radically different ways," *Office of Disciplinary Counsel v. Preski*, 635 Pa. 220 , 134 A.3d 1027 , 1031 (Pa. 2016) (*citing Office of Disciplinary Counsel v. Lucarini*, 504 Pa. 271 , 472 A.2d 186 , 190 (Pa. 1983)), disciplinary cases are fact-intensive and each case, regardless of the nature of the position held by the attorney, must be examined independently with consideration being given to the misconduct and the unique aggravating and mitigating factors.

That being said, I agree that an attorney's position as a public officer serves as an aggravating, but not dispositive, factor in a disciplinary matter. *See Office of Disciplinary Counsel v. Cappuccio*, 48 A.3d at 1240 (holding that "the fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter"); **[*568]** *In re Melograne*, 585 Pa. 357 , 888 A.2d 753 , 756 (Pa. 2005) (holding that "the judge's role is so intimate a part of the process of justice that misbehavior as a judge must inevitably reflect upon qualification for membership at the bar"). Consistent with this jurisprudence, I agree with the majority's determination that Respondent's criminal conduct is aggravated by the fact that he was serving as a common pleas court judge when the illegal acts took place. In addition, Respondent's commission of the criminal conduct while serving as a member of

the judiciary undoubtedly established a serious violation of the public trust as he was sitting in judgment of individuals who were committing drug offenses, while he, himself, was engaging in similar conduct. This specific criminal behavior would warrant the most severe sanction of disbarment in the absence of significant mitigation evidence.

It cannot be ignored, however, that Respondent presented extensive evidence of mitigation including his current recovery from his cocaine addiction and the detailed efforts he has made to rebuild his life, including the performance of community service for organizations such as the Washington City Mission (a homeless shelter), the Sunlight Club (a recovery house that hosts drug and alcohol meetings), the Washington County Drug and Alcohol Commission, and Zero Six Eight (an organization assisting former convicts in starting new businesses). Further, Respondent submitted **[***20]** sixty-eight character witness letters from family members, friends, and pastors; individuals who had worked with him such as former law clerks, secretaries, and court administrators; individuals who had practiced before him including assistant district attorneys, members of law enforcement, and private attorneys; and individuals who had completed successfully the drug treatment court program that Respondent had administered. *See* Respondent's Exhibits 1-69. These letters established that Respondent had served the people of his district with distinction both as a magisterial district judge and a common pleas court judge, highlighting his administration of the first drug court program in Washington County. Respondent further submitted evidence establishing that none of his criminal behavior **[*569]** affected the outcome of any case. *See* Respondent's Exhibits 73 and 74.

[849]** Considering this evidentiary record, I find it ironic that the therapeutic justice that Respondent dispensed to the numerous drug-addicted criminal defendants that came before him, many of whom he led to the path of recovery, is not so readily available to him in this disciplinary matter, particularly considering that his misconduct involved the theft of the very drug to which he was addicted. Respondent's failure to present the requisite expert testimony establishing the causal connection between his addiction and criminal conduct may have arisen from an inability to comprehend the gravity of his disability, as occurs with many individuals struggling with addiction. For example, when asked directly at the disciplinary hearing whether he was addicted to cocaine at the time he began taking the drugs from the evidence locker, Respondent stated, "I didn't think I was." Notes of Testimony, 3/15/2016, at 53. Contrary to the majority's interpretation of this statement as a "straightforward disavowal that addiction was the motivating factor which caused him to begin stealing the cocaine," Majority Opinion at 27, when examined in the context of Respondent's testimony as a whole, as well as the evidence of his subsequent treatment and recovery from addiction, I find that this statement merely reflects that Respondent did not realize he had an addiction problem when his misconduct began.

I view as more probative than Respondent's clouded personal assessment, the testimonials of those people closest to him, who observed the obvious nexus between Respondent's cocaine dependency and his theft of the cocaine. *See e.g.* Respondent's Exhibit 5 (statement of Shawn M. Stevenson, Esquire, opining that "the crimes [Respondent] committed are a direct result of this disease of addiction"); Respondent's Exhibit 7 (statement of Joseph H. Fox, Esquire, indicating that "[w]e know that addiction crosses all age, gender and socioeconomic lines and Judge Pozonsky simply fell victim to a condition which he was, at the time, unable to control"); Respondent's Exhibit 33 (statement of Victor M. DiBattista, Esquire, opining that Respondent's criminal behavior was "completely **[***21]** out **[*570]** of character" and that Respondent had "succumbed to the same evil from which he sought to protect others"); Respondent's Exhibit 34 (statement of family friend,

Michael E. DeSimone, indicating that Respondent's criminal behavior was out of character and resulted from his addiction); Respondent's Exhibit 38 (statement of Bob Brady, Esquire, indicating that Respondent's addiction was an illness, not a behavior born in criminality, which led to his misconduct); Respondent's Exhibit 41 (statement of friend, David Vallina, indicating that Respondent's criminal conduct was "a direct result of a disease, a sickness, from which he is currently recuperating"); Respondent's Exhibit 48 (statement of friends, David and Mona Matalik, indicating that "[i]t is unfortunate that [Respondent's] personal troubles with addiction led to the termination of the good he was doing for others"); and Respondent's Exhibit 58 (statement of Kenneth J. Horoho, Jr., Esquire, indicating that Respondent's criminal behavior was an aberration caused by an addiction that Respondent has proactively addressed and corrected).

Indeed, Respondent presented medical evidence of his addiction through a progress report prepared by licensed professional counselor Deborah E. Stamm, who had treated Respondent after the criminal acts had been committed. *See* Respondent's Exhibit 72 (indicating a general diagnosis that Respondent had a cocaine dependency that was in sustained partial remission). In my view, this testimony came just shy of satisfying the *Braun* standard as it established Respondent's cocaine addiction **[**850]** and the misconduct at issue involved the theft of that particular drug. Neither Counselor Stamm, nor the other two counselors who treated Respondent for his addiction and submitted correspondence on his behalf, however, rendered the medical conclusion that Respondent's addiction caused his criminal behavior.

Accordingly, notwithstanding the probative nature of the various testimonials in support of Respondent, after much thought, as stated, I must agree with the majority that mental health expert testimony is necessary to establish the requisite causal connection between Respondent's mental disability of **[*571]** addiction and his transgressions. If we were to hold otherwise, our disciplinary system could be compromised by the myriad of distinct and novel scenarios, which attorneys could parade, without medical foundation, as mental health mitigation evidence to mitigate the severity of their disciplinary violations.

In summary, I conclude that, through his own misconduct, Respondent has lost everything he once had. Had persuasive *Braun* evidence been presented linking his cocaine addiction to his misdeeds, perhaps the lower tribunals or even the majority would have opted for the maximum suspension of five years, rather than disbarment. Personally, I believe that Respondent's ultimate triumph over his addiction and his contributions to the Drug Court and to the various community organizations he served are worthy of something. **[***22]** However, that value does not tip the scale away from imposition of disbarment, absent appropriate *Braun* evidence.

Justice Donohue joins this concurring opinion.

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This matter was reassigned to this author.

fn 2

These facts were found by the Disciplinary Board and also placed on the record at Pozonsky's sentencing hearing.

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Both the Hearing Committee and the Disciplinary Board credited this explanation, and, as we explain *infra*, the Board declined to consider Pozonsky's acceptance of this position as an aggravating factor justifying his disbarment. Accordingly, Pozonsky's acceptance of this employment and subsequent departure therefrom, is not a factor in our disposition.

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The Board also found that the manner in which the Hearing Committee uncovered this information, via the extra-record method of an internet search, was "inappropriate." Disciplinary Board Report and Recommendations, 12/21/2016, at 10. However the Board determined that the Hearing Committee's error in acquiring this information in this manner was harmless, given that Pozonsky's criminal convictions for crimes committed using his judicial office was an aggravating circumstance sufficient to justify his disbarment.

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The critical difference between a five-year suspension — the maximum suspension — and disbarment is that, at the end of a five-year suspension, the suspended attorney may resume his or her practice simply by demonstrating his fitness to practice law.

In the Matter of Renfroe, 548 Pa. 101 , 695 A.2d 401 , 403 (Pa. 1997). By contrast, an attorney who is disbarred has no expectation of the right to resume practice, and, to obtain reinstatement at the end of the five-year period, he or she must instead show that the magnitude of the breach of trust which resulted in his or her disbarment "would permit the resumption of practice without a detrimental effect upon the integrity and standing of the bar or the administration of justice nor subversive of the public interest." *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573 , 506 A.2d 872 , 875 (Pa. 1986) (internal quotation marks omitted).

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42 Pa.C.S. § 3151 .

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Neither *Preate* nor *Eilberg* , relied on by Pozonsky, compels a different result. In *Preate* , a majority of our

Court, over two dissents, suspended Ernest Preate, the former Attorney General of Pennsylvania, for five years. Attorney General Preate accepted nearly $20,000 in campaign contributions from video poker machine operators while a district attorney of Lackawanna County and as Attorney General, and then failed to disclose them on his campaign finance reports. In *Eilberg* , Joshua Eilberg was a Congressman who was also a partner in a law firm. On behalf of a client, his partners directly lobbied another member of Congress to intervene on a matter being handled by a federal agency. Although Eilberg did not himself participate in these lobbying activities, he, nevertheless, received a check from his partners for a share of the fees paid by the client for his partners' efforts, which was a violation of federal law. He, like Preate, received a five-year suspension. These cases therefore differ from the instant matter in one critical aspect: the degree of severity of the attorney misconduct. That is, unlike Pozonsky, neither Preate nor Eilberg *directly* used the powers of their public offices in order to commit their crimes.

51 A.3d 931
Court of Judicial Discipline of Pennsylvania.

In re Rita A. ARNOLD, Magisterial District Judge, Magisterial District Court 15–2–06, Chester County.

No. 2 JD 12
|
June 13, 2012.
|
Sanctions Order Issued July 24, 2012.

Synopsis

Background: The Judicial Conduct Board filed a disciplinary complaint against magisterial district judge.

Holdings: The Court of Judicial Discipline, McGinley, J., held that:

judge's conduct in failing to docket a citation against her son when it was filed, instructing her office manager to "hold" the citation, and not docketing the citation until police sergeant contacted judge and inquired about the citation, in violation of the judicial rules, and

judge's conduct during disciplinary investigation in presenting a report that contained false statements, lying about why the citation against her son had not been filed, and instructing her officer manager to lie during the investigation violated the judicial rules.

Judge was subject to discipline.

***932** Before CURRAN, P.J., JAMES, MORRIS, McGINLEY, CLEMENT, JR., CELLUCCI, McCUNE, and MULLEN, JJ.

OPINION BY Judge McGINLEY.

I. *INTRODUCTION*

The Judicial Conduct Board ("Board") filed a Complaint with this Court on February 15, 2012 against Magisterial District Judge Rita A. Arnold ("Respondent"). The Complaint charges that:

1. Respondent failed to docket a citation filed in her court by the state police against Forrest C. Solomon, Jr., one of her sons, charging him with harassment, a summary offense, arising out of an altercation with another of her sons, Jonathan Arnold, in a timely fashion and failed to require that the citation was docketed by her staff in a timely fashion.

2. Respondent directed her staff not to docket the Solomon citation.

3. Respondent intentionally directed the transfer of the Solomon citation to Magisterial District Judge Bruno's court in contravention of the established Chester County rule.

4. Respondent provided misrepresentations of material fact to Chester County Court Administration, the President Judge of Chester County, and the Judicial Conduct Board (an arm of the judicial administrative authority of this Commonwealth) during their investigation of these facts.

5. Respondent directed Patricia Davis, her office manager, to provide misrepresentations of material fact to the Judicial Conduct Board in its official investigation of the aforementioned facts.

***933** The Board charges that the said conduct constitutes violations of:

1. Rule 5 of the Rules Governing Standards of Conduct of Magisterial District Judges which provides in part:

> A. Magisterial district judges shall diligently discharge their administrative responsibilities, maintain competence in judicial administration and facilitate the performance of the administrative responsibilities of their staff and of other members of the judiciary and court officials.
>
> B. Magisterial district judges shall require their staff to observe the standards of fidelity and diligence that apply to them. (The Court will call this Count 1.)

2. Rule 13 of the Rules Governing Standards of Conduct of Magisterial District Judges which provides in part:

> Magisterial district judges, constables and all employees assigned to or appointed by magisterial district judges shall not engage, directly or indirectly, in any activity or act incompatible with the expeditious, proper and impartial discharge of their duties, including, but not limited to, (1) in any activity prohibited by law.... (The Court will call this Count 2.)

3. Article V, § 17(b) of the Pennsylvania Constitution which provides in part:

> Magisterial district judges shall be governed by rules or canons which shall be prescribed by the Supreme Court. (The Court will call this Count 3.)

4. Article V, § 18(d)(1) of the Pennsylvania Constitution which provides in part:

> A justice, judge, or magisterial district judge may be suspended, removed from office, or otherwise disciplined for ... failure to perform the duties of office or conduct which prejudices the proper administration of justice[1] .... (The Court will call these Counts 4A and 4B.)

The Board and the Respondent have submitted amended stipulations of fact in lieu of trial pursuant to CJ.D.R.P. No. 502(D)(1) and a waiver of trial. The Court has accepted these stipulations of fact as amended in pertinent part, as recited below, as the facts necessary for the disposition of the case.

II. *FINDINGS OF FACT*

1. Pursuant to Article V, § 18 of the Constitution of the Commonwealth of Pennsylvania and Judicial Conduct Board Rule of Procedure 31(A)(3), promulgated by the Pennsylvania Supreme Court on March 20, 1995 (amended 1996), the Board holds the authority to determine whether there is probable cause to file formal charges, and, when it concludes that probable cause exists, to file formal charges, against a justice, judge or justice of the peace, for proscribed conduct and to present the case in support of such charges before the Court of Judicial Discipline.

2. Since January 3, 1994, Respondent served as a magisterial district judge for Magisterial District 15–2–06, Chester County. Respondent continues to serve ***934** Magisterial District Court 15–2–06 as a magisterial district judge.

3. Respondent is the mother of Forrest C. Solomon, Jr., and Jonathan Arnold, adult half-brothers, who, as of January 2010, each resided with her at her residence located at 1307 Lone Eagle Road, Downingtown, PA 19335.

4. Forrest C. Solomon, Jr. has an extensive record of arrests for crimes ranging from simple assault and harassment to possession with intent to deliver. On January 19, 2010, Mr. Solomon was subject to the supervision of the Chester County Adult Probation and Parole Department (Chester County Probation/Parole) for a conviction of indecent assault and for probation violations on other cases that arose from the indecent assault conviction. Mr. Solomon's supervision will terminate on July 1, 2015.

5. Respondent knew that Mr. Solomon was subject to Chester County Probation/Parole supervision, and she often transported him to his regularly scheduled meetings with Joseph Zangrilli, his then-probation officer.

6. On January 6, 2010, Mr. Solomon failed a required random drug screening at a regularly scheduled meeting with Mr. Zangrilli.

7. Thereafter, on January 19, 2010, Trooper Lauren Long of the Pennsylvania State Police (PSP), Embreeville Barracks, cited Mr. Solomon with harassment, 18 Pa.C.S.A. § 2709(a)(1), graded as a summary offense, as the result of an altercation that took place between Respondent's sons, Mr. Solomon and Jonathan Arnold, at Respondent's residence, which is situated within Respondent's magisterial district.

8. As Mr. Solomon's acts on January 19, 2010 took place within Respondent's magisterial district, the PSP filed the citation in Respondent's court on January 20, 2010, the day

following the altercation. Respondent's staff member, Britney Clark, date stamped and initialed the citation.

9. The Solomon citation then moved from Clark's desk to Respondent's "in box" on her desk for her to docket it into the Magisterial District Judge System (MDJS). Respondent did not docket the Solomon citation into the MDJS at that time.

10. On the same day that the Solomon citation was filed in Respondent's court, Respondent called Sergeant Brandon Daniels of the Embreeville PSP regarding Solomon's arrest and the citation.

11. During their telephone conversation, Respondent told Sergeant Daniels "that was my son and that was my house," referring to both Solomon and the site of the incident. Respondent stated that she had thought that the troopers were only removing Solomon from the house after they responded to the incident between her two sons, and Respondent asked why the troopers had decided to cite her son (Solomon). Daniels could not answer Respondent's questions about the Solomon citation because he was not aware of the details of the Solomon case. He told Respondent that he would inquire into the matter and call Respondent back. At some point during the course of his inquiry into the background of the Solomon arrest and citation, he received the Solomon citation back at the barracks. The citation, when received by Sergeant Daniels, had already been date stamped and marked received by Respondent's court.

12. Sergeant Daniels called Respondent back and told her that, after his investigation, he thought that the Solomon citation had been properly issued. Sergeant Daniels also told Respondent that he ***935** was going to return the citation to her court.

13. Respondent sounded upset when Sergeant Daniels discussed the filing of the citation and Respondent stated that she could not hear the case because it involved her son and Respondent stated that she would have to transfer it. During either the first or second conversation between Respondent and Sergeant Daniels, Respondent stated that Solomon was on probation. Respondent also stated words to the effect that it was a shame that "something as simple as this could really mess" Solomon up.

14. During the period of time that the Solomon citation sat in Respondent's personal office without being docketed, Respondent's court offices at 441 Boot Road, Downingtown, PA, were forced to close on two occasions due to a noxious fume problem. Respondent's court offices closed for the first time on or about January 27, 2010, and they reopened briefly on or about February 8, 2010. Thereafter, on or about February 10, 2010, Respondent's court office location at 441 Boot Road closed permanently due to the noxious fume problem.

15. Respondent's office staff personnel were located at various magisterial district court office locations in Chester County due to the noxious fume problem, whereat they conducted their duties for Respondent. Respondent worked at the offices of Magisterial District Judge Mark Bruno until on or about February 15, 2010, whereupon Respondent's offices were relocated to a temporary office location.

16. On or about February 2010, while Respondent and her staff worked from an office located at 2 North High Street, West Chester, Respondent approached Patricia M. Davis, her office manager, and spoke to her about the Solomon citation,

17. During the course of this conversation, Respondent handed the Solomon citation to Ms. Davis and told her to "hold on to it." Respondent told Ms. Davis that she (Respondent) would instruct her (Ms. Davis) when she was to docket the Solomon citation into the MDJS and when to transfer the citation. Respondent told Ms. Davis that Mr. Solomon had a probation hearing coming up and that Respondent did not know if the citation filed against him would "affect it or not," meaning Mr. Solomon's probationary status.

18. Based on Respondent's instructions, Ms. Davis placed the Solomon citation in her work bin on her desk and did not docket it. The Solomon citation was not docketed until April 5, 2010. During the period when Ms. Davis possessed the Solomon citation, she reminded Respondent on at least one occasion about the Solomon citation.

19. On or about March 14, 2010, Trooper Long was reviewing the status of the citations that she had filed, and she determined that the Solomon citation was not yet docketed. Trooper Long informed Sergeant Daniels, her superior, of this fact, and he told Trooper Long that he would contact Respondent about the matter.

20. On March 15, 2010, Sergeant Daniels telephonically contacted Respondent to inquire about the status of the case.

21. Daniels told Respondent that it was time to update the status of PSP citations, and the PSP was aware that the Solomon citation was not yet docketed. Respondent replied that "it was not a problem," and she told Sergeant Daniels that there was a lot going on and that her court was really backlogged but that the Solomon citation would be docketed "any day."

22. On April 5, 2010, Respondent docketed the Solomon citation into the MDJS and thereafter instructed Ms. Davis to ***936** transfer the Solomon citation to Judge Bruno's court for disposition.

23. Trooper Long continued to check the Pennsylvania Justice Network (JNET) to determine the status of the Solomon citation. On April 8, 2010, Trooper Long learned that the citation was docketed on April 5, 2010, and that the citation was transferred to the court of Magisterial District Judge Bruno on April 7, 2010.

24. The rules in Chester County regarding transfer of cases from one magisterial district court to another require the transferring court to first obtain a transfer order from the President Judge of Chester County prior to affecting the transfer. Respondent knew that she violated this procedure when she transferred the Solomon citation to Judge Bruno's court without authorization from the president judge.

25. On April 7, 2010, after Ms. Davis effected the transfer of the case (in contravention of the pertinent Chester County rule), Respondent called Judge Bruno's court office and told someone present at Judge Bruno's office that Mr. Solomon was in drag/alcohol rehabilitation.

26. Judge Bruno continued the case from the scheduled hearing date of May 19, 2010, until June 2, 2010, in order to accommodate Trooper Long's prescheduled vacation. On June 2, 2010, the parties appeared, and Judge Bruno dismissed the matter because Jonathan Arnold, the victim, did not appear for the trial and because Mr. Solomon presented a certificate of his successful completion of the rehabilitation program.

27. Chester County Probation did not learn of Mr. Solomon's citation, and, as such, it did not take official action against him because of the citation or for his missed meetings, failed drug tests or for a combination of these matters. Before Chester County Probation took action against Mr. Solomon for his failed drug tests and missed meetings, Respondent informed Mr. Zangrilli that Mr. Solomon needed treatment and that he was in a rehabilitation program.

28. Patricia Norwood–Foden is the District Court Administrator of Chester County. Subject to the direction and supervision of Chester County President Judge James E. MacElree, II, Ms. Norwood–Foden manages the non-judicial functions of the Chester County Magisterial District Courts.

Ms. Norwood–Foden received a report from an employee who was working on a project for the Chester County Controller's office involving case management reports. The employee reported to Ms. Norwood–Foden that, when reviewing case management reports, he recognized Mr. Solomon's name and noted several irregularities during case processing of the Solomon citation and on the electronic MDJS case docket for the citation. The employee was aware of the fact that Mr. Solomon was Respondent's son. After receiving the report, Ms. Norwood–Foden reviewed the electronic docket of the case on MDJS and other information, including the Solomon citation itself.

Based upon her independent review, Ms. Norwood–Foden uncovered the following irregularities regarding the processing of the Solomon citation in Respondent's court:

1. Respondent's court received and date stamped the Solomon citation on January 20, 2010. However, the Solomon citation was date stamped a second time on February 8, 2010, and it was not docketed by Respondent until April 5, 2010.

2. Respondent transferred the case to Judge Bruno's court without a valid transfer order from the president judge.

***937** 3. Comparison of the other citations filed during the period of the noxious fume problem in Respondent's court with the Solomon citation indicated that the only citation docketed late was the Solomon citation.

4. Though the case was transferred to Judge Bruno's court, the MDJS case disposition processing report indicated that the user name "RARNOLD" (Respondent's screen name) entered the disposition of "dismissed" into the MDJS system after Judge Bruno conducted the trial hearing.

Ms. Norwood–Foden reported the irregularities to President Judge MacElree. At the direction of President Judge MacElree, Ms. Norwood–Foden discussed the matter with Respondent on or about October 15, 2010. During this conversation, Ms. Norwood–Foden reiterated the proper procedures to transfer a case to Respondent, and she acknowledged that she was aware of the proper procedure. Ms. Norwood–Foden also directed Respondent to craft a written response to President Judge MacElree to address their concerns about the processing of the Solomon citation by Respondent's court.

29. Respondent authored a written response to President Judge MacElree on October 18, 2010. In summary, Respondent indicated in the written response that she did not timely docket the Solomon citation because she misplaced and completely forgot about the citation during the move of her court offices from 441 Boot Road occasioned by the noxious fume problem in January–February 2010. Respondent denied any knowledge of the entry of the "dismissed" disposition for the citation and she denied any "intention of doing anything improper with the citation, or to obtain any favorable treatment for" Mr. Solomon, her son.

30. President Judge MacElree mailed the results of Ms. Norwood–Foden's investigation (including Respondent's October 18, 2010 letter) to the Judicial Conduct Board on October 27, 2010. Upon review of this material, chief counsel opened an investigation on behalf of the Board.

31. During the course of its investigation, the Board deposed Respondent on October 5, 2011. The transcript of that deposition indicates that Respondent acknowledged under oath that she did not forget completely about the Solomon citation during her office moves. Respondent testified that she forgot about the citation between February 15, 2010 (when the citation was packed in a box) and March 15, 2010, when she spoke with Sergeant Daniels. Respondent maintained that, after she spoke with Sergeant Daniels, she searched for the citation until April 5, 2010, when she found it in a box and docketed it. Respondent acknowledged, however, that the delay in docketing the citation and her transfer of the citation each was improper, of itself.

32. The Board issued a subpoena for Patricia Davis, Respondent's office manager, to appear at its offices and to testify regarding the processing of the Solomon citation.

When Respondent learned of the subpoena, she instructed Ms. Davis to testify to the Board that she (Ms. Davis) did not know of the Solomon citation until Respondent told her to transfer the citation on April 5, 2010. However, in reality, Ms. Davis became aware of the Solomon citation in February 2010, when Respondent gave Ms. Davis the Solomon citation and instructed her not to docket it.

Also at the time Respondent learned of Ms. Davis' Board deposition, Respondent had a quizzical, out-of-context conversation with Ms. Davis about their loyalty to each other regarding a personnel issue with ***938** court administration that had been resolved one year prior to the issuance of the subpoena and the conversation.

Unsettled by Respondent's "loyalty" conversation, Ms. Davis reported the matter to Ms. Norwood–Foden, who memorialized the matter and reported it to President Judge MacElree. Ms. Davis was also provided counsel by Chester County for her Board deposition.

The Board conducted a deposition of Ms. Davis on December 20, 2011. At the deposition, Ms. Davis testified that Respondent instructed her in February 2010 to hold on to the Solomon citation and not to docket it. Ms. Davis also testified that, after Respondent learned of Ms. Davis' pending Board deposition, Respondent instructed Ms. Davis as to how Respondent wanted Ms. Davis to testify if the Board asked Ms. Davis about when she first learned of the citation.

III. *DISCUSSION*

Count 1 charges a violation of Rule 5 of the Rules Governing Standards of Conduct of Magisterial District Judges. The language of that Rule which it is necessary to consider is:

> Magisterial district judges shall diligently discharge their administrative responsibilities ... and facilitate the performance of the administrative responsibilities of their staff....

Count 2 charges a violation of Rule 13 of the Rules Governing Standards of Conduct of Magisterial District Judges. The pertinent language of that Rule is:

> Magisterial district judges ... shall not engage ... in any activity or act incompatible with the expeditious, proper and impartial discharge of their duties....

It is easy to see that from the time the State Police citation came into her office Respondent engaged in a course of conduct which violated both Rule 5 and Rule 13. She failed to docket the citation when it was filed as it was her duty and responsibility to do and instructed her office manager to "hold on to it" and not to docket it until Respondent told her to docket it (Findings of Fact Nos. 9, 14, 16, 17, 18). This was an obvious violation of her personal administrative responsibilities and overtly contrary to her obligation to "facilitate the performance of the administrative responsibilities of [her] staff" (Rule 5) (Count 1); and was just as obviously "incompatible with the expeditious, proper and impartial discharge of her duties" (Rule 13) (Count 2).

Because it violated those two Rules, the same conduct was also an automatic, derivative violation of Article V, § 17(b) of the Pennsylvania Constitution, which provides in part that:

> Magisterial district judges shall be governed by rules or canons which shall be prescribed by the Supreme Court.

In re Joyce and Terrick, 712 A.2d 834 (Pa.Ct.Jud.Disc.1998).

The same conduct is also an obvious violation of the language of the Constitution, Article V, § 18(d)(1), which provides that a judicial officer who fails to perform the duties of office is subject to discipline (Count 4A).

Likewise, Respondent's transfer of the Solomon case to Magisterial District Judge Bruno's court was a violation of Rules 5 and 13 as well as of Article V, § 17(b) and § 18(d)(1) (Findings of Fact Nos. 22–25). Moreover, Respondent knew this action was in direct contravention of the Chester County administrative rules which require that a transferring court obtain an order from the President Judge of Chester County in order to accomplish a transfer (Finding of Fact No. 24).

***939** Respondent's subsequent conduct during the investigations conducted by the president judge and then by the Judicial Conduct Board, which included presenting a report to the president judge in which she made false statements (Finding of Fact No. 29), e.g., she stated that she did not timely docket the Solomon citation because she completely forgot about that citation because of the noxious fume problem in her office at the time (Finding of Fact No. 29). However, investigation of all the citations filed in Respondent's court during the noxious fume problem established that the only citation docketed late was the Solomon citation (Finding of Fact No. 28). Later, during the Board's investigation of the case when Respondent learned that the Board had scheduled the deposition of Patricia Davis, Respondent's office manager, Respondent instructed Davis to testify falsely at the deposition concerning when Davis first knew that the Solomon citation had been filed in Respondent's court. Respondent instructed Davis to testify that she first learned that the Solomon citation had been filed in Respondent's court on April 5, 2010, when, in reality, Davis first learned of it in February 2010, and Respondent knew this to be the truth because that was when Respondent handed the citation to Davis and told her to "hold on to it" and not to docket it until Respondent told her to docket it (Finding of Fact No. 17).

Again, this latter conduct is, unmistakably, in conflict with:

> (a) her duty to diligently discharge her administrative responsibilities and to facilitate the performance of the administrative responsibilities of her staff (Rule 5) (Count 1),

(b) her duty not to engage in any activity or act incompatible with the expeditious, proper and impartial discharge of her duties (Rule 13) (Count 2).

Since her conduct during the investigations, described above, was a violation of Rules 5 and 13 of the Rules Governing Standards of Conduct of Magisterial District Judges, it was an automatic, derivative violation of Article V, § 17(b) of the Pennsylvania Constitution.

In addition, that conduct also is such that "prejudices the proper administration of justice," which, under Article V, § 18(d)(1) of the Pennsylvania Constitution, subjects Respondent to discipline. This Court has been called upon frequently to determine whether particular conduct is such that "prejudices the proper administration of justice." *See, In re Cioppa,* 51 A.3d 923, 930 (Pa.Ct.Jud.Disc.2012) and cases cited therein. As those cases demonstrate, we have held repeatedly that:

> A judicial officer who engages in conduct which prejudices the proper administration of justice would have the added element of a mental state in which he or she not only knew that the conduct at issue consisted of some neglect or impropriety, but also acted with the knowledge and intent that the conduct would have a deleterious effect upon the administration of justice, for example, by affecting a specific outcome.

In re Smith, 687 A.2d 1229, 1238 (Pa.Ct.Jud.Disc.1996). There is no question that when Respondent presented her report about her failure to docket the Solomon complaint in compliance with the pertinent procedural rules, and when she spoke to her office manager about how she should testify at her deposition scheduled by the Board in the course of its investigation, that she was "act[ing] with the knowledge and intent that the conduct would have a deleterious effect upon the administration of justice, for example, by affecting a specific outcome." There is no question that Respondent was acting to affect the outcome ***940** in this case—her case—which was being investigated by her president judge and by the Judicial Conduct Board. It is clear, then, that Respondent is subject to discipline under Article V, § 18(d)(1) of the Pennsylvania Constitution for engaging in conduct which prejudices the proper administration of justice (Count 4B).

IV. *CONCLUSIONS OF LAW*

1. Respondent's conduct set out in Findings of Fact Nos. 1–28 is:

(a) a violation of Rule 5 of the Rules Governing Standards of Conduct of Magisterial District Judges,

(b) a violation of Rule 13 of the Rules Governing Standards of Conduct of Magisterial District Judges,

(c) as a violation of the aforesaid Rules 5 and 13, it is an automatic, derivative violation of Article V, § 17(b) of the Pennsylvania Constitution,

(d) such that constitutes a failure to perform the duties of office which is a violation of Article V, § 18(d)(1) of the Pennsylvania Constitution.

2. Respondent's conduct set out in Findings of Fact Nos. 29–32 is:

(a) a violation of Rule 5 of the Rules Governing Standards of Conduct of Magisterial District Judges,

(b) a violation of Rule 13 of the Rules Governing Standards of Conduct of Magisterial District Judges,

(c) as a violation of the aforesaid Rules 5 and 13, it is an automatic, derivative violation of Article V, § 17(b) of the Pennsylvania Constitution,

(d) conduct which prejudices the proper administration of justice which is a violation of Article V, § 18(d)(1) of the Pennsylvania Constitution.

3. Respondent is subject to discipline under Article V, § 18(d)(1) of the Pennsylvania Constitution.

All Citations

51 A.3d 931

Footnotes

[1] The Board charges two discrete violations of the Constitution ("for failure to perform the duties of office" and conduct which "prejudices the proper administration of justice") but it presents them in the disjunctive, i.e., as if it is either one or the other. (In all probability this is because the Board has lifted the language of the Constitution where the disjunctive is appropriate and placed it in Counts 4A and 4B where it is not.) It is clear enough that it is the Board's intention to charge that Respondent's conduct was such that failed to perform the duties of office *and* which prejudices the proper administration of justice. The Court will so treat it.

954 A.2d 118
Court of Judicial Discipline of Pennsylvania.

In re Daniel S. DAVIS, Former Magisterial District Judge Magisterial District 20–3–01 Huntingdon County.

No. 2 JD 07
|
Dec. 19, 2007.
|
Order May 14, 2008.

Synopsis
Background: Complaint against former magisterial district judge was filed by the Judicial Conduct Board.

Holdings: The Court of Judicial Discipline, No. 2 JD 07, Musmanno, J., held that:

judge's actions of issuing commitment orders for defendants who had failed to pay fines and costs without holding a hearing to assess the defendant's financial ability to pay violated law and judicial conduct rule regarding adjudicative responsibilities;

judge's actions of sentencing defendants charged with summary traffic offenses to community service even though Vehicle Code offenses were specifically excluded from alternative adjudication programs violated judicial conduct rule regarding adjudicative responsibilities; and

judge's failure to properly supervise his constable, who with judge's knowledge, was running a separate court of his own that operated completely outside of the law and in many ways at variance with it, violated judicial conduct rule regarding administrative responsibilities.

Order accordingly.

***118 ORDER**

PER CURIAM.

AND NOW, this 14th day of May, 2008, after a hearing before the full Court on the subject of sanctions and upon consideration of Respondent's many years of service as a Magisterial District Judge as well as of his full cooperation with the Judicial Conduct Board in its investigation in this case, it is hereby ORDERED that:

1. Respondent is hereby publicly reprimanded, and

2. The Court accepts Respondent's representations made at the Sanction Hearing, that he will never seek judicial office in this Commonwealth, ***119** either by election or appointment; and, based on those representations, the Court has determined to forego the entry of an order forever barring Respondent from holding judicial office in the Commonwealth.

KURTZ, J., did not participate in the disposition or consideration of this case.

PER CURIAM.

ORDER

AND NOW, this 19th day of December, 2007, based upon the Conclusions of Law, it is hereby ORDERED:

That, pursuant to C.J.D.R.P. No. 503, the attached Opinion with Findings of Fact and Conclusions of Law be and it is hereby filed, and shall be served on the Judicial Conduct Board and upon the Respondent,

That, either party may file written objections to the Court's Conclusions of Law within ten (10) days of this Order. Said objections shall include the basis therefor and shall be served on the opposing party,

That, in the event that such objections are filed, the Court shall determine whether to entertain oral argument upon the objections, and issue an Order setting a date for such oral argument,

That, in the event objections are not filed, within the time set forth above, the Findings of Fact and Conclusions of Law shall become final, and this Court will conduct a hearing on the issue of sanctions.

OPINION BY Judge MUSMANNO.

I. *INTRODUCTION*

The Judicial Conduct Board (Board) filed a Complaint with this Court on October 11, 2007 against Former Magisterial District Judge Daniel S. Davis (Respondent) consisting of one count which charges that the Respondent:

1. Violated Rule 5A. of the Rules Governing Standards of Conduct of Magisterial District Judges.

In its Complaint, the Board, in paragraphs 1–8.14. alleged that Respondent had engaged in certain conduct which it described in said paragraphs. The Respondent filed an Answer to the Complaint in which he admitted each and every one of the allegations made in said paragraphs of the Complaint. The Court accepts these admitted facts, recited below, as the facts necessary for the disposition of this case.

II. *FINDINGS OF FACT*

1. This action is taken pursuant to the authority of the Board under Article V, § 18 of the Constitution of the Commonwealth of Pennsylvania which grants authority to the Board to determine whether there is probable cause to file formal charges, and when it concludes that probable cause exists, to file formal charges against a judicial officer for proscribed conduct and to present the case in support of such charges before the Court of Judicial Discipline.

2. From June 10, 1975, until he resigned effective August 31, 2007, the Respondent served continuously as Magisterial District Judge for Magisterial District 20–3–01 in Huntingdon County, the Twentieth Judicial District, Pennsylvania, encompassing the Townships of Barree, Franklin, Jackson, Logan, Morris, Porter, Smithfield, Spruce Creek, Warriors Mark and West; and the Boroughs of Alexandria, Birmingham and Petersburg, Pennsylvania, with an office located in the Porter Township Building, 7561 Bridge Street, Suite 1, P.O. Box 361, Alexandria, Pennsylvania 16611. As a Magisterial District ***120** Judge he was, at all times relevant hereto, subject to all the duties and responsibilities imposed on him by the Rules Governing Standards of Conduct of Magisterial District Judges.

3. The scheduled audit of Respondent's District Court 20–3–01, for 2003, 2004 and 2005, conducted by the Commonwealth of Pennsylvania Department of the Auditor General ("Department"), Bureau of County Audits, uncovered numerous irregularities and discrepancies with the Respondent Court's paperwork and financial matters.

4. The Bureau of County Audits asked the Department's Office of Special Investigation (OSI) to review the administrative practices and activities of the Respondent; his office staff; and the Magisterial District Court's primary constable, David Metzger.

5. The Department's investigative results were shared with the Board. The Board's independent analysis demonstrates that as a general practice, the Respondent:

(a) failed to discharge his administrative duties, and

(b) failed to maintain accurate and adequate court records.

6. In some cases involving defendants who failed to pay fines and costs, the Respondent issued commitment orders without holding the required hearing to assess the defendant's financial ability to pay.[1] Rather than holding the requisite hearing, the Respondent based his decision on personal and unsubstantiated knowledge of a defendant's finances.

7. The Respondent operated a community service program that did not comply with the laws governing adjudication alternatives.

7.1. Except in cases charging offenses relating to vehicles and game, a magisterial district judge may sentence a person

charged with a summary offense to "an appropriate adjudication alternative." 42 Pa.C.S.A. § 1520(a).

7.2. In at least eighteen (18) cases, the Respondent ordered individuals with Vehicle Code offenses to community service, even though Vehicle Code offenses are specifically excluded from alternative adjudication programs. 42 Pa.C.S.A. § 1520.

7.3. The Respondent's community service program was not authorized by either the Huntingdon County Court Administrator or the President Judge. Huntingdon County has no established policy on community service programs for adults and a limited policy of community service for juveniles. Thus, the Respondent operated his community service program on his own, without the consent or authorization of the appropriate county court and judicial officials.

8. The Respondent failed in discharging his administrative oversight responsibilities by permitting Constable Metzger to operate in a manner contradictory to the law and established procedures.

8.1. Rule 431(B) of the Pennsylvania Rules of Criminal Procedure provides:

> **Rule 431. Procedure When Defendant Arrested With Warrant.**
>
> ***121** (B) When a warrant of arrest is executed, the police officer shall either:
>
> (1) accept from the defendant a signed guilty plea and the full amount of the fine and costs if stated on the warrant;
>
> (2) accept from the defendant a signed not guilty plea and a full amount of collateral if stated on the warrant;
>
> (3) accept from the defendant in the amount of restitution, fine, and costs due as specified in the warrant if the warrant is for collection of restitution, fine, and costs after a guilty plea or conviction; or
>
> (4) cause the defendant to be taken without unnecessary delay before the proper issuing authority.

8.2. Pennsylvania Rule of Criminal Procedure 454(E)(1) provides:

> If the defendant is without the financial means to pay the amount in a single remittance, *the issuing authority* may provide for installment payments and shall state the date on which each installment is due. (Emphasis added).

8.3. Rather than bringing all defendants before the Respondent, Metzger would establish a payment plan for some defendants who were unable to pay the entire amount of the warrant.

8.4. Metzger's payment plans required defendants to make installment payments directly to Metzger.

8.5. Metzger charged service fees each time he collected a payment.

8.6. The Respondent permitted Metzger to establish and collect partial payments from the defendants. This lack of administrative oversight led to serious problems with Metzger's handling of the money he collected from defendant including:

- forgery (of payment remittances collected by Metzger),
- fines and costs collected, not remitted,
- fines and costs collected, but not remitted timely,
- deducting service fees from defendants' payments,
- depositing defendants' payments into his own business and/or personal bank accounts,
- spending defendants' payments prior to remittance to Respondent's District Court,
- requesting defendants pay with cash or money order payable to Metzger rather than to the Respondent's District Court as required, and
- failure to issue receipts to defendants.

8.7. The Respondent knew that Metzger established payment plans when the defendants were unable to pay for their fines and costs.

8.8. The Respondent knew that Metzger collected fines, costs and restitution from defendants and deposited this money in

his business and/or personal bank account. The Respondent did not object to Metzger depositing the defendant's payments into Metzger's business and/or personal bank account.

8.9. The Respondent knew Metzger remitted fines, costs and restitution to the Respondent's District Court with a check from Metzger's business bank account by the name of "State Constables Service."

8.10. The Respondent knew Metzger was, in most instances, deducting his service fees from the money collected from defendants and remitting only the remaining portion of the money to the Respondent's District Court.

8.11. The proper procedure is for a constable to remit the entire amount of money collected from a defendant to the ***122** Magisterial District Court along with an invoice for the appropriate constable service fee. The Magisterial District Judge then reviews the constable service fees listed on the service fee invoice and approves the amount to be paid to the constable. Any service fees disallowed are to be refunded to the defendant. Metzger retained his service fees from the money collected from defendants and also retained the five dollar ($5) Commonwealth surcharge.

8.12. The five dollar ($5) Commonwealth surcharge is pursuant to 42 Pa.C.S.A. § 2949(b), which assesses a surcharge of $5 per docket number in each criminal case and $5 per named defendant in each civil case in which a constable or deputy constable performs a service.

8.13. Surcharges collected under 42 Pa.C.S.A. § 2949(b), if collected by a constable or deputy constable, must be turned over within one week to the issuing authority, which is then required to remit the same to the Department of Revenue for deposit into the Constables' Education and Training Account.

8.14. On September 24, 2007, Honorable Robert B. Stewart, III, the District Attorney of Huntingdon County, filed an Amended Information (Huntingdon County Docket No. CP–31–CR–247–2007) against Metzger charging him with:

1. two (2) counts of Forgery (Felony 3), in violation of 18 Pa.C.S.A. § 4101(a)(1)(2)(3) of the Pennsylvania Crimes Code; and,

2. one (1) count of Theft by Failure to Make Required Disposition of Funds Received (Misdemeanor 1) in violation of 18 Pa.C.S.A. § 3927(a) of the Pennsylvania Crimes Code.[2] (A true and correct copy of the Amended Information is attached to the Board's Complaint as Exhibit 1 and is made a part hereof by reference.)

III. *DISCUSSION*

Here the Board charges that the Respondent's conduct set out in the Complaint and admitted by Respondent, constitutes a violation of Rule 5A. of the Rules Governing Standards of Conduct of Magisterial District Judges. That Rule provides:

> RULE 5. ADMINISTRATIVE RESPONSIBILITIES.
>
> A. Magisterial district judges shall diligently discharge their administrative responsibilities, maintain competence in judicial administration and facilitate the performance of the administrative responsibilities of their staff and of other members of the judiciary and court officials.

We note that, in his Answer, Respondent admits that he violated Rule 5A. While we recognize that Respondent's admission bespeaks of a desire to cooperate with the Board and may well be intended to facilitate the business of the Court, it is this Court which has been invested with the constitutional duty of making the determination of whether any given facts—agreed to or not—constitute a violation of the Constitution or Rules of Conduct such that subjects a judicial officer to discipline. We have dealt with this subject in earlier ***123** cases: in *In re Strock,* 727 A.2d 653, 660 (Pa.Ct.Jud.Disc.1998) we said:

> We do not believe that this Court should accept and adopt as its own, without examination, stipulations that specified facts (a) support whatever charges the Board and any given respondent stipulate they support, and (b) justify this Court's entering Conclusions of Law that a respondent is subject to discipline for violation of specified constitutional

and ethical precepts simply because a given respondent so concedes.

We believe it would be wrong to find that "Respondent is subject to discipline under the Board's complaint" on any count which the facts do not support. We believe this Court's obligation to make an independent examination of the facts to determine if they support the charges which a respondent concedes they support is no less than the obligation of a trial court receiving a guilty plea in a criminal case "to satisfy itself that there is a factual basis for the plea of guilt." *Commonwealth v. Nelson,* 455 Pa. 461, 463, 317 A.2d 228, 229 (1974), and "to determine ... whether the facts acknowledged by the defendant constitute the prohibited offense." *Commonwealth v. Anthony,* 504 Pa. 551, 558, 475 A.2d 1303, 1307 (1984), see also *Commonwealth v. Rosario,* 418 Pa.Super. 196, 613 A.2d 1244 (1992), *aff'd,* 545 Pa. 4, 679 A.2d 756 (1996), *Commonwealth v. Reno,* 303 Pa.Super. 166, 449 A.2d 630 (1982).

We reiterate what we said in *In re Timbers,* 668 A.2d 304, 305 (Pa.Ct.Jud.Disc.1995):

Furthermore, part of this Court's necessary function is to develop a body of law that will provide judicial officers with some guidance as to the conduct which may form the basis for the imposition of sanctions. In order to develop such a body of law, the Court, rather than parties (through binding stipulated agreements), must determine whether the facts support proposed conclusions.

We also note, preliminarily, that Respondent is no longer a judicial officer, having resigned on August 31, 2007, see Finding of Fact No. 2. Though not raised by Respondent, it is appropriate to point out that the jurisdiction of this Court is not thereby terminated. *See, In re Sullivan,* 805 A.2d 71, 72 n. 1 (Pa.Ct.Jud.Disc.2002); *In re Larsen,* 717 A.2d 39, 43 (Pa.Ct.Jud.Disc.1998); *In re Cicchetti,* 697 A.2d 297, 301 n. 1 (Pa.Ct.Jud.Disc.1997); *In re Chesna,* 659 A.2d 1091, 1092–93 (Pa.Ct.Jud.Disc.1995).

We turn now to the charges set out in the Board's Complaint. The offending conduct of Respondent in this case can be placed into three categories.

1. He issued commitment orders for defendants who had failed to pay fines and costs without holding a hearing to assess the defendant's financial ability to pay (Finding of Fact No. 6). Respondent decided whether or not to commit defendants to jail based on his own unsubstantiated, personal evaluation of defendants' financial wherewithal. This is a violation of the law of Pennsylvania.

75 Pa.C.S.A. § 6504(b) provides that any person who does not comply with an order imposing a fine and costs in a traffic case may be imprisoned. 42 Pa.C.S.A. § 9758(c) provides that, in the event of nonpayment of fines in a non-traffic case, the sentence of the court may include an alternative sentence. 18 Pa.C.S.A. § 1105 authorizes the imposition of a sentence of imprisonment in a non-traffic summary case. Rule 456 of the Pennsylvania Rules of Criminal Procedure provides that in all summary cases "the issuing authority shall conduct a hearing to determine whether ***124** the defendant is financially able to pay as ordered." Rule 456(C). The Rule then provides that "upon a determination that the defendant is financially able to pay as ordered, the issuing authority may impose any sanction provided by law." Rule 456(C)(1).

Respondent's practice described above was in violation of the law and constituted a violation of Rule 4A. of the Rules Governing Standards of Conduct of Magisterial District Judges which prescribes his *adjudicative* responsibilities and not a violation of Rule 5A. which prescribes his *administrative* responsibilities. Rule 4A. provides:

RULE 4. ADJUDICATIVE RESPONSIBILITIES.

A. Magisterial district judges shall be faithful to the law and maintain competence in it. They shall be unswayed by partisan interests, public clamor or fear of criticism.

Holding hearings is the prototypical adjudicative function, and, to say the least, it would be awkward to say that a judge who is ignoring the law by not holding hearings is being "faithful" to it. We find that Respondent's failure to hold hearings to determine defendants' financial ability to pay fines and costs was a violation of Rule 4A. of the Rules Governing Standards of Conduct of Magisterial District Judges.

We recognize that the Board has not charged Respondent with a violation of Rule 4A. but rather with violation of Rule 5A. of the Rules Governing Standards of Conduct of Magisterial

District Judges. This in no way offends Respondent's due process rights. We have dealt with this situation before. For example, in *In re Berkhimer,* 877 A.2d 579, 597–98 (Pa.Ct.Jud.Disc.2005) we said:

> Any suggestion, however that this may derogate Respondent's right to due process does not hold for, as the Supreme Court held in *In the Matter of Glancey,* 518 Pa. 276, 542 A.2d 1350 (1988) and in *In the Matter of Cunningham,* 517 Pa. 417, 538 A.2d 473 (1988), and as we held recently in *In re Harrington,* 877 A.2d 570 (Pa.Ct.Jud.Disc.2005), the Board's focus on one rule and this Court's finding violation of another is not prejudicial because the underlying conduct is the same and the Respondent has been advised of what that was from the beginning of these proceedings.

See, also, In re Trkula, 699 A.2d 3, 12 (Pa.Ct.Jud.Disc.1997).

2. Respondent sentenced defendants charged with summary traffic offenses to community service even though Vehicle Code offenses are specifically excluded from alternative adjudication programs.[3]

Again, the Board charges that this conduct is a dereliction of Respondent's administrative responsibilities in violation of Rule 5A. We consider that Respondent's duty to impose legal sentences, and to refrain from imposing illegal ones, to be exclusively related to his adjudicative responsibilities. Such deviation from the law certainly cannot be equated with faithfulness to it; and thus we do not hesitate to find that this conduct was not a violation of Rule 5A. of the Rules Governing Standards of Conduct of Magisterial District Judges and *was* a violation of Rule 4A.

3. We address now the allegations relating to the extemporaneous, *ultra vires* activities of Mr. Metzger, Respondent's ***125** constable. Essentially, Mr. Metzger was running a separate court of his own, operated completely outside of the law, and in many ways at variance with it[4]—all with Respondent's knowledge. Findings of Fact Nos. 8.1–8.14.

This is a clear violation of Rule 5A. as charged by the Board, for it was Respondent's duty to supervise his constables—and anybody else working for him—to assure that they conduct the business of his court in compliance with all the laws pertaining to their court duties. This supervisory responsibility is an administrative responsibility and Respondent certainly failed to discharge this responsibility. We, therefore, find that Respondent violated Rule 5A. of the Rules Governing Standards of Conduct of Magisterial District Judges.

IV. *CONCLUSIONS OF LAW*

1. Respondent violated Rule 4A. of the Rules Governing Standards of Conduct of Magisterial District Judges by failing to hold hearings as required by law in order to determine defendants' financial ability to pay fines and costs.

2. Respondent violated Rule 4A. of the Rules Governing Standards of Conduct of Magisterial District Judges by imposing illegal sentences.

3. Respondent violated Rule 5A. of the Rules Governing Standards of Conduct of Magisterial District Judges by failing to properly supervise his constable so as to assure that he conduct the business of the court in compliance with the law and not in violation of it.

4. Respondent is subject to discipline under Article V, § 18(d)(1) of the Pennsylvania Constitution.

KURTZ, J., did not participate in the consideration or disposition of this case.

All Citations

954 A.2d 118

Footnotes

[1] Defendants who are unable to pay their fines and costs can be sentenced to jail both (1) in lieu of payment of fines and costs in traffic cases pursuant to 75 Pa.C.S.A. § 6504 and (2) as an alternative sentence in non-traffic summary offenses pursuant to 42 Pa.C.S.A. § 9758(c). Before a defendant in a non-traffic offense can be sentenced to jail under 42 Pa.C.S.A. § 9758(c), the Pennsylvania Rules of Criminal Procedure require a hearing to be held to determine whether the defendant has the financial ability to pay the fines and costs.

[2] In a press release announcing the filing of the criminal complaint against Metzger, District Attorney Stewart noted:

> "I do not believe that either Magisterial District Judge Davis or any other member of his staff ever took any money out of his office other than the salaries that they had earned. This investigation has been difficult for Magisterial District Judge Davis and his staff. They have all cooperated fully with the Auditor General's special investigators."

[3] "Community Service" is included as an "adjudication alternative authorized by [section 1520]." 42 Pa.C.S.A. § 1520(a).

[4] Indeed, some of Mr. Metzger's activities may have been criminal, see Finding of Fact No. 8.14.

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173 W.Va. 446
Supreme Court of Appeals of West Virginia.

STATE ex rel. Edward JAMES PATTERSON
v.
The Honorable Naaman J. ALDREDGE, Chief Judge of the Circuit Court of Logan County.

No. 16234.
|
June 26, 1984.

Synopsis
Original proceeding in mandamus was brought to compel circuit court judge to render final decision in civil action. The Supreme Court of Appeals, McGraw, J., held that delay of 33 months between initial hearing and filing of mandamus action in rendering decision on petitioner's motion for summary judgment and defendants' motion to dismiss was unreasonable and justified commanding judge to render final decision within 30 days.

Writ granted.

Procedural Posture(s): Motion to Dismiss.

****806 *446** *Syllabus by the Court*

1. Under article III, § 17 of the West Virginia Constitution, which provides that ***447** "justice shall be administered without sale, denial or delay," and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), which provides that "A judge should dispose promptly of the business of the court," judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission.

2. "Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case if it unreasonably neglects or refuses to do so." *State ex rel. Cackowska v. Knapp,* 147 W.Va. 699, 130 S.E.2d 204 (1963).

Attorneys and Law Firms

Glyn Dial Ellis, Atty. at Law, Logan, for relator.

Naaman J. Aldredge, Chief Judge, Logan County, Logan, for respondent.

Opinion

McGRAW, Justice:

The petitioner, Edward James Patterson, brought this original proceeding in mandamus seeking to compel the respondent, Chief Judge Naaman J. Aldredge of the Circuit Court of Logan County, to render a final decision in a civil action instituted by the

petitioner in 1980. On April 2, 1984, this Court entered an order directing the respondent to render such a decision within thirty days, noting that a more comprehensive opinion supporting our order would follow.

On October 22, 1980, the petitioner initiated a civil action in the Circuit Court of Logan County seeking adjudication of certain property rights. An answer was filed by the defendants named in the petitioner's suit on November 18, 1980. On June 12, 1981, a hearing was held before the respondent on the defendants' motion to dismiss and petitioner's motion for summary judgment. After three months of inactivity, the matter was again scheduled for argument on September 29, 1981, since the respondent stated he could not recall the law in this matter. Over the next fifteen months, the petitioner's attorney made four requests for a decision from the respondent. Despite repeated assurances by the respondent that a final decision would be ****807** forthcoming, no action was taken. Instead, the matter was again scheduled for argument for a third time in January 1983. Still, following this hearing, no action was taken for the next thirteen months. Finally, on March 6, 1984, the petitioner filed this original proceeding in mandamus seeking to compel the respondent to render a final decision.

In his answer, the respondent admitted all of the charges contained in the petitioner's request for a writ of mandamus. His only reply was that his workload afforded him an inadequate opportunity to study the case and that its complexity made it difficult for him to arrive at an opinion.

Under article III, § 17 of the West Virginia Constitution, which provides that "justice shall be administered without sale, denial or delay," and under Canon 3A(5) of the West Virginia Judicial Code of Ethics (1982 Replacement Vol.), which provides that "A judge should dispose promptly of the business of the court," judges have an affirmative duty to render timely decisions on matters properly submitted within a reasonable time following their submission. Article III, § 17 of the West Virginia Constitution, which guarantees the expeditious disposition of all civil matters, is separate from the right to a speedy trial in criminal cases protected under article III, § 14 of the West Virginia Constitution. Canon 3A(5) of the West Virginia Judicial Code of Ethics, as well as the principle contained within its admonition, is often utilized as a foundation for the imposition of judicial discipline for unreasonable delays in the disposition of court business. *See, e.g., In re Weeks,* 134 Ariz. 521, 524–25, 658 P.2d 174, 177–78 (1983); *In re Heideman,* 387 Mich. 630, 631–32, 198 N.W.2d 291, 291–92 (1972); *In re Anderson,* 312 Minn. 442, 447, 252 N.W.2d 592, 594 (1977); *In the Matter of Kohn,* 568 S.W.2d 255, 260–62 (Mo.1978); *In re Corning,* 538 S.W.2d 46, 48–50 (Mo.1976); ***448** *In the Matter of MacDowell,* 57 A.D.2d 169, 174, 393 N.Y.S.2d 748, 751 (1977); *Judicial Qualifications Commission v. Cieminski,* 326 N.W.2d 883, 886 (N.D.1982); *Matter of Cieminski,* 270 N.W.2d 321, 324 (N.D.1978).

In addition to the constitutional and ethical provisions which compel the prompt disposition of all civil actions, it should be noted that our rules of civil procedure anticipate that judges will act in a timely fashion. In this respect, the fundamental rule of construction governing our rules of civil procedure is that "They shall be construed to secure the just, speedy, and inexpensive determination of every action." W.VA.R.CIV.P. 1 (1982 Replacement Vol.). Finally, we note that several states have enacted constitutional or statutory provisions requiring judicial officers to dispose of court business within certain time frames. *See, e.g.* IDAHO CONST. art. 5, § 17 (1980) (thirty days); ARIZ.REV.STAT.ANN. § 11–424.02 (1983 Supp.) (sixty days); KY.REV.STAT.ANN. § 454.350 (Bobbs-Merrill 1983 Supp.) (ninety days); TENN.CODE ANN. § 20–9–506 (1980) (sixty days).

In the single Syllabus Point of *State ex rel. Cackowska v. Knapp,* 147 W.Va. 699, 130 S.E.2d 204 (1963), this Court stated:

> Mandamus will not lie to direct the manner in which a trial court should exercise its discretion with regard to an act either judicial or quasi-judicial, but a trial court, or other inferior tribunal, may be compelled to act in a case if it unreasonably neglects or refuses to do so.

See also Syl. pt. 2, *Kanawha Valley Transportation Co. v. Public Service Commission,* 159 W.Va. 88, 219 S.E.2d 332 (1975); Syl. pt. 2, *State ex rel. United Fuel Gas Co. v. DeBerry,* 130 W.Va. 418, 43 S.E.2d 408 (1947); Syl. pt. 1, *State ex rel. Buxton v. O'Brien,* 97 W.Va. 343, 125 S.E. 154 (1924); Syl. pt. 1, *Taylor County Court v. Holt,* 61 W.Va. 154, 56 S.E. 205 (1906); *Fleshman v. McWhorter,* 54 W.Va. 161, 163–64, 46 S.E. 116, 116 (1903); Syl. pt. 1, *Roberts v. Paull,* 50 W.Va. 528, 40 S.E. 470 (1901); *State ex rel. Wayne County Court v. Herrald,* 36 W.Va. 721, 728, 15 S.E. 974, 976 (1892); Syl. pt. 2, ****808** *Miller v. County Court,* 34 W.Va. 285, 12 S.E. 702 (1890); Syl. pt. 3, *State ex rel. Boggs v. County Court,* 33 W.Va. 589, 11 S.E. 72 (1890); *White v. Holt,* 20 W.Va. 792, 815 (1883).

In *Cackowska,* 147 W.Va. at 700–01, 130 S.E.2d at 205, this Court held that a delay of seventeen months in rendering a decision on a writ of error to an order of a county court affirming the final report of the commissioner of accounts in an estate matter was "unreasonable," and justified the issuance of a writ of mandamus commanding rendition of a decision. Therefore, in the present action, we concluded that a delay of thirty-three months between the initial hearing and the filing of this mandamus action in rendering a decision on the petitioner's motion for summary judgment and the defendants' motion to dismiss was also unreasonable, and justified commanding the respondent to render a final decision within thirty days of our April 2, 1984 order.

Writ granted.

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