

PENNSYLVANIANS FOR MODERN COURTS

REPORT AND RECOMMENDATIONS FOR IMPROVING PENNSYLVANIA'S JUDICIAL DISCIPLINE SYSTEM

APRIL 2017





*“An independent, fair, honorable and impartial judiciary
is indispensable to our system of justice.”*

*“Judges should uphold the dignity of judicial office at all times,
avoiding both impropriety and the appearance of impropriety
in their professional and personal lives. They should at all times conduct themselves
in a manner that garners the highest level of public confidence in their independence,
fairness, impartiality, integrity, and competence.”*

PREAMBLE TO THE PENNSYLVANIA CODE OF JUDICIAL CONDUCT (2014)

REPORT AND RECOMMENDATIONS FOR IMPROVING PENNSYLVANIA'S JUDICIAL DISCIPLINE SYSTEM

APRIL 2017

CONTRIBUTING EDITORS

Hon. Phyllis W. Beck

Laura Horton

Lynn A. Marks

W. Thomas McGough, Jr.

Maida R. Milone

Paul H. Titus

SPECIAL CONTRIBUTING EDITOR

Zygmunt A. Pines

SPECIAL ACKNOWLEDGEMENT TO OUR INTERNS

Garrett Cardillo

Jonathan Gilman

Manali N. Sangoi

SPECIAL THANKS

Cynthia Gray, National Center for State Courts

PENNSYLVANIANS FOR MODERN COURTS

Two Penn Center, Suite 1140, 1500 JFK Blvd., Philadelphia, PA 19102

Phone: (215) 569-1150 • Fax: (215) 569-9153

Email: info@pmconline.org • www.pmconline.org

TABLE OF CONTENTS

INTRODUCTION	1
TIMELINE OF JUSTICE JOAN ORIE MELVIN	4
NARRATIVE	
CRIMINAL CONVICTION AND REMOVAL OF JUSTICE JOAN ORIE MELVIN	5
THE “PORNGATE” SCANDAL	6
Justice Seamus McCaffery Implicated in the E-mail Scandal.....	6
THE McCAFFERY CONTROVERSY GENERATES NEW INVESTIGATIONS	9
THE 2014 INVESTIGATIONS AND EXORNERATION OF JUSTICE EAKIN: THE JCB AND JUDGE BYER	10
The Eakin Matter Redux: The 2015 Investigation and Prosecution of Justice Eakin	12
The Del Sole Report	13
The JCB Files Charges	15
EAKIN’S SUSPENSION HEARING	16
Conflicts of Interest.....	17
An Unorthodox Settlement Attempt	18
The JCB Asserts Confidentiality in the CJD	19
Eakin’s Resignation and CJD’s Decision	19
ATTORNEY GENERAL KANE’S EXIT	22
Release of the Attorney General’s Report	22
Coda	24

TABLE OF CONTENTS

RECOMMENDATIONS

1. APPOINTMENTS	25
A. Selection and Composition of the Nominating Committee	26
B. Transparency	27
C. Best practices	27
2. RECUSALS AND DISQUALIFICATIONS.....	28
Definitional clarity and practicality	29
Mandatory Disclosure and Reporting	30
Procedures for the Reporting and Documentation of Recusals	32
Procedures for Enforcement	32
Limited Confidentiality	32
Supreme Court	33
3. DISCIPLINARY LOOPHOLE	34
4. DISPOSITIONS: MONETARY SANCTIONS	36
5. INTERIM SUSPENSIONS	38
6. DISCIPLINE BY CONSENT	41
7. EDUCATION AND TRAINING	43
8. TRANSPARENCY AND CONFIDENTIALITY	45
9. THE CONSTITUTIONAL RESPONSIBILITIES FOR REGULATING JUDICIAL BEHAVIOR.....	47
A. Judicial Discipline and the Supreme Court	48
B. The Judicial Conduct Board and Judicial Discipline	51
C. The Supreme Court as the Ethical Leader.....	51
10. PUBLIC TRUST AND CONFIDENCE	53
Supreme Court and disciplinary bodies	54
Executive and Legislative Branches	55
Media, bar associations, good government groups, and scholars	55
CONCLUSION	56
ENDNOTES	57

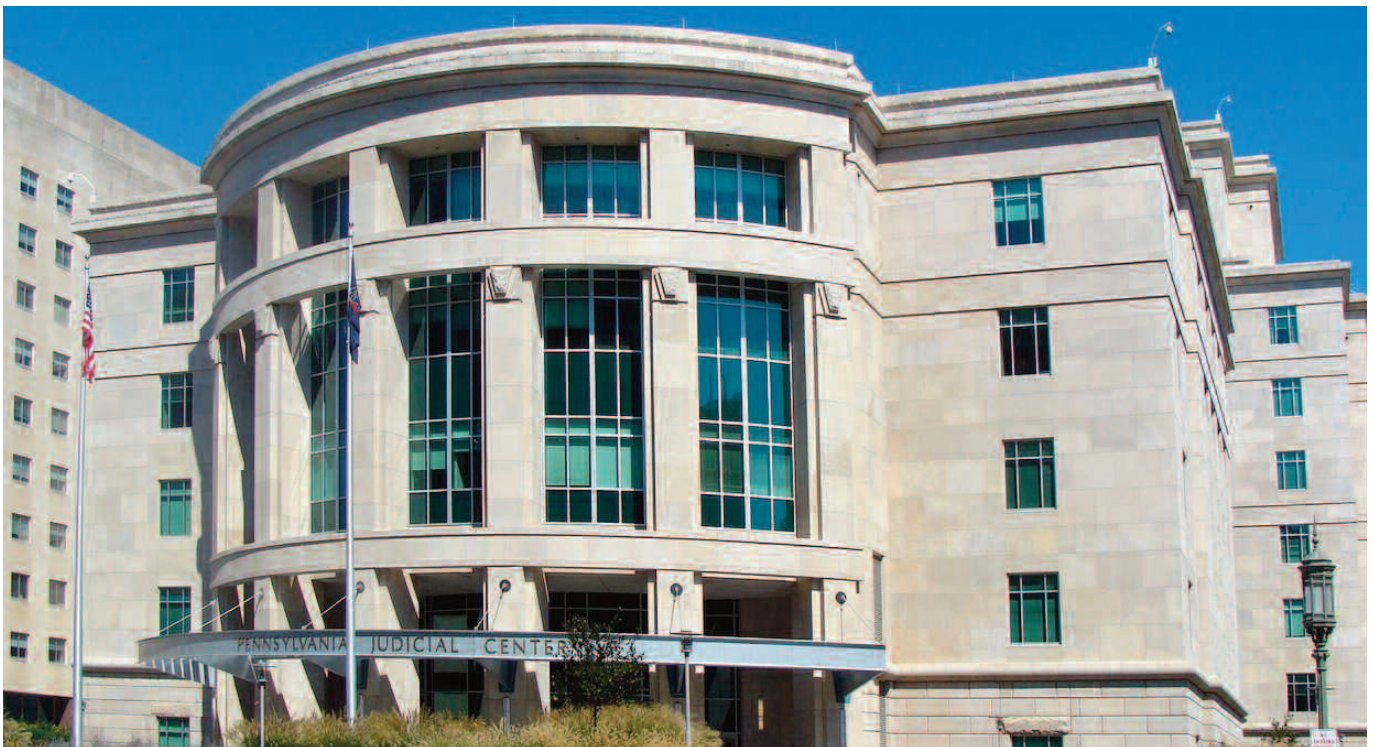
INTRODUCTION

There are over one thousand state jurists in Pennsylvania at many court levels: magisterial district, municipal, common pleas, intermediate appellate, and supreme. The overwhelming majority are diligent, competent, dedicated, and ethical.

Jurists are faced with the responsibility of applying the rule of law in matters affecting the life, liberty, and property of our citizens. Every day they face the difficult task of adjudicating competing claims in criminal, civil, and family law cases. They serve society by their leadership in valuable “therapeutic,” problem-solving court programs (e.g. veterans, drug treatment, mental health, dependency etc.) and various good works benefitting their communities. Our citizens look to our judges for wisdom and inspiration.

Judges are the ultimate guardians of the rule of law. As Alexander Hamilton observed in the *Federalist Papers*, “laws are a dead letter without the courts to expand and define their true meaning and operation.”¹ Fundamental to the exercise of such an extraordinary responsibility is the judiciary’s core value of integrity, a civic virtue that governs both the behavior of jurists and the processes of the legal system. Integrity is both personal and institutional.

Personal integrity, for example, is guided by detailed ethical codes that circumscribe a jurist’s conduct on or off the bench. Process integrity is similarly regulated by a vast and complex network of rules and procedures to foster the democratic values of due process, impartiality, equality, and fairness. To protect the judiciary’s moral core, the Pennsylvania Constitution has entrusted the Judicial Conduct Board, the Court of Judicial Discipline, and the Pennsylvania Supreme Court with the shared responsibility of oversight and enforcement.² If one looks at the three branches of government, one recognizes that the judiciary is distinctive in terms of its procedurally complex self-regulatory infrastructure governing conduct and processes.



Notwithstanding our ethical ideals, no human endeavor or system is perfect. Mistakes will be made and wrongs will be committed. The focus of this report is on the flaws and failures of individuals and entities within the context of judicial ethics and the judicial disciplinary system.

Over a year ago, Pennsylvanians for Modern Courts (“PMC”) perceived a need to re-examine Pennsylvania’s judicial disciplinary system even though we had issued a report on the subject just a few years ago in 2011. The catalyst for our concern was the on-going developments in the reported misconduct cases of three Supreme Court justices (Joan Orie Melvin, Seamus McCaffery, and Michael Eakin). These public examples of misconduct played out within a span of four years. In the public arena, the actions of these justices, and other jurists involved in misconduct, represented disturbing high-profile judicial scandals that tarnished the image of the judicial system. From a state or national perspective, such collective misconduct was rightfully viewed as stunning and unprecedented.³

Pennsylvania, it should be noted, has not been a stranger to judicial scandals. A few notorious examples come to mind.

There was the cash gifts-to-judges scandal in 1988, referred to as the “Roofers Scandal,” involving eight trial judges who received cash gifts (ranging from \$200 to \$500) from a labor union.⁴ Later, in the early 1990s, Supreme Court Justice Rolf Larsen was criminally convicted, impeached, and removed from judicial office regarding his possession of a controlled substance.⁵ In 2011, two trial judges from Luzerne County were exposed in a kids-for-cash scandal in which hundreds of minors were essentially put on a judicial conveyor belt and, as documented in a report by the Interbranch Commission on Juvenile Justice, heartbreakingly separated from their families without any semblance of due process.⁶ And in 2014-15 a widespread scandal, involving judges who gave “special consideration” to litigants charged with traffic offenses, led to the federal trial and convictions of seven jurists and the eventual abolition of Philadelphia Traffic Court by legislation and constitutional amendment.⁷ Much has already been written about all these events.

What made the recent scandals so noteworthy was that the Orie Melvin-McCaffery-Eakin matters exposed not only the misbehavior of our highest judicial officials, but also some significant process issues within Pennsylvania’s judicial disciplinary system as administered by the Judicial Conduct Board, the Court of Judicial Discipline, and the Supreme Court. Having witnessed these demoralizing events, which were intensely followed and reported by the media, we determined that there was a compelling need to assess what was happening in Pennsylvania’s judicial system. Hence, this report.

Our study is rooted in the realities of recent events. The report begins with a chronologically-focused factual narrative of Pennsylvania’s three recent judicial scandals, especially the public saga of Justice Eakin. This detailed narrative is intended to establish an historical record and context for the subsequent commentaries and ten specific recommendations for reform. The objective is to shed light on our judicial disciplinary culture. We explore how *individual* and *institutional* integrity within the judicial disciplinary process can be cultivated through the supporting values of ethical behavior (personal and official), impartiality, accountability, openness, transparency, and fairness. Recent events demonstrate how important these values are.

It is worth noting that this report does not address a goal that we have strongly supported for many years, namely, the merit appointment of Pennsylvania’s jurists. Our support for merit selection remains steadfast for many good reasons. But we recognize that the method of judicial selection is no guarantee for ethical conduct or fair processes. The system of judicial discipline is clearly a distinct subject of concern.

Lastly, the recommendations herein propose reforms that can be achieved by rules or, if necessary, by statute. We do not diminish the importance of constitutional reform and leave the door open for that possibility. We decided that the predominant focus should be on reforms that can be implemented by the Judicial Conduct Board, the Court of Judicial Discipline, and the Supreme Court. The options for meaningful reform, for now, are left largely in their hands.

We thus proceed to the factual narrative.



TIMELINE OF JOAN ORIE MELVIN

JANUARY 8, 2010

Joan Orie Melvin begins her first 10-year term with the Pennsylvania Supreme Court

MAY 18, 2012

Justice Melvin is indicted and charged with multiple felonies stemming from her illicit use of Commonwealth-paid employees to perform campaign work for her

The Supreme Court issues an order sua sponte relieving Justice Orie Melvin of any and all jurisdictional responsibilities as a justice

The Judicial Conduct Board (JCB) files a petition with the Court of Judicial Discipline (CJD) for an interim order of suspension

MAY 22, 2012

The CJD enters an interim order suspending Justice Melvin with medical benefits

JUNE 7, 2012

The CJD decides that Melvin's suspension should be without pay

FEBRUARY 21, 2013

An Allegheny County jury finds Melvin guilty of three counts felony theft, one count of felony conspiracy, and two misdemeanor charges

MAY 1, 2013

Melvin resigns from the Supreme Court

MAY 7, 2013

Melvin sentenced to three years of house arrest followed by two years of probation, ordered to perform community service and pay over \$180,000 in fines and restitutions

MAY 21, 2013

Melvin files appeal to Pennsylvania Superior Court

OCTOBER 28, 2014

Melvin drops the appeal of her conviction

JANUARY 17, 2015

Melvin is disbarred

AUGUST 14, 2015

The CJD removes Melvin from judicial office and holds her to be ineligible for future judicial office

NARRATIVE¹

CRIMINAL CONVICTION AND REMOVAL OF JUSTICE JOAN ORIE MELVIN



Joan Orié Melvin was elected to the Supreme Court of Pennsylvania for a ten-year term beginning on January 8, 2010. She previously served on the Superior Court of Pennsylvania from 1998 until 2009. She had run unsuccessfully for the Supreme Court in 2003.

On May 18, 2012 Justice Melvin was indicted and charged with multiple felonies stemming from her illicit use of Commonwealth-paid employees to perform campaign work for her.

On May 18, 2012, the Supreme Court (“Court”), noting the “compelling and immediate need to protect and preserve the integrity of the Unified Judicial System and the administration of justice,” issued an order *sua sponte* (on its own) relieving Justice Orié Melvin of any and all jurisdictional responsibilities as a justice and directed her to not take any further administrative or judicial action whatsoever in any case or proceeding.²

On May 18, 2012, the Judicial Conduct Board (“JCB”) filed a petition with the Court of Judicial Discipline (“CJD”) for an interim order of suspension. On May 22, 2012, the CJD entered an interim order suspending Justice Orié Melvin with medical benefits and deferred a decision as to the continuation of the justice’s salary. Following hearings in June and August of 2012, the CJD ordered that Justice Melvin’s interim suspension, based on the totality of circumstances, should be without pay.

On February 21, 2013, on the criminal front, an Allegheny County jury found Melvin guilty of three felony counts, one felony count of conspiracy, and two lesser misdemeanor counts.

Melvin resigned from the Supreme Court on May 1, 2013.

Following her conviction, Melvin was sentenced to and ordered to perform community service and pay a fine of \$55,000 and restitution of \$127,979.97. (Melvin’s two sisters, one her judicial secretary and the other a Pennsylvania state legislative representative, were also convicted and sentenced for similar theft of services crimes.)

In January of 2015, Melvin was disbarred upon consent. Finally, on August 14, 2015, after discontinuing the appeal of her sentence, former Justice Orié Melvin was removed from judicial office by the CJD and held to be ineligible for future judicial office.

THE “PORNGATE” SCANDAL

During her review of the Gerry Sandusky child sex abuse prosecution in 2014, the then-Attorney General of Pennsylvania, Kathleen Kane, discovered that employees from the Office of Attorney General (“OAG”) had sent hundreds of sexually explicit e-mails on state-owned computers during work hours. At that time, Kane was in her second year of her first term as Pennsylvania’s chief law enforcement officer.

In late September and early October of 2014, Kane released some of these e-mails to the public, igniting a scandal that later came to be known as “Porngate” in the media. At the time, the e-mails were described as involving pornographic images shared among prosecutors, defense lawyers, law enforcement, and judges.

Eventually, further revelations about the content of those e-mails and the friendly circle of senders-recipients would travel to the doorstep of the Supreme Court of Pennsylvania.



Justice Seamus McCaffery Implicated in the E-mail Scandal

Seamus McCaffery was elected to the Pennsylvania Supreme Court in 2007. He had previously served for twenty years in the Philadelphia Police Department before being elected a Philadelphia Municipal Court judge in 1993, where he gained notoriety for his role in presiding at the “Philadelphia Eagles Court” held at the Veterans Stadium. At the time of his election to the Supreme Court, McCaffery was a jurist on the intermediate appellate court, the Pennsylvania Superior Court, having been elected in 2003.

McCaffery’s involvement in the exchange of sexually explicit e-mails surfaced in early October 2014 when local news outlets reported that McCaffery had sent and received hundreds of pornographic e-mails between late 2008 and mid-2012. At the time, McCaffery had already been the focus of negative media publicity. Prior to the e-mail revelations, there was a series of articles between March and August 2013 about fees that McCaffery’s wife (employed by McCaffery as his chief assistant) had allegedly received for the referral of clients to plaintiffs’ personal-injury law firms. It was also disclosed, at the time, that the FBI had begun an investigation. (When the FBI later completed its investigation, no criminal charges were brought.)

T I M E L I N E

JANUARY, 2008

McCaffery begins his first 10-year term with Pennsylvania Supreme Court

JANUARY, 2012

J. Michael Eakin begins his second ten-year term on the Supreme Court of Pennsylvania

MARCH-AUGUST 2013

Articles about fees McCaffery’s wife (employed by him as his chief assistant) had allegedly received for referral of clients to plaintiffs’ personal injury law firms

FBI had begun investigation (no criminal charges were brought)

OCTOBER 17, 2014

Chief Justice Castille obtained the email messages and publicly revealed that McCaffery exchanged 234 emails with more than 1,500 sexually explicit photos or videos between 2008 and mid-2012

Following these e-mail revelations, the Pennsylvania Supreme Court began an internal investigation on its own initiative.

Chief Justice Castille, who displayed an increasingly acrimonious relationship with his colleague McCaffery, demanded that Attorney General Kane allow the Court to review any e-mails between the courts and the OAG for any signs that justices might have been involved. Despite some resistance, on October 15, 2014, Chief Justice Castille obtained the e-mail messages and publicly revealed that his colleague, Justice McCaffery, had exchanged 234 email messages containing more than 1500 sexually explicit photos or videos between 2008 and mid-2012. No other justices were identified as having received or sent any e-mails containing sexually explicit material, although it was later revealed that McCaffery had sent offensive e-mails to other justices, judges, and court administrators.

A coalition of legal and civil rights groups recommended the release of all e-mail traffic between justices and prosecutors, not just messages with sexually explicit material, to address concerns of whether there existed too close a camaraderie between jurists and prosecutors, a concern that took on increasing importance and publicity during the subsequent disciplinary investigation of Justice Eakin. Chief Justice Castille also called for the release of all e-mails involving all jurists, not just justices, to determine whether there were improper relationships between judges and prosecutors.

The Supreme Court decided to take action. On October 20, 2014 the Supreme Court issued a *per curiam* (i.e., on behalf of the court) opinion and ordered a temporary suspension of their colleague, Justice McCaffery. There was no separate hearing or formal evidential record preceding the Court's action. (The Court's order noted that Justices Eakin and McCaffery did not participate in the matter.)

The Supreme Court's interim suspension order referred to "circumstances, which have been the subject of intense media attention" that have had a great impact upon the integrity of the judicial system. The order offered a litany of allegations, stating: "Justice McCaffery may have improperly contacted a Philadelphia traffic-court official in connection with a traffic citation issued to his wife; Justice McCaffery may have acted in his official capacity to authorize his wife to accept hundreds of thousands of dollars in referral fees from plaintiffs' firms while she served as Justice McCaffery's administrative assistant; and Justice McCaffery may have attempted to exert influence over a judicial assignment on the Philadelphia common pleas bench outside the scope of his official duties." As was noted previously, many of these allegations had been circulating in the press for a considerable time, but there was no public indication that the JCB was investigating these matters or planning to file charges because of confidentiality constraints.

TIMELINE

OCTOBER 17, 2014

Eakin provided the JCB with a "self-report" letter that released to the media after McCaffery threatened and released some of Eakin's emails due to Eakin's failure to comply with McCaffery's deadline and demand

JCB issues statement that confirmed receipt of the "self report" letter from Eakin

OCTOBER 20, 2014

Supreme Court engages former judge, Robert L. Byer, as Special Counsel to review any e-mail messages between any justices and members of the OAG staff from 2008-2012 per administrative order No. 430, Judicial Administration Docket

Supreme Court issued a *per curiam* opinion ordering temporary suspension of McCaffery. No separate hearing or formal evidential record preceding Court's action

The Court’s opinion further noted: “More recently, Justice McCaffery has publicly accepted responsibility for exchanging hundreds of sexually explicit e-mails with a member or members of the Office of Attorney General, which surfaced in the course of the Attorney General’s review of the handling of the Gerald Sandusky investigation. It also appears that e-mails sent and received by Justice McCaffery were circulated amongst others within the Office of Attorney General.”



The Court further addressed, in a general manner, the nature of the sexually explicit materials, stating: “According to the Chief Justice of Pennsylvania’s review of some of the e-mails in question and attachments to them, the material is extremely disturbing. In this regard, the Chief Justice has indicated that some pictures and videos in the e-mails and attachments depict explicit sexual acts and these and/or others contains highly demeaning portrayals of members of various segments of the population, including women, elderly persons, and uniformed school girls.”

Going beyond the e-mail controversy, the Court identified another basis for its action, as follows: “Finally, in a report submitted by Justice Eakin to the Judicial Conduct Board, Justice Eakin has asserted that Justice McCaffery importuned him to urge the Chief Justice to retract a statement of his review of the material received from the Attorney General’s Office, or, alternatively, materials embarrassing to Justice Eakin would be released to the media.”

The Court’s order of suspension did not affect McCaffery’s judicial compensation and was issued without prejudice to the ability of the Court of Judicial Discipline “to modify the terms of suspension relative to judicial compensation, should formal charges be filed.”

Chief Justice Castille, who had made a public disclosure of McCaffery’s e-mails and was months away from mandatory retirement, filed a caustic concurring opinion.

TIMELINE

OCTOBER 27, 2014

McCaffery resigned his seat on the Supreme Court.
The JCB dropped its investigation in exchange for McCaffery’s pledge not to seek senior judge status or run for judicial office again. No formal judicial charged were filed against him

As a result of the resignation and arrangement, McCaffery was able to keep his pension (estimated \$11,000/month), which might have influenced his resignation

NOVEMBER 5, 2014

Investigators from the Judicial Conduct Board receive and review emails submitted by the Office of the Attorney General to determine if any misconduct occurred on the Supreme Court

Eakin self-reported to JCB, claiming that Justice McCaffery threatened to release emails showing Eakin’s involvement in the exchanges

The investigation looked at emails from 2008-2012. Emails were reviewed at OAG, and a CD containing the emails was handed over

Justice Todd issued a brief dissenting opinion on due process grounds regarding the interim suspension order, stating that the Court should have directly referred the matter to the Judicial Conduct Board for investigation, rather than acting on its own to suspend McCaffery. Citing the absence of findings regarding credibility and the merits of the unvetted allegations, Todd's dissent ended with the observation: "Even a Justice is entitled to due process."³

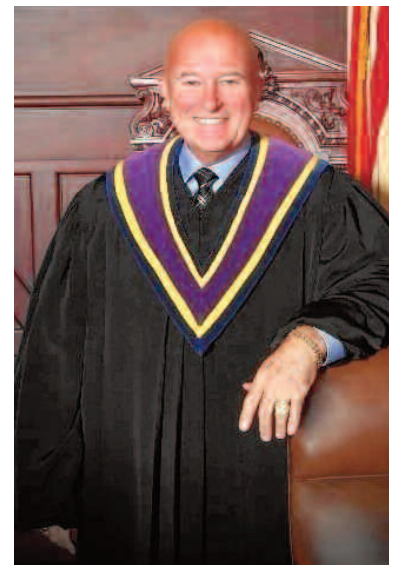
The day after the Court's suspension order, a spokesperson for the courts acknowledged that McCaffery and his staff were asked to surrender immediately all court equipment. McCaffery was also informed that his home Internet account, provided by the Court as a professional courtesy and convenience to him and other justices, would be shut down.

The McCaffery scandal had a speedy resolution. On October 27, 2014, McCaffery resigned his seat on the Supreme Court. The JCB dropped its investigation of McCaffery reportedly in exchange for McCaffery's pledge not to seek senior judge status or run for judicial office again. No formal judicial disciplinary charges were filed against McCaffery. As a result of McCaffery's resignation and arrangement with the JCB, he was able to keep his pension, estimated to be \$11,000/month, which may have been a significant bargaining chip in influencing McCaffery to resign.

THE MCCAFFERY CONTROVERSY GENERATES NEW INVESTIGATIONS

The pornography scandal that culminated in the Supreme Court's suspension and resignation of McCaffrey paved the way for further investigations that would produce profound and unanticipated developments.

First, pursuant to the suspension order, the Supreme Court directed the JCB to determine, on an emergency basis within 30 days, whether there is or is not probable cause to file formal misconduct charges against McCaffery regarding any allegations against him. The Court ordered the JCB to issue a public report if it is unable to perform "its constitutionally prescribed duties in a timely fashion." Furthermore, the Court ordered the JCB to file a report with the Court if the JCB concluded that probable cause to file charges was lacking. To effectuate the Court's order, the Court directed the JCB to obtain copies of the e-mails and related offensive materials from the Office of Attorney General.



T I M E L I N E

DECEMBER 8, 2014

Chief counsel of the JCB concludes investigation of Eakin and makes a recommendation to the JCB

DECEMBER 10, 2014

OAG makes more emails available to JCB

These emails were discovered after the Nov. 5 disk was created

DECEMBER 17, 2014

JCB sends letter to Eakin calling him a "passive recipient"

JCB dismisses both charges against him

Second, in accordance with the McCaffery suspension order, Robert L. Byer, formerly a jurist on the Commonwealth Court (one of Pennsylvania’s two intermediate appellate courts), was retained by the Supreme Court as “special counsel” to commence an investigation into the e-mail controversy. According to press reports, Byer was directed by soon-to-be Chief Justice Thomas Saylor to investigate three issues: (1) whether the e-mail messages contained pornography; (2) whether they revealed improper discussions between justices and lawyers regarding cases; and (3) whether the communications suggested that justices should have recused themselves from any cases.

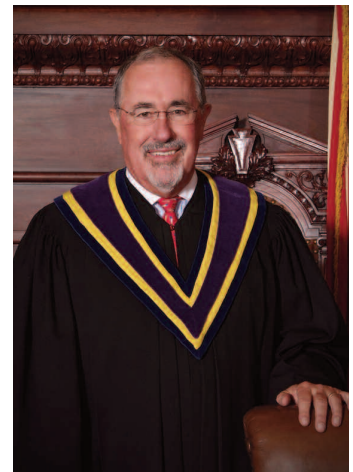
These investigations would eventually lead to an examination of Justice Eakin’s role in the expanding e-mail controversy.

THE 2014 INVESTIGATIONS AND EXONERATION OF JUSTICE EAKIN: THE JCB AND JUDGE BYER

Before being elected to a ten-year term on the Supreme Court of Pennsylvania in 2001, Michael Eakin served as the district attorney for Cumberland County from 1984 to 1995. Prior to his elevation to the Supreme Court, he served on the Pennsylvania Superior Court, having been elected in 1995. During his term on the Supreme Court, Justice Eakin was given the responsibility of serving as a liaison justice for the judiciary’s computer technology.

As noted in the Supreme Court’s suspension order, McCaffery contacted Justice Eakin and threatened him with the release of e-mails involving Eakin’s private e-mail account. As later recounted by the JCB, McCaffery told Eakin that “he was not going down alone.” After Eakin failed to comply with McCaffery’s deadline and demand, e-mails from Eakin were leaked to the media. The next day, on October 17, 2014, Justice Eakin provided the board with a “self-report” letter⁴, which was released to the media. Eakin and McCaffery also engaged in finger-pointing, contradictory press releases.

Based on Eakin’s self-report letter to the JCB, as well as the Supreme Court’s directive to the JCB in the McCaffery suspension order, the JCB launched another investigation of Eakin, interviewing Eakin, issuing subpoenas to the Office of the Attorney General (“OAG”) and, in turn, receiving 48 e-mails existing on OAG’s servers that were sent or received by Eakin’s “John Smith” e-mail account. The JCB also received



T I M E L I N E

DECEMBER 19, 2014
Byer submits his Special Counsel report to the Supreme Court. As to Justice Eakin, Byer found the e-mails “unremarkable” and found nothing improper by Eakin

SEPTEMBER 11, 2015
Philadelphia Daily News requests copies of Eakin’s emails.
OAG rejects the request, but reexamines the evidence

SEPTEMBER 21, 2015
SC suspends AG Kane’s law license. All five justices, including Eakin, participate in the decision

SEPTEMBER 28, 2015
AG Kane sends letter to chair of JCB and Chief Justice Saylor with disc of e-mails involving Justice Eakin

OCTOBER 1, 2015
AG Kane arrested on new perjury charge

e-mails from Eakin’s government e-mail addresses, although these were later found not to contain any inappropriate content.

On December 8, 2014, the JCB’s chief counsel Robert Graci presented the results of the Eakin investigation to the JCB for a vote to determine if formal disciplinary charges should be filed.

Background information about Graci became an important and relevant factor in the progress of the Eakin e-mail story. Appointed in 2012, Robert A. Graci, a former Superior Court judge, was responsible for managing and supervising the JCB’s office, investigations, and allocation of investigatory resources. Although not disclosed until later, Graci had reportedly worked for Eakin on Eakin’s 2011 Supreme Court retention election as the campaign’s lawyer-spokesperson. Eakin was also acknowledged to be a long-time friend of Graci.

The JCB assessed its investigatory information and declined to bring formal disciplinary charges against Eakin. According to press reports, Graci described the dozens of e-mails as “mildly pornographic and sexually suggestive.” On December 19, 2014, Graci sent a letter to Eakin informing him of the dismissal of the charges and thanking him for his cooperation in the investigation.

The 2014 investigation of Eakin by the JCB is noteworthy in one particular respect. It was eventually learned (and confirmed by the JCB’s filing on December 22, 2016 in the Court of Judicial Conduct) that Eakin did not give any statements under oath when he was interviewed (without counsel) on three occasions by the JCB.

Two days after the JCB informed Eakin of its conclusion of the disciplinary matter, special counsel for the Supreme Court, Robert Byer, submitted his independent report to the Court in response to the instructions he was reportedly given regarding the scope of the investigation.

Byer found the e-mail exchange among the justices and OAG staff to be “unremarkable.” Specifically, with respect to the e-mails reviewed, Judge Byer found: (1) there were no e-mails of an improper nature sent by any justices to any representative of the OAG or from any representative of the OAG to any justice; (2) none of the e-mail messages contained any discussion of or related to any case in the Pennsylvania judicial system; (3) there was no reason for recusal of any justice regarding the e-mail communications; and (4) the e-mail communications revealed no improprieties of any judge of any other court. The only pornographic e-mails were found to have been sent by McCaffery but did not involve other justices. Byer found nothing of an improper nature, although he noted there was one e-mail message sent to Justice Eakin that contained offensive sexual content.

T I M E L I N E

OCTOBER 2, 2015	OCTOBER 9, 2015	earlier dismissal of the charges against Justice Eakin were based on incomplete evidence
Justice Eakin promises full cooperation with new review	Daily News obtains some emails sent and received by Justice Eakin and publishes a summary of each email.	
Pa Supreme Court hires outside counsel, former Superior Court Judge Joseph Del Sole, to review emails	Source of this leak remains anonymous	JCB launches a new investigation (investigation no. 2015-601) into the emails
Del Sole previously represented Kane	JCB issues statement that, since the emails submitted by Kane and summarized by Daily News were not included in the original group, their	

Following receipt of Byer's report, the Supreme Court did not take any action against Eakin.

The Eakin Matter Redux: The 2015 Investigation and Prosecution of Justice Eakin

The catalyst for the "Porngate" controversy, Attorney General Kathleen Kane, became herself the target of a separate criminal investigation. In August 2015, Kane was charged with perjury regarding statements leaked from an unrelated grand jury investigation. This sensational twist added another layer of controversy and difficulty in the on-going development of the e-mail investigation, which had already resulted in the firing or departure of high-ranking officials in the executive branch.

On September 21, 2015, the Supreme Court unanimously voted to suspend Kane's law license. All five justices, including Justice Eakin, voted to suspend her law license on an emergency temporary basis.⁵

The media reported that Kane had directed her office to engage in a comprehensive review of all e-mails sitting on the OAG servers purportedly to comply fully with the Right to Know Law requests from the media.

On September 28, 2015, Kane sent a letter to the then-JCB chair, Jayne Duncan (a magisterial district judge), and Chief Justice Saylor. The letter was accompanied with a disc titled "John Smith." The disc contained more e-mails sent by Eakin from the John Smith e-mail account from 2008.⁶

Kane decided to make some of Eakin's e-mails public. The media reported that the new batch of e-mails went beyond sexually explicit content and contained offensive and inappropriate communications to a senior deputy attorney general that joked about African-Americans, Hispanics, Muslims, women, and sexual minorities. Kane publicly questioned why the JCB had exonerated Eakin last year.

These new disclosures ignited another round of investigations and unrelenting sensational media coverage that exposed offensive banter regarding women and minorities.

In response to the disclosures and intense media coverage, the Supreme Court issued a statement saying: "Members of the Supreme Court are disturbed by the content of the e-mails, as reported by the media." Stating that it had retained a lawyer to review the e-mails and make a report, the Court said that it "aspires to maintain the highest ethical standards and the trust and confidence of the public at large."

On October 1, 2015, Kane was arrested on a new charge of perjury.

T I M E L I N E

OCTOBER 12, 2015

The Supreme Court issues a statement that they are "disturbed" by Justice Eakin's emails and that it has retained a lawyer (former Judge Joseph Del Sole) to review the e-mails

OCTOBER 13, 2015

Justice Eakin apologizes for insensitive emails. He criticizes their release to the Daily News

OCTOBER 30, 2015

Del Sole provides Supreme Court with his report recommending against SC's intervention but recommending referral to JCB

OCTOBER 19, 2015

JCB makes Dec. 17, 2014 letter to Justice Eakin public

NOVEMBER 2, 2015

SC adopts Del Sole's report. Justices Todd and Stevens issue separate public statements

The Del Sole Report

The Supreme Court decided to undertake its own separate investigation of Justice Eakin, this time hiring Joseph Del Sole, a practicing attorney in Allegheny County.

Del Sole, an experienced and respected jurist, served on Pennsylvania's intermediate appellate court, the Superior Court, as judge and president judge. On the Superior Court he was a colleague of both Eakin and Saylor (who defeated him in the 1997 race for the Supreme Court). Del Sole also had valuable experience with Pennsylvania's judicial disciplinary process, having once served as chair of the JCB. And, in an interesting side story, Del Sole had represented Kane in the Supreme Court in her 2015 legal challenge to the appointment of a special prosecutor regarding her alleged grand jury leaks.

Del Sole completed his review and issued a 26-page report, revealing that Eakin received 786 e-mails on his John Smith account, a substantial number of which contained sexually explicit materials, such as pictures of nude women or videos of sexual intercourse, racially insensitive jokes, and comments disparaging women and minorities.

The report explicitly noted, however, that Eakin sent or forwarded multiple e-mails that were chauvinistic and offensive to women or contained nude pictures. The report found those e-mails to be "offensive, tasteless, insensitive, juvenile and repugnant to reasonable sensibilities." The report distinguished the received messages from the 157 e-mails that Eakin sent from his John Smith account. With regard to the e-mails sent by Eakin, the report found nothing pornographic. Del Sole's report further noted that his "review of the e-mails sent from Justice Eakin's account revealed nothing that can be characterized as racist, homophobic or otherwise discriminatory toward any group (other than the gender-related issues previously discussed)."

Del Sole's report noted that the e-mails reviewed differed in number and content from those previously submitted to Byer for his review. Del Sole expressed his belief that the circumstances of the McCaffery case were dissimilar and involved circumstances "far broader than the transmission of inappropriate e-mails." Del Sole stated that none of the e-mails revealed illegal activity or conduct that could be viewed as undermining the sanctity of the judicial process.

Ultimately, Del Sole concluded that the e-mails he reviewed did not constitute evidence of extraordinary circumstances warranting immediate exercise of the Supreme Court's extraordinary supervisory powers. He recommended that the JCB should be allowed the opportunity to conduct a thorough investigation to

T I M E L I N E

NOVEMBER 11, 2015

Daily News and Associated Press report Robert Graci, chief counsel for the Judicial Conduct Board, is a 'longtime Eakin friend' who worked on his retention election campaign in 2011

NOVEMBER 16 2015

Senator Anthony Williams calls for resignations from Justice Eakin and first deputy attorney general Bruce Beemer, and the removal of Robert Graci from the Judicial Conduct Board

NOVEMBER 19 2015

Justice Eakin releases statement through attorney William C. Costopoulos, calling for the investigation to be moved from the Judicial Conduct Board to the Court of Judicial Discipline

resolve whether Eakin’s conduct violated the applicable rules and canons of judicial conduct. The cost of the review and report was \$88,000.

On November 2, 2015, the Supreme Court adopted Del Sole’s recommendation and issued a statement that deferred the Eakin matter for JCB’s consideration.

Justices Todd and Stevens attached statements. Justice Todd stated that she was disappointed and offended, both personally and professionally, by much of the content of the e-mails that contained offensive images, comments, and “jokes” as well as by the derogatory stereotyping and mocking of racial,

ethnic, and religious groups, and gays and lesbians. Justice Stevens noted that one could reasonably conclude that the JCB did not fully investigate the matter a year ago when it had the opportunity to do so. Both Todd and Stevens urged a thorough investigation of the e-mails by the JCB. Stevens cautioned that the JCB should “not minimize or sanitize the seriousness of the matter.”

In statements to the press, former Chief Justice Castille repeated his call for the appointment of a special independent prosecutor with full investigatory authority to sort out the e-mail scandal. He called the prior investigations a “whitewash.” Others, such as Pennsylvanians for Modern Courts and The Philadelphia Inquirer, called for the appointment of a special prosecutor or master to fully and objectively investigate and publicly report. State Senator Anthony Williams (Philadelphia), for example, called for the resignation of Eakin and those who had reviewed Eakin’s e-mails. He said: “This is not Porngate, this is hategate.”

Examples of offensive content that was received by Justice Eakin included:

- Emails with purported jokes making light of rape and sexual assault. For example, a “motivational poster” with a photograph of an unconscious college-age woman with the caption “Alcohol: Thank you, Mr. Daniels. Thank You, Mr. Guinness. Muchas Gracias, Señor Tequila.” The same email included other offensive “motivational posters.” Another email had a joke which referred to asking a woman to smell a chloroform laced rag as a “pick-up line.”
- Emails with negative stereotypes of African-Americans. These included purported jokes and short videos;
- Emails demeaning to Latinos and in particular to Mexican immigrants. One video depicted a person who claimed to need day-laborers loading a truck full of Latino men and driving them at high speed over a rough road to an INS office;
- Emails with jokes offensive to Muslims; and
- Emails with jokes offensive to homosexuals.

Screenshot of the Del Sole Report

TIMELINE

NOVEMBER 24 2015

Judicial Conduct Board issues response to Justice Eakin statement asking for investigation to be moved to Court of Judicial Discipline, stating that immediate removal of the matter to the Court of Judicial Discipline is not possible under current guidelines, and assuring Eakin’s attorney that the investigation is nearly complete

DECEMBER 5, 2015

Philadelphia Inquirer reports that Justice Eakin participated in ploy to install a new appointee to the Court of Judicial Discipline to “pack the court” in his favor. (Nomination was promptly withdrawn by Chief Justice Saylor upon publication of the news item)

Inquirer publishes new e-mail chain between Justice Eakin and Jeffrey Baxter, a prosecutor in the Attorney General’s office, planning their visits to strip clubs

Governor Wolf issues statement calling for Justice Eakin’s resignation

Costopoulos says that Justice Eakin will not step down

The JCB Files Charges

On November 19, 2015, through his counsel, Eakin proposed that the Judicial Conduct Board should abort its second investigation of his e-mails and refer the matter directly to the Court of Judicial Discipline. The Philadelphia Inquirer termed the proposal an arrogant and senseless effort to dictate the terms of his own investigation. The media made a startling accusation by reporting that Eakin was implicated in a “ploy” to influence the disciplinary process, discussed *infra*.

These developments and the growing public criticism were, in a sense, an important inflection point in the Eakin story.

On December 5, 2015, Governor Tom Wolf called on Justice Eakin to resign and, through his spokesperson, decried any attempt to rig the disciplinary result. Eakin’s lawyer responded that the justice had no intention of stepping down. The Philadelphia Inquirer called for the removal of Eakin and for the appointment of a special prosecutor.⁷

A critical event in the disciplinary process occurred on December 8, 2015 when the JCB filed a formal complaint in the CJD alleging that Eakin exchanged lewd and offensive e-mails containing remarks demonstrating racial, gender, ethnic, and sexual orientation bias. The complaint said Eakin had “engaged in conduct so extreme that it brought the judicial office into disrepute.” Eakin’s counsel defended the conduct as “male banter” and “locker room talk with the boys.”

Others interjected themselves into the controversy. Three days before Eakin’s upcoming CJD hearing, the entire trial court bench (6 judges) of Cumberland County, Eakin’s home county, sent a letter to the CJD. Although the letter did not directly or impermissibly vouch for Eakin’s character, it came perilously close to what others saw as an ethical borderline. The judges’ letter expressed their concern about the prospect of a jurist being disciplined for private e-mails.

T I M E L I N E

DECEMBER 8, 2015

Judicial Conduct Board formally files misconduct charges against Justice Eakin, requiring him to face disciplinary hearing in the CJD

Justice Eakin issues statement reiterating his cooperation with the JCB and his dedication to transparency

Complaint notes Chief Counsel Graci’s recusal in the JCB’s investigation and deliberations regarding the filing of the complaint and also notes JCB member Dooley’s abstention

DECEMBER 9, 2015

Judge Jack Panella assigned to hear Justice Eakin’s judicial misconduct case

State Senators Anthony Williams and Judy Schwank introduce proposal intended to eliminate Supreme Court as a constitutional appointing authority for the judicial disciplinary system

EAKIN’S SUSPENSION HEARING

A panel of the Court of Judicial Discipline conducted its hearing on December 18, 2015.

The presiding jurist, Judge Jack Panella (a Superior Court judge who ran unsuccessfully in 2009 for a Supreme Court seat against his colleague Judge Orié Melvin), went on record to castigate the Cumberland County judges for having sent the aforementioned letter.

At the hearing, Eakin tearfully apologized for exchanging the e-mails and said that he had been the victim of a “media circus.” The justice pleaded with the court not to suspend him. A prominent ethics expert, Sam Stretton, testified on behalf of Eakin and said that, in his professional view, the justice did not violate judicial canons. Deputy chief counsel for the JCB, Francis Puskas, argued that suspending Eakin was necessary to protect the integrity of the Court and give the public confidence that it operates without bias. He told the CJD: “There is something horribly wrong in the air and this court must clear it.”

The CJD decided the matter promptly. On December 22, 2016, the CJD suspended Eakin of his judicial and administrative duties. The suspension was with pay and medical benefits.

In its statement of reasons, the CJD noted that it had “ordered a hearing in the case to ensure that the due process rights of the Respondent [Eakin] were honored.” As in the Justice Orié Melvin case, the CJD re-affirmed the principle that the presumption of innocence did not apply at the interim stage and that its review would be based on the “totality of circumstances” as to whether the suspension should be with or without pay.

Noting that Eakin’s e-mails, which occurred on government-issued equipment, had become infamous and the subject of numerous newspaper articles, the CJD concluded that Eakin’s actions had tainted the Pennsylvania judiciary in the eyes of the public. Until the trial on the merits, the court determined that the integrity of the Pennsylvania judiciary continued to be the subject of disrespect, thus leaving the court with suspension as the only means to ensure the public’s confidence. The suspension order continued Eakin’s benefits and salary (\$203,409/yr.). The CJD did not provide a specific explanation about its reasons for the continuation of Eakin’s salary other than to refer to the facts of the case and the totality of circumstances standard.⁸

Trial was scheduled for March 29, 2016.

T I M E L I N E

DECEMBER 10, 2015

Judicial Conduct Board issues order scheduling a hearing for December 21st, 2015, and requiring Justice Eakin to “show cause why he should not be suspended as a Justice of the Supreme Court of Pennsylvania”

DECEMBER 16, 2015

Justice Eakin files answer and new matter with the Court of Judicial Discipline admitting to many charges contained in the Judicial Conduct Board’s initial complaint but denying that his actions were violations of the prior Code of Judicial Conduct and the Pennsylvania Constitution

Justice Eakin’s lawyers issue a statement saying that the questionable emails were never meant to be public and did not contain pornography

Prosecutors in an unrelated case accuse Kathleen Kane and her twin sister Ellen Granahan of receiving emails that were similar in content and impropriety to those sent and received by Justice Eakin

Kane makes Granahan’s emails public

Conflicts of Interest

During the growing e-mail scandal, the media reported some seriously troubling behind-the-scenes actions regarding the investigatory/prosecutorial and administrative/judicial processes.

For example, the JCB complaint against Eakin specifically noted that, at the time of its decision on December 7, 2015, Chief Counsel Graci “was recused from involvement in the investigation of Eakin and physically removed himself from the Board’s discussions and deliberations and did not participate in any fashion in presenting the matter to the Board.” (However, it was later reported in the press that, despite the claim of recusal in the 2015 investigation, Graci apparently participated in the deposition of Eakin at the outset of the 2015 investigation.)

The JCB complaint also noted that, with respect to its 2015 investigation and its decision, JCB member Eugene Dooley did not vote on the matter. The Philadelphia Inquirer reported that Eugene Dooley, a voting member of the JCB, had himself received pornographic e-mails from McCaffery. (It is not clear if Dooley recused in the 2014 JCB investigation and decision.)

JCB chair, Jayne Duncan, was also reported to have ties to Eakin. Duncan had been involved in another unrelated litigation in which she hired Heidi Eakin, Eakin’s wife, as her attorney. The December 8th JCB complaint noted that Duncan was recused from voting in the 2015 Eakin matter. (As with Dooley, it is not clear if she had also recused in the 2014 investigation.)

In early December 2015, investigative reporters for The Philadelphia Inquirer revealed what it termed was a “ploy” to stack the judicial disciplinary deck. The Inquirer reported that Eakin contrived to “pack the court in his favor,” by rushing with the appointment of a presumably sympathetic member (Karen Snider, a former head of the Department of Public Welfare and a Republican) onto the Court of Judicial Discipline. Chief Justice Saylor had described Snider as “a candidate with excellent credentials” and was reported to have shared concerns about Eakin’s participation in the appointment. It was also reported that Justices Todd and Stevens opposed the appointment of Snider. (At the time, there were only five justices on the Court: Saylor, Eakin, Baer, Todd and Stevens.)

After the news about the so-called plot was made public, Chief Justice Saylor promptly withdrew the Snider nomination. The Philadelphia Inquirer stated that the retreat occurred only after it had exposed “the plot.” As noted previously, Governor Wolf called for Eakin’s immediate resignation. He described the episode as absurd, saying that Eakin demonstrated a “remarkable lack of judgment.”

TIMELINE

<p>DECEMBER 18, 2015</p> <p>Six Cumberland County judges send a letter to the Court of Judicial Discipline, asking them to clear Justice Eakin of all charges</p>	<p>He also reiterates that the emails were never meant to be public</p> <p>Costopoulos claims that a suspension would be an unnecessary interruption of the Supreme Court’s operations, and emphasizes that the last offensive email Justice Eakin sent or received was in 2014</p>	<p>The Court of Judicial Discipline does not indicate when a ruling might be issued</p> <p>DECEMBER 22, 2015</p> <p>Court of Judicial Discipline orders paid suspension for Justice Eakin until a pending trial determines whether Eakin violated judicial conduct rules when he exchanged the emails</p>
<p>DECEMBER 21, 2015</p> <p>Justice Eakin apologizes for “what I have allowed to happen” at hearing before the Court of Judicial Discipline</p>		

An Unorthodox Settlement Attempt

A procedurally peculiar and confusing aspect of the Eakin disciplinary case was an attempt to explore and effectuate a settlement agreement in a manner not specifically provided for in the applicable rules of procedure.

On January 22, 2016, in his capacity as presiding judge of the panel assigned to Eakin’s case, Judge Jack A. Panella communicated with a prominent Philadelphia attorney, Richard Sprague, about his potential involvement in the case as a “resolution mediator.” Sprague was cautioned not to contact the CJD or relay to the Court any of the details of Sprague’s involvement. The CJD, in response to press inquiries, confirmed the involvement of Sprague. The press reported that the appointment was unprecedented and criticized by some experts and the Attorney General.

After negotiations were completed, Eakin requested that he be able to share the proposed settlement, based on an agreed narrative, with the CJD. Under the agreement, the most serious charges, which could result in a loss of Eakin’s pension, would have been dropped.

Presiding Judge Panella, however, rejected any proposal or attempt to avoid a trial. At a hearing on February 26, 2016, Panella pointedly refused to entertain any facts of the proposed settlement, noting that under the CJD rules Eakin could only submit a proposed stipulation of facts in lieu of trial. After the hearing, Eakin’s attorney said the CJD’s rejection of a negotiated deal came as a “total shock.”

Press coverage continued with the focus on whether, as in the Justice McCaffery case, there were attempts to engineer a “back room bargain” for Eakin.

T I M E L I N E

JANUARY 6, 2016

The Philadelphia Inquirer reports that Justice Eakin tried to install new leaders in judicial vacancies created by November 3rd, 2015 general election

JANUARY 12, 2016

Witness lists are released for Justice Eakin’s trial

JANUARY 21, 2016

Pretrial conference for Justice Eakin is held at the Court of Judicial Discipline in Harrisburg

CJD Judge Jack A. Panella gives the Judicial Conduct Board 30 days to file a brief addressing the issues raised in the conference

Following the submission of this brief, Justice Eakin is given 30 days to submit a response, after which a trial date can be set

JANUARY 22, 2016

CJD presiding Judge Panella sends letter to Philadelphia attorney Richard Sprague regarding his potential involvement as a reported “resolution mediator” in the Eakin matter

The JCB Asserts Confidentiality in the CJD

Another noteworthy aspect of the on-going e-mail scandal was the assertion of confidentiality by the JCB in response to the CJD's attempt to elicit information in preparation for the trial.

On February 22, 2016, JCB's counsel filed a 46-page letter-brief addressed to Judge Panella. In its introductory paragraph, counsel stated: "The Board understands that it has the discretion, consistent with the statement that you made at the close of the pre-trial conference and with its constitutional mandate of confidentiality in its proceedings, to decline to answer some or part of the factual questions posed by the Court that relate to the Board's proceedings."

Two questions, identified as Issues 20.1 and 22, sought information pertaining to the 2014 investigation, specifically, whether there had been any disclosure (by chief counsel Graci, Eakin, or Eakin's counsel) regarding a close personal relationship between Graci and Eakin and Graci's support of Eakin.

The JCB responded as follows: "The Board respectfully declines to answer...The disclosure of a potentially-disqualifying conflict held by Board counsel in a Board investigation, and the Board's decision, if any, regarding same, is clearly a matter relating to Board proceedings and is, therefore, confidential [citing Pennsylvania Constitution, Article V, sec. 18(a)(8)]. Further, the response to this question, if any, is of no relevance to the question of Justice Eakin's conduct, which is the matter pending before this Court."

There is no indication that the CJD pursued the board's refusal to answer the court's questions or the legal validity of the board's claim of confidentiality. It is worth observing that there had already been public disclosures relevant to JCB recusals. As noted previously, the JCB's 2015 complaint stated that Graci was not involved in the board's decision of December 7, 2015, to file charges; the complaint had also revealed the recusal of JCB members, Duncan and Dooley, in the 2015 decision to prosecute Eakin.

Eakin's Resignation and CJD's Decision

On March 15, 2016, Justice Michael Eakin – whose seniority would have entitled him constitutionally to succeed Chief Justice Saylor as the Chief Justice of Pennsylvania – resigned.

In assessing his options, Eakin was facing an upcoming CJD trial and the risk of losing a substantial pension (estimated to be \$153,000 annually) if convicted. Although Eakin's attorney denied that there was any private deal, questions were raised whether Eakin's decision to resign would be viewed favorably by the

T I M E L I N E

FEBRUARY 5, 2016

The Court of Judicial Discipline confirms that it has brought in prominent Philadelphia lawyer Richard A. Sprague to act as a mediator in Justice Eakin's case

FEBRUARY 8, 2016

Sprague says that mediation is impossible under the CJD's current guidelines

Sal Cognetti, Jr., special counsel to the CJD says that he does not anticipate further mediation being conducted

CJD makes public a statement from Judicial Conduct Board counsel saying Kane has failed to comply with the December subpoena requesting all offensive emails in her possession

CJD and whether it would influence a more lenient outcome.

Two days after Eakin's resignation, the JCB moved to withdraw count 4 of the complaint – the most serious count— namely, that Eakin had brought the judicial office into disrepute. Conviction on this count would have resulted in a pension forfeiture under Article V, section 18(d) of the Constitution of Pennsylvania.

The full CJD stayed all further proceedings until further order to consider the stipulations of *facts* filed jointly by Eakin and the JCB. The stipulations included an acknowledgment that Eakin had sent and received 120 e-mails containing sexually-oriented photos and dozens of jokes mocking women, minorities, immigrants, and others.

On March 24, 2016, the full six-member CJD, pursuant to its constitutional power to impose discipline notwithstanding Eakin's resignation, unanimously found Eakin guilty of ethical misconduct under former⁹ Canon 2A (*judges should avoid impropriety and the appearance of impropriety in all their activities*) and Article V, sec. 17(b) of the Pennsylvania Constitution. In a significant procedural move that would greatly benefit Eakin, the CJD essentially dismissed as moot the most serious count (i.e., bringing the judicial office into disrepute) on the basis that the facts of that count were “derivative” of the first count.

The CJD decided that a jurist can violate (former) Canon 2A by conduct that affects the integrity and impartiality of the judiciary whether that conduct did or did not occur within the judicial decision-making process. The CJD noted that Eakin had used government supplied equipment to send and receive the offensive e-mails and, given his significant administrative responsibilities as a justice, Eakin's actions can be considered “on the bench” conduct.

The CJD's opinion characterized Eakin's conduct as “egregious.” The CJD said that it viewed the sordid and offensive e-mails with disgust and disapproval. Focusing on the content of Eakin's emails, the court made the following assessment:

T I M E L I N E

FEBRUARY 9, 2016

Justice Eakin's disciplinary trial is scheduled for March 29th in Philadelphia

FEBRUARY 21, 2016

Counsel for the Judicial Conduct Board argues in a filing that they should be permitted to prosecute Justice Eakin based on emails he was sent without necessarily proving that he read them

Joint motion is filed by Justice Eakin's attorneys and Judicial Conduct Board attorneys requesting a public hearing in advance of the March 29th trial



Whether labelled misogynistic, racially-biased against national origin, or biased toward sexual orientation, they represent a list of topics which should give any jurist pause. The list also corresponds, in a number of instances, with categories protected by the laws of the United States and of our Commonwealth. Significantly, they could cause citizens to wonder whether their cases received unbiased consideration by Respondent [Eakin], something that we find abhorrent to the principles to which Respondent has ostensibly dedicated his entire professional career. A reasonable inference that Respondent lacked the impartiality required of judges also fundamentally lessens public confidence in the judiciary.¹⁰

In determining the appropriate sanction for such conduct, the CJD opinion noted the following factors: the conduct was not criminal or prejudicial to the administration of justice; there was no evidence that Eakin’s judicial decisions were made or influenced by improper reasons or that they reflected any bias; Eakin’s judicial tenure was long and exemplary and he was well regarded as a jurist. The CJD found that Eakin’s conduct seriously jeopardized the reputation of the judiciary and failed to promote public confidence in the integrity and impartiality of the judiciary.

The CJD concluded that Eakin was deserving of a substantially reduced sentence because he had accepted responsibility and had resigned his judicial office.

Ultimately, the court fined Eakin \$50,000.00 to be remitted within six months to the General Fund of the Commonwealth. In a footnote, the Court stated: “In light of Respondent’s retirement from active service we see this sanction as tantamount to a six-month suspension without pay.”¹¹

Counsel for Eakin stated that no appeal would be filed.

T I M E L I N E

FEBRUARY 22, 2016

Counsel for the Judicial Conduct Board argues in a letter brief, submitted to Judge Panella, that it should be permitted to prosecute Justice Eakin based on e-mails he received without necessarily proving that he read them

Joint motion is filed by Justice Eakin’s attorneys and Judicial Conduct Board attorneys requesting a public hearing in advance of the March 29th trial

Judicial Conduct Board asserts confidentiality in refusing to answer some questions posed by Judge Panella regarding the 2014 JCB investigation

JCB’s letter brief also reveals that Eakin did not give statements under oath and that no stenographer was present during the JCB’s interviews of Eakin in the 2014 investigation

Letter brief acknowledges that Eakin’s “self-report” regarding the 2014 investigation was incomplete

The Court of Judicial Discipline responds to 2/21 joint motion, scheduling a hearing for February 25th in Pittsburgh

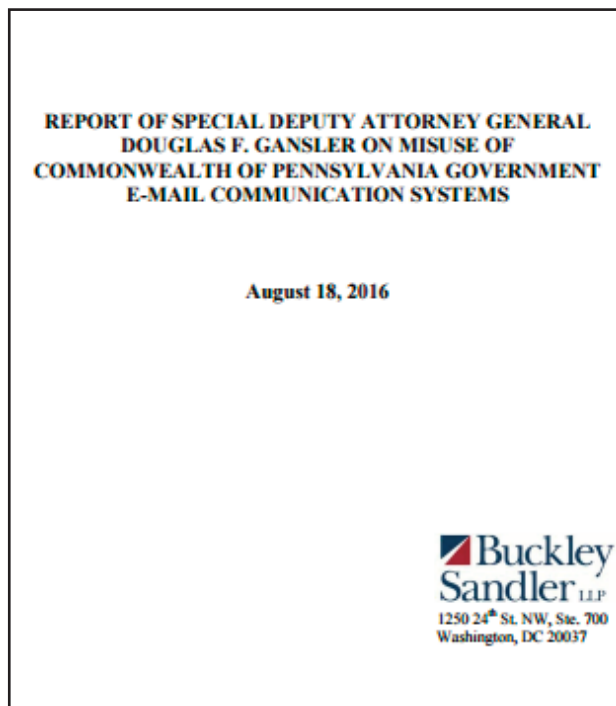
ATTORNEY GENERAL KANE’S EXIT

On August 15, 2016, Attorney General Kane – who was elected as an outsider in a landslide as Pennsylvania’s first female democrat attorney general and who was the catalyst for the e-mail investigation that resulted in the termination of the careers of many high level public officials – was convicted of perjury, obstruction, and other crimes. Kane resigned as attorney general, effective August 17, 2016 and on October 24, 2016 was sentenced to a prison term of 10 to 23 months. Kane indicated that she would appeal her conviction.

Release of the Attorney General’s Report

Kane’s legacy would not end with her forced departure, however. In early December 2015, Kane announced that she had appointed a former top law enforcement from the state of Maryland to head a wide-ranging investigation into the chain of pornographic e-mails exchanged among state prosecutors, judges, and law enforcement officials on government-owned computers. Kane appointed Maryland’s former attorney general, Douglas Gansler. Kane stated that there were “thousands” of offensive e-mails that exposed a constitutional crisis. She vowed that Gansler would have “the sword of prosecutorial powers.”

Although the report was completed in August of 2016, its publication was delayed by Kane’s successor Bruce Beemer so that he could carefully review the report’s content and accuracy. On November 22, 2016, Beemer released Gansler’s report (“Gansler report”).¹² Attorney General Beemer decided to redact the names from the report because of his concerns about the report’s methodology, which Beemer said ensnared many innocent people and unfairly singled out harmless communications. Beemer stressed that there was no evidence that the exchange of pornographic and offensive e-mails on government servers involved any



T I M E L I N E

FEBRUARY 26, 2016

A hearing is held, and a 3-member panel of the Court of Judicial Discipline rejects the possibility of a settlement

MARCH 7, 2016

Lawyers for the Judicial Conduct Board file a motion seeking to move Justice Eakin’s trial from Philadelphia to Harrisburg

MARCH 8, 2016

Lawyers for Justice Eakin file a motion requesting a hearing by the entire 6-judge panel of the Judicial Conduct Board at which they intend to propose a resolution

MARCH 9, 2016

The Court of Judicial Discipline denies the motion to move the trial from Philadelphia to Harrisburg

The Court of Judicial Discipline denies the motion for a full panel hearing, keeping the scheduled trial on track for later this month

inappropriate contact between prosecutors and judges that affected the administration of justice or the outcome of cases. Beemer indicated that he would make a referral to the Judicial Conduct Board regarding the jurists identified in the redacted report.

As the press reported, Gansler’s approach was more critical. His report stated that the misogyny and racism – both implied and explicit – in some of the communications was startling and suggested a much broader issue within government than one of disrespecting e-mail and other policies. Gansler stated that, in reviewing the volume and content of the e-mail exchanges, a significant problem exists reflecting a “fundamental and dangerous degree of impropriety that threatens public confidence in a fair and unbiased law enforcement, a judicial system, and impartial government generally.”¹³ The report made four specific recommendations.¹⁴ Gansler stated that he hoped his report would bring a further level of public awareness to the problem of inappropriate communications by officers of the court and other Commonwealth employees and will cause a requisite change in behavior.¹⁵ The report also recommended referral to the Judicial Conduct Board of all judges who sent sexually explicit or offensive emails.

Upon release of the Gansler report, the Judicial Conduct Board, through its Chief Counsel (Robert Graci), issued a brief press statement indicating that, consistent with its constitutional obligations, including confidentiality, the JCB would conduct an independent examination and take any and all steps necessary to preserve the integrity of the judiciary.

In a coincidental side note, shortly before the release of the redacted report by Beemer, a federal court judge (Gerald A. McHugh) issued an opinion in support of his order granting a convicted double murderer (Donetta Hill) a new hearing. Hill had contended that detectives had coerced her confession by subjecting her to racist and sexual taunts. Although Hill did not raise the e-mail controversy in her post-conviction pleadings, Judge McHugh observed in a footnote that, at the time Hill’s case was before the state supreme court, two justices had been exchanging pornographic, sexist, and racist communications.¹⁶

T I M E L I N E

MARCH 15, 2016

Justice Eakin tenders his resignation

MARCH 17, 2016

Judicial Conduct Board asks to withdraw the charge that Eakin acted in a way which brought the judiciary into disrepute

MARCH 22, 2016

The Court of Judicial Discipline issues a unanimous order to delay proceedings in Eakin case “until further order”

MARCH 24, 2016

The full Court of Judicial Discipline determines that former Justice Eakin violated Canon 2A of the prior Code of Judicial Conduct and that his conduct was a derivative violation of art. V, sec. 17(b) of the Pennsylvania Constitution. Court imposes a fine of \$50,000. Eakin’s attorney states that this judicial determination will allow the former justice to keep his state pension and that no appeal will be filed

Coda

The resignation of Eakin and the decision of the CJD should not be viewed as a closure to the e-mail scandal, which disturbingly expanded from sexually explicit photos to offensive jokes and troublesome communications, shared among executive branch officials and jurists in a behind-the-scenes electronic communications network.

For example, in late March 2016, after the resolution of the Eakin matter, the press revealed that Justice Todd had urged the JCB and the disciplinary board for lawyers to review the e-mails of every judge and lawyer involved in the e-mail scandal. Justice Todd confirmed that she had requested the reviews when special counsel for the Court reported that Eakin had exchanged offensive e-mails with fellow judges and lawyers. (As the press noted, it was unclear what attorney ethics rules might have been violated regarding the e-mail communications.) The status of the requested investigation is not known. In connection with the release of the Gansler report, the disciplinary entities (the Judicial Conduct Board, the Court of Judicial Discipline, and ultimately the Supreme Court) will confront serious issues as to allegations of judicial misconduct, disciplinary enforcement, and the need for reforms, all of which the press and public will certainly scrutinize.

Lastly, this narrative closes on a note of uncertainty and, as reflected in Recommendations 1 and 7, some hope for a fresh beginning. Events in 2015 and 2016 produced a re-constituted Supreme Court with new perspectives and backgrounds. In 2015, three justices were elected to the Court: Christine Donohue, Kevin Dougherty, and David Wecht. In 2016, Governor Wolf appointed, and the Senate confirmed, Sallie Updyke Mundy to the Court. They have joined Chief Justice Saylor, Justice Max Baer, and Justice Debra Todd, all who witnessed first-hand the events described in this narrative.

The purpose of this extended documentary record is to establish a concrete factual context for the following recommendations.



T I M E L I N E

AUGUST 15, 2016

AG Kane convicted of perjury,
obstruction and other crimes

AUGUST 17, 2016

AG Kane resigns

OCTOBER 24, 2016

AG Kane sentenced to prison
for term of 10-23 months

NOVEMBER 22, 2016

AG Beemer releases "Gansler report,"
previously commissioned by AG Kane

The Judicial Conduct Board released a statement saying, "Consistent with its obligations under the Pennsylvania Constitution, including its obligations of confidentiality, the Board will conduct an independent examination of those emails"

❖ R E C O M M E N D A T I O N S ❖

1. APPOINTMENTS

The integrity of the judicial disciplinary process begins with greater openness and transparency in the selection of the members of the Judicial Conduct Board and the Court of Judicial Discipline. There should be an established selection process that emphasizes transparency, fairness, and merit based on general pre-established qualifications criteria. Whether the Pennsylvania Constitution should be amended with respect to the appointing authorities and the composition of the disciplinary entities deserves careful legislative consideration and public input. The Governor and the Supreme Court should work together to create a judicial disciplinary process that is open, transparent, and fair.

The integrity of the judicial disciplinary system depends, first and foremost, on members who are both qualified and impartial. And it depends on a process that is transparent and accountable. As the events of the Eakin investigation demonstrate, a sound institutional framework in the appointment process is essential.

We have been down this road before.

In 2011, the American Bar Association (“ABA”) conducted a study of Pennsylvania’s judicial disciplinary system.¹ The report’s first recommendation concerned the need to improve the transparency of the process in the appointment of members to the Judicial Conduct Board (“JCB”) and the Court of Judicial Discipline (“CJD”).² We whole-heartedly repeat and support that generalized recommendation and offer specific suggestions as to its implementation. At present, the process of application and appointment is not transparent, although the Supreme Court has recently taken commendable steps in its attempt to inform and reach out to the public.

The ABA report recommended an open and well-publicized nomination process involving a diverse screening committee, identification of qualifications criteria for candidates, publication of vacancies and appointments, and an online application process. These suggestions are eminently sound and feasible. Whether they are attainable goals depends on the level of commitment and leadership from the judicial and executive branches of government.

A commendable appointment process will necessarily depend on the institutional arrangements to support such a process. We offer the following factors for consideration.

A. Selection and Composition of the Nominating Committee:

There should be a cooperative arrangement between the judicial and executive branches to establish a nominating committee. The purpose of the committee would be to receive and solicit applications and to assess whether the candidates meet the basic qualifications for appointment. The committee would be responsible for providing a list of interested and qualified candidates to the Governor and Supreme Court whenever a vacancy arises. The committee's list of qualified candidates could also identify candidates with exceptional qualifications. In terms of size, we propose that the nominations committee should consist of eight members, four chosen by the Governor, and four chosen by the Supreme Court for a specified (e.g. three years) term. We believe that an 8-member committee is workable, although it could be increased to achieve more diversity. The nominating committee would be composed of the following: four lay persons, two judges, and two attorneys. It is our belief that a plurality of lay persons is preferable to a process dominated by judges or attorneys. The judicial and executive branches would have an equal number of appointments among the previously mentioned categories of representatives. We recommend that appointments by the Governor and Supreme Court should seek to appoint members that reflect diversity (e.g. racial, gender, ethnic, sex orientation, occupational, and geographic diversity) as well as political party representation.³ The Governor and Supreme Court should cooperate to promote such diversity goals.

We believe that this cooperative task should not be a difficult one. For example, there are many former members of the JCB and CJD who are a valuable resource. Because of their knowledge and experience, they could provide guidance and assistance. To facilitate the process, the Administrative Office of Pennsylvania Courts ("AOPC") could serve as an administrative liaison to assist in the formation of a nominating committee and in the committee's work. Essentially, regardless of the nomenclature (e.g. committee, commission) there should be a well-defined, institutionalized, rather than *ad hoc* or *laissez-faire*, process for the identification and selection of interested and qualified candidates, as was recommended by the ABA in 2011. The recommended process is aspirational and not intended to create another layer of bureaucracy. But we believe that a more formalized process, in tandem with the Supreme Court's renewed outreach efforts, is an important first step to promote integrity and quality in the judicial disciplinary process. Such an aspiration should be acknowledged and pursued.

B. Transparency:

We believe transparency of the appointment process is essential. All vacancies on the JCB and CJD should be prominently advertised and posted on the judicial and executive websites. We are gratified that the Supreme Court has recently taken positive steps toward providing greater information to the public.⁴ Bar associations, non-governmental and public interest agencies should be encouraged to post information about the vacancies and the application process. The completed application and the list of qualified candidates, however, should be confidential in the belief that privacy interests tip the balance in favor of creating a greater pool of interested and qualified candidates. Appointments to the disciplinary bodies should be promptly and prominently published. There should be a brief annual statement or report regarding the number of applications received; appointments, if any, made; and information about the background of the appointees. Again, this recommendation seeks to promote transparency through a more formal and open process.

C. Best practices:

The application process for membership on the JCB and CJD should be open, transparent, and user-friendly. The JCB and CJD should identify desirable qualifications in consultation with the Governor and the Supreme Court. There should be a customized application form to be completed by *every* candidate for submission to the nominating committee. Upon appointment, the candidate's application form should be available for public inspection. While we recognize that the Unified Judicial System's website publishes a standard application form for appointments to the Supreme Court's procedural rules committees, we believe the form and/or the process has been of limited usefulness. Those deficiencies should be examined and avoided, especially with respect to the visibility of the form and the mechanics of the application process on the web sites.

On the positive side, the Supreme Court's recent outreach policy and updated web page, including a short video by Justice David Wecht who has been assigned to this initiative, signify that there will be a greater effort to improve the appointment process. In addition, the current application form has meritorious features to capture information about diversity, criminal background, and potential conflicts of interest. With respect to potential conflicts of interest, the questionnaire should provide and seek more information. Many applicants, especially non-lawyers, may not appreciate the meaning or import of "conflict of interest." The form, for example, could specifically ask whether the applicant has or has had (e.g. within the last 10 years) a personal (family or friend), pecuniary, or professional relationship with any Pennsylvania jurist. The relevance of this concern is reflected in the previous factual narrative and is amplified more fully in our second recommendation.

The importance of safeguards to promote openness and transparency in the appointment process should not be overlooked. As the introductory factual narrative demonstrates, the appointment process has the potential of being misused, whether intentionally or unintentionally. A skewed process can subvert the fair and impartial administration of justice by facilitating nepotism, political patronage, favoritism, a disregard or devaluation of merit, conflict of interest, discrimination, or bias.

We recognize that, in response to the Eakin controversy, there has been a recent legislative proposal ⁵ to eliminate the Supreme Court as an appointing authority for the two judicial disciplinary bodies. At this time, we have reservations about such a proposal. First, eliminating the state's highest court as an appointing authority from the selection process is a marked departure from the overwhelming practice in the other states where the state supreme court has an important institutional role in the judicial disciplinary appointment process. Second, we believe that the recommendations herein present a viable and sensible response to the institutional and procedural problems of our current appointment process. They also avoid the potential politicization of the disciplinary process. ⁶

If such alternatives for reform are eventually not pursued and achieved cooperatively by the judicial and executive leadership, then perhaps legislative intervention should be seriously re-considered. Whether the Pennsylvania Constitution requires amendment – a process that is time-consuming, arduous, and unpredictable – with respect to the composition of the disciplinary bodies and the appointing authorities deserves careful legislative deliberation and public input.

Lastly, it is worth noting that the executive and judicial branches have engaged in cooperative ventures in the past, such as the Interbranch Commission on Juvenile Justice (regarding the Luzerne County juvenile justice scandal) and the Interbranch Commission on Racial, Gender, and Ethnic Fairness. We urge the Governor and the Supreme Court to work together in creating a judicial disciplinary appointment process that is open, transparent, and fair. ♦

2. RECUSALS AND DISQUALIFICATIONS:

The integrity of the judicial disciplinary process requires the disclosure and prevention of conflicts of interest regarding the members and staff of the Judicial Conduct Board and the Court of Judicial Discipline. The disciplinary entities should institute a mandatory disclosure process and forms to identify conflicts of interest (actual or potential) through the promulgation of clear, enforceable rules. There should be limited confidentiality regarding recusals by the Judicial Conduct Board members and their staff. The Supreme Court should also establish a procedure and protocol for recusal of its members in administrative matters.

Impartiality is an essential ingredient of integrity. Such an observation is an often-repeated one, almost to the point of its being a cliché. But such an ethical principle of good government can have profound practical importance.

The narrative of recent events in the judicial system demonstrates that impartiality is not a theoretical concern. At various times, impartiality was compromised by actual conflicts of interest or the appearance thereof in the Eakin matter, specifically: chief counsel of the JCB enjoyed a close relationship with the target of an investigation; the chair of JCB had been represented by the wife of the target of an investigation; another JCB member had been the recipient of lewd emails that were the focus of separate investigations; and there was an alleged attempt to, in effect, tip the scales of justice by maneuvering for the appointment of a member who might be sympathetic to the nominator (under investigation) in the event of a future prosecution in the CJD. Each of these events presents disturbing ethical issues about our understanding and practice regarding recusals and conflicts of interest.

Once again, these concerns are not new. In 2011 PMC issued a report on the judicial disciplinary system, *Report and Recommendations for Improving Pennsylvania's Judicial Discipline System*.¹ Without the benefit of a concrete factual foundation or specific examples at that time, we nevertheless strongly advocated that the disciplinary bodies, primarily the JCB, clarify and strengthen the recusal rules and provide needed guidance. We again strongly endorse those generalized recommendations and see the need to amplify them with practical suggestions for implementation.

Definitional clarity and practicality:

How broadly or narrowly a term is defined can dictate how one analyzes an issue and achieves an outcome. We believe that “recusal” and “conflicts of interest” must be better and more broadly defined to address the realities of today’s complex world.

Recusal, in a broad sense, is the act of removing oneself from participation in a process or decision to avoid an actual or perceived “conflict of interest.” Traditionally, conflicts of interest have been defined in a narrow pecuniary sense, i.e. any substantial financial interest or relationship that might compromise one’s impartiality. Hence, today we have so-called mandatory financial disclosure forms to identify facts that might compromise a public official’s or fiduciary’s impartiality.

Conflict of interest has also been broadly defined to include specific situations in which one’s interest is in actual or apparent conflict to his/her official or fiduciary duties to investigate and decide a matter fairly and impartially. Modern rules of recusal identify various conflict-of-interest situations that may necessitate recusal,

such as when one has knowledge of disputed evidentiary facts; when one has a personal interest in the proceeding, is a complainant, the object of an investigation, related to a party to a proceeding, related to a witness, or is likely to be a material witness in a proceeding.

Given the complexity of possibilities, recusal rules often contain general provisions that require recusal when one has (or might appear to have) a bias or prejudice concerning a party. For example, the National District Attorney's Association's National Prosecution Standards prescribe recusal when "the personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised."² Such a provision provides a salutary safeguard.

We believe that the "personal interests" standard should be considered and adopted. The ethical safeguard could be strengthened by adding a generalized illustration, such as "including personal (family or friend), professional, political, or pecuniary relationships within the last [e.g. 5-10] years." The object of recusal and conflict of interest standards is to alert others, by generality and specificity, to the possibility of a conflict – actual or apparent — that could compromise one's fiduciary duties and fidelity to the common good. Such an approach, we believe, would have helped in preventing the conflict of interest problems that Pennsylvania has recently experienced.

Strong and clear recusal rules are crucial to integrity. Thus, we recommend that the disciplinary entities, primarily the JCB, re-examine their recusal and conflict of interest rules and standards. With respect to the JCB, we also make the same observation that we did in 2011: the JCB rules must be streamlined and simplified to avoid obfuscation or confusion. They are simply too cumbersome to promote public understanding. Such rules, for all entities, must also be easily identifiable and accessible on their respective web sites. The JCB's "Member Conduct Rules," for example, are extraordinarily difficult to find on the web. Impediments to easy access should be promptly addressed and ameliorated.

Mandatory Disclosure and Reporting:

We recommend that the members of the JCB and CJD – as well as their staffs – complete conflict of interest disclosure forms on an annual basis and amend such forms promptly whenever an actual or potential conflict of interest arises. Sound and workable mechanisms to support and enforce ethical conduct are essential.

Conflict of interest disclosures are not novel. They are prevalent in government and many public interest and professional organizations that recognize the importance of monitoring and enforcing fiduciary responsibilities. Useful and informative templates for such forms can be easily accessed on the internet. Some forms, including those from non-legal organizations, that we have examined are particularly good and we recommend that they be considered.³ Moreover, conflict

of interest forms would be similar in ethical purpose to the financial disclosure forms that many government officials and employees, including jurists, are required to complete on an annual basis.

The conflicts of interest disclosure form should acknowledge one's ethical-fiduciary responsibilities, including the duty to avoid conflicts of interest and to act in the best interests of the organization and the public. Conflicts of interest should be clearly defined and ideally supported by specific principles, guidelines, and examples. And, as will be addressed in our next recommendation, the form should describe the process for reporting actual or potential conflicts and completing the form.

The form should have an acknowledgment section in which the signatory indicates that he/she has read the policy and has made a full disclosure. The signatory should also acknowledge the duty to report promptly any actual or potential conflict of interest that he/she became aware of after the submission of the form.

The form should be signed and dated. It should be completed on an annual basis.

We recommend that the responsibility for reporting should not be limited to the appointed members of the JCB and CJD, but should also extend to their respective staffs. The power to make official decisions should not be the cut-off point for ethical responsibility. Staff, who work closely with members of their respective disciplinary organizations, must be subjected to similar ethical constraints. As we have seen by the incident involving the chief counsel of the Judicial Conduct Board — whose life-blood is ethical behavior — compliance with ethical principles by *all* those significantly involved in the disciplinary process is extraordinarily important to the administration and perception of justice.

The application of such ethical responsibilities upon staff is not unusual. Almost all state court judicial systems have codes of conduct that apply to their administrative employees. For example, we note that one CJD provision, applicable to its members, addresses the duties of confidentiality and faithful performance upon its staff.⁴ Furthermore, with respect to judicial disciplinary organizations, we have found that both New York and California have imposed specific mandatory recusal and conflict-disclosure responsibilities on their disciplinary staffs.⁵

We make one additional observation. We recognize that the Court of Judicial Discipline provides for a recusal process for its judicial members. Pursuant to its internal operating procedures, a CJD member submits a memo to the court administrator of the CJD to indicate a recusal. No explanation need be given.⁶ While we commend this procedure, we believe that the additional protocols recommended herein for disclosure and recusal would better serve the public interest. As the Pennsylvania Constitution provides⁷, both the JCB and CJD are entrusted with the power to “prescribe general rules for the conduct of its members.” Such ethical rules and protocols should be adopted.⁸

Procedures for the Reporting and Documentation of Recusals:

In addition to rules identifying what constitutes a conflict of interest and the duty to disclose, there should be clear procedures to support the process.

We recommend that conflict of interest forms should be submitted on an annual basis to the respective chairs of the JCB and CJD. In the event of a conflict of interest not reported on the annual form, there should be prompt disclosure to the respective chairs of the JCB and CJD, followed by the submission of a revised conflict of interest form. If a conflict of interest report presents an unresolved issue of recusal, the chair of the respective disciplinary body should promptly report the matter to the full board or court and submit the matter for their collective review and decision. All decisions regarding recusal should be documented e.g. in the minutes of the JCB's meetings or on the docket of the CJD.

Procedures for Enforcement:

Ethical rules are of limited use if they are not supported by complementary rules for enforcement. Conflicts of interest pose serious dangers to the integrity of an organization, its decision-making, as well as to the public's trust and confidence.

We, therefore, recommend that the JCB and CJD promulgate rules governing the conduct of its members and staff with respect to the mandatory disclosure of conflicts of interest and potential consequences for non-compliance. In that regard, we note that the Pennsylvania Constitution specifically empowers the JCB and CJD with the ultimate sanction of removal if one of its members violates the organization's rules of conduct.⁹ Thus, the JCB and CJD have the power to prescribe and enforce ethical rules of disclosure and recusal for its members and staff and should do so.

Limited Confidentiality:

As we urged in our first recommendation, the disciplinary process, within recognizable limits, should be open and transparent. Nonetheless, facts pertaining to the investigatory process, including whether to file a disciplinary complaint, should remain confidential, unless waived or otherwise ordered by a court. Likewise, behind-the-scenes discussions and deliberations preceding a formal court adjudication must be deemed confidential.

In our view, recusals are not within the ambit of an investigatory or adjudicatory process. They precede deliberation and decision-making. It is commonplace, for example, for judicial opinions to note a jurist as "not participating" as was done in the McCaffery suspension order. We believe that there is public benefit in disclosing information as to whether one with an actual or apparent conflict of interest has participated in investigatory or adjudicatory decision-making.

However, the dividing line for disclosure should be drawn at the filing of formal

charges. If formal charges have been filed by the JCB, then any recusal pertaining to the investigation and filing of such charges should not be deemed confidential.

The JCB complaint against Eakin, for example, provided specific information as to the recusals of Graci, Duncan, and Dooley.¹⁰ This information was disclosed after their prior participations had been reported in the press. It is also noteworthy that shortly after the resolution of the Eakin matter, the JCB amended its IOPs to provide: “Consistent with the Constitution and the Board’s rules, should the Board conclude that public disclosure from a particular matter is necessary to protect the integrity of the system of judicial discipline in the Commonwealth of Pennsylvania, the Board may so authorize.”¹¹ While this amendment may be viewed as a more open and flexible policy of disclosure, it is actually too narrow. In our view, disclosure of recusals serves to protect the integrity of the system and should not be circumscribed by a vague discretionary policy that promotes secrecy.

We believe that the fact of such recusals, not the completed form itself, should be public with respect to matters that have culminated in the filing of formal charges in the CJD. In all other instances, disclosure of a recusal would require a court order.

Supreme Court:

We recognize that the issue of recusal by members of our highest court is a difficult and delicate matter. But, given what occurred in the Eakin matter, we must address it. While we are not privy to the facts of the Court’s deliberations, we simply wish to express our deep concerns about the reported involvement of a justice in the appointment of a member on the CJD while he was the focus of an investigation. As the United States Supreme Court noted recently in *Williams v Pennsylvania*:

Bias is easy to attribute to others and difficult to discern in oneself...The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral or whether there is an unconstitutional potential for bias.¹²

If the test of impartiality is whether participation in a decision would cause a fair-minded, objective observer to conclude that one’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised, then the answer should be clear – there should be recusal. The question is how?

The answer is a simple one — adopt a policy and procedure for recusal. While we think such a policy could be broad in scope, a reasonable start would be to adopt a policy limited to administrative matters.¹³

Establishing such a rule is achievable if the Court demonstrates the will and courage to do so.

For example, the Michigan Supreme Court took an important step to demonstrate the importance of judicial integrity by adopting a recusal rule for its justices. The rule permits the entire court to review a motion that challenges a justice's refusal to recuse.¹⁴ Such a procedure is commendable and we urge the Court's consideration of a similar process to address conflicts of interest, at least with respect to administrative matters. We note that Pennsylvania's Code of Judicial Conduct provides: "A judge shall perform the duties of judicial office, *including administrative duties*, without bias or prejudice." (emphasis supplied)¹⁵

In our system of government, as we have noted previously, the members of the JCB and CJD have the specific constitutional power and responsibility to prescribe rules governing the conduct of its members.¹⁶ The Supreme Court certainly has no less authority or responsibility.

While there might be generalized concerns about the impact of such a recusal rule on collegiality, we believe that the fair and impartial administration of justice is paramount. And given the Court's interventions in the Orie Melvin and McCaffery cases, we find such a theoretical concern unpersuasive.

The proposed ethical safeguard may be viewed as limited in its application, and its efficacy would likely be dependent on internal self-policing. But adoption of such a process would be a public recognition by the Supreme Court that administrative matters are not inconsequential. As was acknowledged by the JCB and CJD in the Eakin matter, Supreme Court justices have significant administrative responsibilities.¹⁷ Moreover, such an internal operating procedure would have deterrent and persuasive value for a justice about his/her participation in a matter in which impartiality could reasonably be questioned.

Over the years, the Supreme Court has expansively interpreted and exercised its constitutional power for the superintendence of our justice system, as we address in another recommendation regarding the Court's role in judicial disciplinary matters. Exercising its supreme powers to address the ethical issue of administrative recusals for the justices would send a clear signal about the Court's commitment to fairness and impartiality. ♦

3. DISCIPLINARY LOOPHOLE:

Consistent with the American Bar Association's model rules for disciplinary enforcement, the Judicial Conduct Board and the Court of Judicial Discipline should have continuing disciplinary power or jurisdiction to proceed against a jurist after his/her resignation or retirement when the jurist has committed serious misconduct in the performance of his/her official duties. Such continuing

disciplinary authority should be reasonable in duration, for example, not to exceed one year from the date of the jurist's retirement or resignation.

Public officials, including jurists, should be accountable for misconduct they have committed in the course of performing their official duties. A jurist who commits misconduct should not escape accountability by the expedient act of resignation or retirement. The primary focus should be on the jurist's behavior during his/her judicial tenure. Absent a negotiated settlement between the offending jurist and the JCB, resignation or retirement before the filing of formal charges should not prevent the exercise of disciplinary authority.

In its 2011 report on Pennsylvania's judicial discipline system, the American Bar Association recommended that the jurisdictional disciplinary gap should be addressed. Referring to the ABA's Model Rules of Judicial Disciplinary Enforcement, the ABA said that the loop hole should be closed and noted that other states have adopted provisions to provide for continuing disciplinary authority.¹

Specifically, the ABA report referred to one of its model rules of judicial disciplinary enforcement, which addresses disciplinary jurisdiction over former jurists as follows:

Former Judges: The Commission has continuing jurisdiction over former judges regarding allegations that misconduct occurred before or during service as a judge if a complaint is made within one year following service as a judge.²

We believe that such a model rule is reasonable and should be adopted. However, we believe disciplinary authority should be limited to serious acts of misconduct (e.g. commission of a felony or acts involving the corruption of the judicial process) committed in the performance of a jurist's official responsibilities. The ABA's one-year limitation, measured from the date of resignation or retirement, is reasonable.

The exercise of such authority is important for various reasons. It serves to protect the integrity of the judicial system by making all jurists accountable for their misconduct. And, with respect to former jurists, it enables the imposition of appropriate sanctions, including restitution and barring a jurist from future judicial office. As the commentary to the ABA's model rule notes: "This continuing jurisdiction ensures that judges cannot avoid judicial discipline by resigning before information regarding their misconduct was made known to disciplinary counsel and thereafter seek judicial office with no record of misconduct."³

We recognize that there may be legal uncertainty as to the appropriate mechanism to close this judicial disciplinary gap.⁴ We believe appropriate action can be achieved by rule. We say this for two reasons.

We note that there is no specific impediment in the Pennsylvania Constitution to

the exercise of such disciplinary authority over judges who have retired or resigned. We also recognize that there is no specific constitutional provision acknowledging such authority. Thus, the question remains whether the 1993 constitutional amendments, which dramatically restructured our judicial disciplinary system, are sufficiently broad and flexible to authorize such disciplinary authority.

In that regard, we note that the issue of continuing disciplinary authority over a former jurist was briefly addressed in dictum in the 2002 case of *In re Jules Melograne*, wherein Justice Cappy addressed such disciplinary authority as follows:

Appellant's definition of the Court of Judicial Discipline's authority is an overly restrictive one, not consonant with the role of that tribunal. The Court of Judicial Discipline exists to police the conduct of the judiciary and assure the public of the integrity of this branch of government. Were we to adopt Appellant's view of that court's power, the Court of Judicial Discipline would not be able to hear a complaint brought against a judicial officer who left office due to voluntary retirement, superannuation, or even impeachment; such an overly restrictive definition of that Court's authority would be in opposition to, rather than consistent with, the Court of Judicial Discipline's role. Thus, we would reject Appellant's argument and hold that the Court of Judicial Discipline has the power to sanction mis-behaving judicial officers, regardless of whether they are in office during the pendency of disciplinary proceedings.⁵

We recommend that the Judicial Conduct Board should adopt a rule for continuing disciplinary authority, limiting the filing of disciplinary charges to one year from the date of a jurist's resignation or retirement. The exercise of such disciplinary power can then be appropriately raised and challenged in proceedings in the Court of Judicial Discipline and the Supreme Court.

If it is determined that the exercise of such disciplinary authority is constitutionally impermissible, then we recommend that the legislature take appropriate action toward a constitutional amendment authorizing the exercise of such disciplinary authority over jurists who have retired or resigned. ❖

4. DISPOSITIONS – MONETARY SANCTIONS:

The Court of Judicial Discipline should amend its rules to specifically identify the various financial penalties available in its arsenal of disciplinary sanctions.

Pennsylvania law does not explicitly provide for the imposition of monetary sanctions such as attorney's fees, fines, costs, and restitution. But the Pennsylvania Constitution is broadly phrased to authorize the Court of Judicial Discipline to order "removal from office, suspension, censure or *other discipline*" as authorized by

the Constitution and warranted by the record.¹ This provision gives the Court of Judicial Discipline broad discretion to fashion an appropriate sanction as it sees fit. To determine what sanction is appropriate, the court generally weighs the nature of the conduct and any mitigating or aggravating circumstances.

In the recent case of former Justice Eakin, the court fined Eakin \$50,000 for sending racially disparaging, misogynistic, and offensive emails. Although this sort of conduct undoubtedly undermines the public's trust and confidence in the judicial system, the court "temper[ed]" its ultimate sanction, in light of mitigating circumstances (namely, the e-mail communications were not criminal, no evidence was found to suggest that the e-mails reflected improper biases in his decision-making, and Eakin accepted responsibility and resigned).²

The CJD's rationale for the imposition of the financial sanction, however, was not clear. The court intimated in two footnotes that it sought to "restor[e] public confidence in the impartiality of the judiciary."³ In another footnote, the court characterized the fine as "tantamount to a six-month suspension without pay," a statement that causes one to wonder what the sanction would have been if Eakin had not resigned.⁴ At the time of his disciplinary proceeding, Eakin's annual salary was \$203,409.

Other states, for example, authorize and identify through their rules or statutes the types of monetary sanctions that can be imposed.⁵ Cynthia Gray, a judicial discipline expert who authors an informative blog on judicial ethics, has noted that judicial conduct commission in nine states have express authority to impose fines: Florida, Indiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Mexico, and West Virginia. She has also noted that states have imposed other kinds of monetary penalties, citing, for example, the Pennsylvania case of *In re DeLeon*, where the Court of Judicial Discipline ordered the jurist to pay restitution.⁶

Monetary sanctions advance important conduct-regulating objectives. They not only punish wrong-doing, but also help in restoring the public trust after a violation. As other courts have noted, monetary sanctions have a deterrent value.⁷ To this end, a sanction that results in effective deterrence to other jurists best serves the public interest. Fines provide increased deterrence beyond less tangible threats of sanctions, such as reprimands, and signal to jurists the seriousness of ethical violations in tangible terms.

We, therefore, recommend that the Court of Judicial Discipline amend its rules to provide for and identify the types of monetary sanctions that can be imposed when a jurist is adjudicated to have committed misconduct. Whenever the CJD imposes a monetary sanction, it should fully explain its rationale for the benefit of the respondent-jurist as well as to provide notice and guidance to others in the future. ❖

5. INTERIM SUSPENSIONS:

There should be clarity, consistency, and fairness regarding the criteria relevant to the imposition of interim suspensions with or without pay. In fairness to the respondent-jurist, and in order to promote public trust and confidence in the judicial disciplinary process, the Court of Judicial Discipline should reexamine its policies and procedures regarding interim suspensions. In all cases, the Court of Judicial Discipline should clearly articulate on the record its reasons why an interim suspension is imposed with or without pay.

The preliminary stage of the judicial disciplinary process is a critical one. At the beginning of the disciplinary process, after formal charges have been filed, two important issues arise: should the jurist be temporarily suspended and, if so, should that suspension be with or without pay. Those issues are significant for both the jurist and the public.

Fundamental to a rational and fair judicial disciplinary system is the identification and articulation of guidelines and reasons to support such interim disciplinary actions. We believe that the Court of Judicial Discipline should re-examine and reform its interim disciplinary process to establish clarity, predictability, transparency, and fairness. It was a general recommendation that PMC made in 2011 and now repeat with amplification.¹

The Constitution of Pennsylvania provides: “Prior to a hearing, the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or justice of the peace against whom formal charges have been filed with the court by the board or against whom has been filed an indictment or information charging a felony.”²

In most cases³, it is the Judicial Conduct Board that brings the question of interim disciplinary action to the Court of Judicial Discipline. The Board’s role is described in its internal operating procedures as follows: “When a judicial officer is charged or indicted with a felony criminal offense, Board Counsel is authorized to file a petition requesting interim suspension. Unless the Board directs otherwise, Board Counsel will request interim suspension with pay. For all other circumstances where the filing of a petition for interim suspension may be appropriate, Board Counsel shall request authorization and direction from the Board on whether to seek interim suspension with or without pay.”⁴

There is nothing in the Pennsylvania constitution, statutes, or rules of the disciplinary entities (Judicial Conduct Board, Court of Judicial Discipline) to provide guidance as to the relevant considerations supporting interim judicial suspensions or whether such suspensions should be with or without pay. In the absence of such information, it is necessary to examine the cases involving interim suspensions.

In a few prominent cases,⁵ the Court of Judicial Discipline has attempted to identify some parameters relevant to deciding the appropriate interim action.

For example, the constitutional due process provisions of Article 18, including the presumption of innocence and the opportunity for a hearing, have been held to be inapplicable at the preliminary disciplinary stage. Instead, the Court of Judicial Discipline has stated that it will apply a “totality of circumstances” test that focuses on: the nature and quality of the charges, the relation of those charges to the official duties of the jurist, the impact or potential impact on the administration of justice, and the harm or potential harm to the public’s confidence in the judiciary, plus other circumstances relevant to the jurist’s conduct.⁶ These are recognizably important and relevant factors for the court’s consideration. But having examined a number of interim suspension orders from the Court of Judicial Discipline, we can discern no balancing of interests that consider facts (for example, background, record of service) about the jurist, elected by the public, when it considers an appropriate interim sanction such as suspension without pay.

Having considered the totality of circumstances approach in theory and practice, we have basic concerns regarding the Court of Judicial Discipline’s record regarding its interim disciplinary processes : (1) in many cases, the CJD enters its interim disciplinary suspension orders, especially those that deny continued compensation, without any public explanation as to how it applied the totality test or what factual factors justified both the temporary suspension and denial of compensation; (2) whatever factors or guidelines determine the propriety of an interim disciplinary action, they are not identified in any court rules; (3) in those few high profile cases in which the CJD articulates its reasoning, the analysis seems to conflate interim disciplinary suspension with the continued compensation issue, which we view as implicating distinct concerns; and (4) the predisposition of the CJD appears to favor interim suspensions without pay whenever a jurist is charged with a felony, an approach that we have ascertained is contrary to the practice in many other states.

The Eakin case provides a recent example. Although there were no pending criminal charges, there was sustained adverse media coverage of the multiple allegations against the supreme court jurist (and others), publicity that arguably damaged the judiciary’s image and public confidence. There were also multiple investigations (by the Supreme Court and Attorney General’s office) that revealed disturbing conduct by one of the Commonwealth’s highest ranking judicial officials. In its opinion and order in response to the Judicial Conduct Board’s petition for interim relief, the CJD emphasized the integrity of the judicial system as a factor in applying its totality of circumstances test, noting that suspension, pending trial and development of more facts, was the only means to protect the public. However, the court decided to continue Eakin’s compensation and said nothing to explain that specific aspect of its decision.⁷

We believe that interim suspensions from judicial duty and denial of compensation

involve separate and distinct issues of public policy. Clearly, if the objective is to protect the integrity of the judicial system and the public's trust and confidence in its judicial processes, temporarily suspending a jurist from further judicial duties is an effective and salutary step. The factors identified in the "totality of circumstances" test are eminently relevant to the questions of protecting the public interest and whether a jurist should continue to adjudicate.

But are there (or should there be) specific criteria relevant to the question of a suspended jurist's continued compensation, other than perhaps the United States Supreme Court's facile observation that "government does not have to give an employee charged with a felony a paid leave at taxpayer's expense"?⁸ In response, it could be pointed out that there are ways to address this monetary concern: the judicial disciplinary process could be expedited to minimize the expenditure of public monies for a jurist charged with misconduct; and, if convicted, the jurist can be assessed fines, fees, and costs, as was ultimately done in the Eakin matter.

We recognize that, as the Court of Judicial Discipline has decided, judicial disciplinary proceedings are quasi-criminal and that the due process protections of Article V, section 18 are not applicable at the preliminary disciplinary stage. We recognize that the panoply of such protections could complicate and prolong the disciplinary process, potentially contributing to what the Court of Judicial Discipline has noted as a "cottage industry" of judicial disciplinary litigation.

Nevertheless, we believe that the issue of a jurist's innocence, while not presumptive, should not be deemed totally irrelevant to the Court of Judicial Discipline when it addresses the recognizably difficult issue of interim suspension and continued compensation. Completely divorcing the constitutionally prescribed presumption of innocence from the preliminary suspension stage is a convenient and artificial line of demarcation that effectively minimizes the level of justice accorded to an accused jurist. As a matter of fundamental fairness, when denial of compensation can impose extreme hardship, affecting a jurist's livelihood and ability to defend the disciplinary (and criminal) charges, we believe that every jurist who has been suspended without pay deserves to know specifically why — factually and legally — such a denial of salary is being imposed. It surprises us that more has not been said about this issue.

It may appear that this discussion, from a public policy point of view, is too sympathetic to jurists who have been charged with violating their oath of office. Of course, it is important to recognize that, at the interim disciplinary stage, there has been no judicial fact-finding of guilt whatsoever and no conviction.

Having explored this thorny issue in greater detail, we have discovered that there is a countervailing practice in many other states — embodied in either their constitutions, statutes, or procedural rules. These provisions provide a greater level of predictability, clarity, consistency, and fairness as to what sanctions are appropriate when a judicial official is charged with a crime.

Common to those provisions is that a jurist, charged with a felony, is suspended *without* loss of salary, at least until conviction. We believe that such a categorical, easy-to-apply approach may reflect an unstated public policy that a jurist's suspension is sufficiently protective of the public's interest in a fair and impartial judicial system; furthermore, the "with compensation" approach avoids the potential for arbitrary, ad hoc or inconsistent decision-making at an important preliminary stage.⁹ We believe that approach is predictable, sensible, and fair.

We, therefore, recommend that both the Judicial Conduct Board and Court of Judicial Discipline re-examine their unarticulated policy and procedures regarding the imposition of interim suspensions without pay. We recommend that these entities establish clear written guidelines and criteria that will inform a charged jurist, the jurist's counsel, the legal community, and the public as to the factors that the Court of Judicial Discipline deems relevant to interim suspensions without pay. Preferably, these guidelines should be established through procedural rules.¹⁰ Clearly, such guidelines or rules can identify relevant criteria to guide action while providing the disciplinary entities with sufficient flexibility when faced with exceptional circumstances justifying a deviation from its rule or policy.

Moreover, in all cases, regardless of the current absence of relevant rules or guidelines for interim suspensions, the Court of Judicial Discipline should provide a brief explanation why it has decided to take adverse interim action against a jurist. The reasons for a judicial order should be revealed, not concealed. A public record that plainly articulates the legal and factual bases for decision-making promotes transparency of the judicial process and provides assurance to all that justice has been fairly and consistently administered. Each stage of the judicial disciplinary process should embody such fundamental fairness. ♦

6. DISCIPLINE BY CONSENT:

The Court of Judicial Discipline should consider and adopt the American Bar Association's prior recommendation of a "discipline by consent" procedure. Such a process is both fair and reasonable.

As the trial date for Justice Eakin in the Court of Judicial Discipline was approaching, attorneys for the justice and Judicial Conduct Board engaged in behind-the-scenes discussions. The apparent purpose was to reach some sort of accommodation that would avoid a costly, lengthy, and potentially embarrassing public trial. The discussions were private. The news reports, however, described a process that appeared to mimic either a plea bargain or mediation. The problem, however, was that the applicable rules did not recognize such a proposed (by whom, we don't know) procedure. In the end, the attempt to strike a bargain collapsed. The Court of Judicial Discipline made clear that the pre-trial and trial processes

must be in accordance with the specific applicable rules of procedure governing proceedings in the Court of Judicial Discipline. Those rules did not specifically accommodate mediation or plea bargains. It is a process that gives the court significant leverage. As a result, Eakin resigned his office and opted to follow the procedure prescribed by Rule 502 of the CJD's Rules of Procedure.

Rule 502 outlines a process for stipulations of fact, as follows: "In lieu of trial, the parties may submit to the Court stipulations as to all facts necessary to a decision of the issues in the case. The stipulations shall be binding upon the parties and may be adopted by the Court as the facts of the case upon which a decision shall be rendered. When submitted, the stipulations shall be accompanied by a signed waiver of any right to trial granted under the Constitution and the Rules of this Court." The Court can accept or reject the proposed stipulations.¹ In electing to proceed under Rule 502, former Justice Eakin essentially relied on the CJD to impose a merciful sanction. The move was a calculated risk. Unlike a traditional plea bargain arrangement, there was no agreement or proposal regarding an appropriate punishment.

In 2011, the American Bar Association's report on Pennsylvania's judicial disciplinary system recommended that procedures for "discipline on consent" be developed and adopted, consistent with the ABA's model rules of judicial disciplinary enforcement ("MDJE").² Referring to its model rule, the ABA report noted: "Discipline on consent benefits all participants in the process. It allows for the prompt resolution of matters, conserves resources and allows the judge to avoid a costly, public trial."³

The ABA report provided details as to how discipline by consent would work. It said: "The agreement should set forth sufficient facts, analysis, and citations to authority to enable the Court to make an informed decision. The agreement should be accompanied by an affidavit executed by the judge stating that he or she is entering into the agreement freely and voluntarily, that he or she consents to the recommended sanction, and that the facts set forth in the affidavit are true. The Court of Judicial Discipline should approve or reject the petition for discipline on consent. If the Court rejects the petition, the judge's admission should be deemed withdrawn and cannot be used in the proceedings. If approved, the petition should be considered a final order of judicial discipline."⁴

We believe this is a commendable and fair process. It provides a meaningful opportunity for the JCB and jurist to engage in a negotiation about the essential facts, applicable case law, and reasonable sanction. As with the current process, the discipline by consent procedure can avoid a lengthy trial and save costs. Within the decisional matrix of whether to invoke the discipline on consent procedure, it would be appropriate for the CJD to articulate its assessment of various factors, such as the gravity of the offense, the jurist's record of service, and whether the public interest would be served if the court approved a petition for discipline by consent.

We also believe that the CJD has the authority to adopt the discipline by consent process through an appropriate rule of procedure. We recommend that the CJD should give serious consideration to the prior recommendation of the ABA and adopt a discipline by consent process. ❖

7. EDUCATION AND TRAINING:

Under a very recent Supreme Court order, all jurists are now required to complete three hours each year in judicial ethics education, a requirement we strongly endorse. The Supreme Court's mandatory judicial education order should specifically make clear that a jurist's failure to comply fully with the mandatory education (substantive and ethics) requirements may constitute neglect of duty and result in an automatic referral to the Judicial Conduct Board. Information regarding such failure to comply fully with the annual mandatory judicial education requirements should be available to the public. There should be sufficient professional, administrative, and financial resources to support the mandatory judicial education program. The Continuing Judicial Education Board should publish an annual report.

An ethical culture promotes ethical behavior. Ethical behavior requires knowledge and sensitivity to values that are of central importance to the justice system. Such knowledge and sensitivity can be cultivated by consistent education and training.

It is perhaps easy to lose sight of a central concern – ethical behavior – when we concentrate on the integrity and reformation of our judicial disciplinary and administrative processes. But it has been the accumulation of individual ethical shortcomings and lapses of good judgment that demonstrates the need for such re-examination and reform, including — the exchange of lewd and offensive communications among jurists, public officials, and attorneys; the misuse of government resources; the existence of potential conflicts of interest and the appearances of impropriety; a perceived attempt to manipulate internal processes; the insensitivity, bias, and prejudice toward various groups of citizens and the failure to appreciate the ethical and disciplinary significance of such attitudes; and the problematic camaraderie among jurists, prosecutors, and defense counsel, especially in the context of social media.

We, therefore, applaud the Supreme Court in requiring that every jurist complete three hours each year in ethics education, which should address both personal and professional responsibilities.¹

We further recommend the following:

- Ethics education should include information relating to sensitivity and fairness with respect to race, gender, religion, ethnicity, transgender and

sexual orientation, and disability, including the subject of implicit or unconscious bias.²

- Ethics education should also address issues such as inappropriate communications, conflicts of interest, appearance of impropriety, recusals, proper use of social media, proper use of government resources (technology and staff) and avoiding ethically-compromising relationships with attorneys.³
- The Judicial Conduct Board, the Court of Judicial Discipline, and the State Conference of Trial Judges, should have meaningful input into the planning of ethics and related educational courses and programs.
- The mandatory educational program should receive adequate funding and administrative support to fulfill its mission and should be included in the judiciary's request for appropriations.
- To enable jurists to comply with this educational requirement, convenient modes of delivery (e.g. webinars) should be explored and utilized as is done in other state judiciaries.
- Although implied in the new judicial education requirements, the Supreme Court's order should follow the examples of Florida and Washington and make specifically clear that a jurist's failure to comply fully with the annual educational requirement may constitute a neglect of duty and result in referral to the Judicial Conduct Board;⁴
- To promote greater openness and accountability, the Continuing Judicial Education Board should issue an Annual Report regarding the specific courses offered during the reporting period, identification of accredited providers, statistics as to compliance and types of courses (e.g. by the AOPC educational department, distance learning, teaching etc.) completed, the members of the board, anticipated program developments, and other information relevant to the continuing judicial education program.
- Given the commendable policies in other states that acknowledge the public's right to know⁵, information as to jurists who have not fully complied with the annual education requirement should be readily available to the public.

Lastly, we recommend that the Court of Judicial Discipline and Judicial Conduct Board should require their members and staff to complete mandatory ethics education and training on an annual basis.⁶

The importance of mandatory judicial education and training in ethics should be self-evident given the recent high-profile judicial misconduct cases.⁷ Our recommendation on this point is underscored by the first recommendation recently made in Gansler's report, namely, that the Commonwealth branches of government should conduct mandatory anti-bias and diversity training.⁸ As our

recommendation herein makes clear, however, such judicial education and training should be more expansive to encompass the other ethical problems that recent events have revealed. ❖

8. TRANSPARENCY AND CONFIDENTIALITY:

Both the Judicial Conduct Board and the Court of Judicial Discipline should enact procedures and practices that promote greater transparency and accountability of its processes and decision-making. With respect to the Judicial Conduct Board, confidentiality should be narrowly interpreted. The Judicial Conduct Board and the Court of Judicial Discipline should improve their web sites to make their processes and information more accessible to the public.

Transparency is an important concern throughout this report. As we have noted, there needs to be greater visibility of the processes and decision-making of the judicial disciplinary entities. We have made specific recommendations concerning appointments, conflicts of interest, recusals, the criteria governing interim suspensions, and disclosure of reasons supporting interim suspensions in all cases. Consistent with recommendations that were made by the American Bar Association and Pennsylvanians for Modern Courts in 2011, we maintain the view that confidentiality, particularly with respect to the Judicial Conduct Board, should be narrowly interpreted.¹

In 2011, PMC made a specific recommendation regarding the JCB's apparently expansive reading of the applicable constitutional provisions and its internal operating procedures. As we said then: "We recommend that the Board amend IOP 5.01 to ensure that it comports with the constitutional provisions and does not expand them to create a special confidentiality privilege of the Board."²

Almost one year before we issued this recommendation, the scope of the JCB's interpretation of the constitutional confidentiality provisions became a publicized issue when it asserted a broad right to confidentiality in connection with an investigation conducted by the Interbranch Commission on Juvenile Justice. The Commission's work focused on a highly publicized judicial corruption scandal in Luzerne County involving payoffs to two judges and the violation of rights of thousands of juvenile defendants in the county's juvenile court. During its investigation, the Supreme Court was asked to address the JCB's assertion of constitutional confidentiality when it refused to provide information requested by the Commission. The controversy culminated in a decision by the Supreme Court of Pennsylvania in which it recognized a deliberative process privilege for the JCB as to its investigations or any deliberations concerning whether to file charges, as well as confidential deliberations of law or policymaking reflecting opinions,

recommendations, or advice.³

The Supreme Court resolved the dispute between the JCB and the Interbranch Commission. But the scope of constitutional confidentiality, as the Interbranch Commission's later report noted, requires a careful review and perhaps constitutional revision as it relates to the confidentiality and accountability of the JCB in fulfilling its constitutional obligations.⁴

It is important to note that the constitution addresses JCB confidentiality in terms of categories of information, viz., complaints, as well as statements, testimony, documents, records or other information acquired by the board in the conduct of an investigation. The constitution further provides that "All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality."⁵

It seems reasonably apparent to us that the constitutional cloak of confidentiality applies to a complaint made, as well as information obtained and decisions made with respect to the *investigation* of a matter. Information that relates to board *processes*, at least with respect to matters that culminate in the formal filing of a complaint, should not be privileged. Such non-confidential matters, for example, would include information about recusals and disclosures of conflicts of interest since they are not integral to the actual investigations or decision to file (or not file) a disciplinary complaint; they are functionally removed from and preliminary to investigative-deliberative-decision making actions. In addition, there may well be future issues of legitimate public concern regarding the JCB's administrative or operational processes. Such information, as long as it does not necessarily implicate or jeopardize disclosure of the JCB's investigations or deliberations relating to such investigations, should be presumptively public.⁶ The polestar of confidentiality should be protection of the board's investigation and decision whether to file charges.

We note that the Board has revised its internal operating procedures to some degree since 2011. As noted in one of our recommendations (number two) of this report, the JCB addressed the issue of recusals in 2016, acknowledging that recusals may be disclosed if it is "necessary to protect the integrity of the system of judicial discipline."⁷ While reflecting a greater sensitivity to transparency, we believe the qualification within the IOP is problematic. Information regarding recusals and disclosures of potential conflicts of interest should be available to the public with respect to all cases in which formal charges are brought by the board. Transparency about recusals is one way to protect and demonstrate the integrity of the system of judicial discipline.

In addition, we believe that the JCB's amendment of its confidentiality IOP has been more cosmetic than substantial. The wording of the confidentiality provision goes beyond the applicable constitutional provisions to include "processes." We continue to believe that confidentiality should be strictly limited to information

acquired in the course of an investigation and the decision to file charges. Compared to the confidentiality provision we reviewed in 2011, the amended IOP can still be expansively interpreted to serve as a cloak in protecting the JCB and its members.⁸ We urge the JCB to once again re-examine its confidentiality provisions in light of what has occurred in the Eakin matter and, especially, in reference to the letter and spirit of the Pennsylvania constitution. Confidentiality should not be used as an expansive cloak of privacy.

We also recommend that both the JCB and CJD re-examine and renovate their web sites to include more readily-accessible information.

Specifically, internal operating procedures and rules governing the conduct of the JCB and CJD members (and staff) should be prominently identified and *easily* accessible on the entities' respective web sites. A citizen or lawyer should not be required to go on an Internet hunt to obtain basic and important information about procedures, rules, cases, or processes. The CJD should make all its opinions and orders readily available on its web site. Currently, the CJD "archives" its pre-2008 opinions, directing the viewer to "contact the administrative office of the court" to obtain the information. Such a process is inexcusably archaic, cumbersome, and contrary to modern notions of internet privacy.⁹

We note that the recent report from the attorney general, the Gansler report, cited the need for the JCB to make the reporting of suspected misconduct easier, including the ability to file complaints on-line, the creation of a hot-line for reporting misconduct, and expanded education to the public.¹⁰ These observations are consistent with a recommendation we made in our 2011 report.¹¹ We endorse these salutary reforms.

Greater transparency promotes accountability and ultimately instills greater public trust and confidence in the integrity and fairness of the judicial disciplinary process. ♦

9. THE CONSTITUTIONAL RESPONSIBILITIES FOR REGULATING JUDICIAL BEHAVIOR:

(A) The Supreme Court's exercise of authority in judicial disciplinary matters should be strictly limited. Other than appellate review of final orders of the Court of Judicial Discipline, the Supreme Court's intervention in judicial misconduct matters should be confined to clearly articulated extraordinary and emergency circumstances, such as the filing of felony charges against a jurist and the immediate need to protect the integrity of the judicial system. In all other circumstances, if the Supreme Court receives or uncovers information regarding suspected misconduct of a jurist, a prompt referral should be made to the Judicial Conduct Board. (B) The Judicial Conduct Board must fulfill its independent constitutional responsibilities of investigation and, when warranted, prosecution through a process

that is impartial, thorough, fair, and prompt. (C) The Supreme Court should re-examine and revise the applicable canons and rules governing the ethical conduct of jurists.

A. Judicial Discipline and the Supreme Court:

The proper role of the Supreme Court in judicial disciplinary matters is a difficult one. Our fundamental concern is the potential exercise of unrestrained supreme power in tension with the Pennsylvania Constitution's specific allocation of responsibilities for the discipline of jurists

Under Article V of the Pennsylvania Constitution, the Supreme Court has paramount constitutional authority to exercise general supervisory and administrative authority over all courts and jurists.¹ Supreme judicial power of the Commonwealth is vested in the Supreme Court.²

The amendment of the constitution in 1993 represented a wholesale revision of the institutional framework for the suspension, removal, discipline, and compulsory retirement of the Commonwealth's jurists. A two-tier system – one investigatory and prosecutorial (the Judicial Conduct Board) and the other adjudicatory (the Court of Judicial Discipline) – was established with specific disciplinary authority over jurists, subject to appellate review of final orders of the CJD by the Supreme Court. The change was a significant departure from Pennsylvania's former unitary judicial discipline system.³

It is probably safe to say that when these constitutional changes took effect, many contemplated that the Supreme Court's role in judicial disciplinary matters would be a very narrow one, limited to appellate review of final orders of the Court of Judicial Discipline.⁴ Over the years, however, it has become clear that the Supreme Court envisioned a greater role for itself regarding its constitutional responsibilities for the Commonwealth's unified judicial system and the Court's relationship to the JCB and CJD.⁵ The issue of the allocation of constitutional responsibility in matters of judicial misconduct reached an extraordinary climax in 2014.

The controversy centered on magisterial district judge, Mark Bruno, who was indicted on felony charges connected to a purported ticket-fixing scandal in Philadelphia Traffic Court. Four months after Bruno's indictment, the CJD suspended him temporarily *with* pay. A few months thereafter, the Supreme Court ordered Bruno's interim suspension *without* pay. To make a long story short, the matter landed in the Supreme Court primarily to address the public jurisdictional tussle between the Court and the CJD.⁶

The essential question was whether the CJD's power of interim suspension was exclusive or concurrent vis-a-vis the constitutional powers and responsibilities of the Supreme Court. The Pennsylvania Constitution, for example, specifically invests the Court of Judicial Discipline with the authority to issue a non-appealable

interim suspension order of any jurist when the JCB files charges or when the jurist is indicted for a felony.⁷

In a lengthy analysis of the Court's constitutional and historical powers, the Court declared that it retained "King's Bench" authority (an ancient English common law power originating in the 12th century and transported to the Pennsylvania colony in 1722) to order the interim suspension without pay of a sitting jurist. The Court's pronouncement was broad.

Recognizing "the high and transcendent authority" of the Supreme Court's supervisory power over the Unified Judicial System, the Court asserted its power to investigate and/or suspend a jurist and stated that such a power was distinct from the jurisdiction of the CJD. The Court noted that its King's Bench power cannot be divested unless such a divestiture or limitation is clearly expressed or necessarily implied in the constitution.⁸

From the Supreme Court's perspective, the Court of Judicial Discipline was an inferior tribunal and, in the event of conflicting orders, the Supreme Court's pronouncement is supreme. The Court, furthermore, left open the question of its historical King's Bench supervisory power over the CJD with regard to cases pending in the CJD.⁹ The open-ended reservation of such power, while only theoretical at present, could present serious constitutional difficulties in the future.

In attempting to resolve the delicate matter, the Supreme Court in *Bruno* diplomatically acknowledged the need for restraint and constitutional comity. Recognizing the extraordinary *sui generis* (i.e. unique) nature of the facts presented, the Court adopted an ambiguous line of demarcation for the exercise of its extraordinary King's Bench power in matters implicating the CJD's jurisdiction – the Court would act only in "extraordinary circumstances." The Court noted that the law would have to develop incrementally.

Less than three weeks after the Court's pronouncement in *Bruno*, the Court dramatically took King's Bench action against its colleague, Justice Seamus McCaffery. In the absence of any pending criminal charges against McCaffery (none were ever filed), in reliance on the informal internal fact-finding conducted by an openly hostile colleague, and accusations by another (non-participating) colleague who was also implicated in a developing scandal— the Court issued an interim order of McCaffery's suspension with pay. There was no prior notice of the charges or accusations, nor an opportunity given for a response preceding the Court's action, which understandably would have been awkward. However, consistent with fundamental due process, the order gave McCaffery a post-deprivation opportunity to petition the Court to vacate or modify the order.¹⁰

The order occurred against a backdrop of sensational news stories about McCaffery (and his wife) and frustration that the Judicial Conduct Board was not proceeding expeditiously in addressing the accusations and rumors against McCaffery. The Court ordered the JCB to conduct a prompt, emergency investigation and to

provide the Court with a report of its findings concerning any of the allegations noted by the Court about McCaffery “or any other matters which may be pending before the Board in which Justice McCaffery is the subject of complaint or inquiry.”

Resolution of the McCaffery matter came swiftly. Within one week of the Court’s order, McCaffery and the JCB reached a confidential accommodation. McCaffery submitted his resignation on October 27, 2014.¹¹

The Court’s action against McCaffery was an unprecedented assertion of extraordinary judicial power.¹² Whether viewed through a disciplinary or administrative lens, the circumstances leading to the suspension (albeit “interim”) of an independently elected and sitting justice signified a serious institutional rupture.¹³

The purpose of this commentary, however, is not to resolve or critique the constitutional issue of the Court’s power to exercise emergency interim intervention in matters that involve suspected judicial misconduct. Such an attempt would be futile and naïve. The Court, for now, has emphatically decided that it possesses the power to act and will intervene only in “extraordinary circumstances.”¹⁴ We prefer to view this power as an emergency safety valve, administrative rather than judicial in nature, designed to protect the integrity of the unified judicial system only in exigent or extraordinary circumstances.

“Extraordinary circumstances,” which can serve as an important safety valve in unforeseen circumstances, is an amorphous, elastic term that fails to provide a modicum of clarity and predictability, which are essential to the fair and impartial rule of law. The McCaffery suspension presents a disturbing example of a legal process that, in our view, should not be repeated. We believe that the identification of some criteria for the application of the vague standard may provide guidance for the exercise of such extraordinary discretion.

We recommend that, consistent with the constitutional provisions applicable to the Court of Judicial Discipline with respect to interim suspensions, as well as the Supreme Court’s broad supervisory powers, the Supreme Court’s emergency power should be limited to circumstances involving the filing of felony charges against a jurist and the immediate need to protect the integrity of the judicial system. In all other circumstances, especially when the Court uncovers or receives information of suspected judicial misconduct, the Court should make an immediate referral to the Judicial Conduct Board.¹⁵ This is acutely relevant when the Court takes disciplinary-like action against one of its colleagues. Whenever the Court exercises this extraordinary emergency power, it should clearly articulate the legal and factual bases for doing so.

We make some final observations.

The modern Supreme Court of Pennsylvania has been noticeably active in exercising its constitutional responsibilities of administration and oversight of the unified judicial system beyond the promulgation of procedural and ethical rules.

For example, the Supreme Court has not been reluctant to take steps to authorize investigations and hearings to protect the integrity of the judicial system and institute reforms. As the Court noted in *Bruno*, it has taken such action with respect to the so-called kids-for-cash scandal in Luzerne County and the allegations of ticket-fixing in the (former) Traffic Court of Philadelphia. These actions go well beyond a court's traditional adjudicatory role.¹⁶

With respect to such administrative investigations by the judiciary, we recommend that the Court, in appropriate cases, confidentially provide relevant information of suspected judicial misconduct to the Judicial Conduct Board for its prompt review and, if necessary, action. Furthermore, with respect to internal fact-finding, basic procedural safeguards should be observed. Any confidential interrogation of a jurist should be preceded by a clear statement to the jurist that evidence of suspected judicial misconduct may result in a referral to the JCB.

Many may rightfully review the Supreme Court's recent interventions in judicial discipline matters as a cautionary tale. If the Court persists in exercising its authority in an unrestrained and ill-defined manner that continues to provoke serious constitutional and due process concerns, some may view such actions as an open invitation to constitutionally curtail or limit the Court's King's Bench powers.¹⁷

B. The Judicial Conduct Board and Judicial Discipline:

As to the JCB, we recognize that it must be exceedingly difficult when it is faced with the onerous and intimidating responsibility of investigating charges of misconduct against a sitting Supreme Court justice. The pressures and resources attending such an investigation – within the context of a limited staff and hundreds of other cases – present enormous challenges.¹⁸ Similar pressures confront the JCB whenever a well-publicized scandal erupts, e.g. Philadelphia Traffic Court or Luzerne County's kids for cash controversy. Nevertheless, it is incumbent upon the JCB to conduct — and promptly complete — an investigation of an accused jurist, and, if warranted, to prosecute that jurist, regardless of rank, through a process that is unimpeachably independent, impartial, thorough and fair. The integrity of our justice system demands no less. (As we note in the next item, we are encouraged by the JCB's recent efforts in providing ethical guidance to the judiciary.)

C. The Supreme Court as the Ethical Leader:

The Pennsylvania Constitution, Art. V, sec. 17 (b) entrusts the Supreme Court with the ultimate responsibility of moral leadership. The Constitution prescribes that “Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court. Justices of the peace [now designated as magisterial district judges] shall be governed by rules or canons which shall be prescribed by the Supreme Court.”

Canons and rules of conduct regulate ethical behavior and provide indispensable guidance to jurists. In 2014, the Supreme Court approved a massive revision of the Code of Judicial Conduct. The Supreme Court has also promulgated various policies to address the problem of discrimination and harassment within the judicial system, the proper use of information technology, and the conduct of the judiciary's employees. The Supreme Court has also established and supported the Interbranch Commission on Gender, Racial and Ethnic Fairness. These are significant accomplishments to demonstrate the judiciary's commitment to fair and ethical behavior. It is easy to lose sight of such leadership when one is embroiled in the emotion and developing narrative of a high-profile scandal.

Scandals, nevertheless, present an opportunity for a system to confront its weaknesses and take corrective action. We believe that the Court must exert its moral leadership by reviewing and revising the applicable codes and rules for judicial conduct in light of the various ethical issues that recent events have exposed and that have been highlighted in this report. While canons and rules cannot guarantee ethical behavior, they can provide practical guidance. They also reflect moral leadership.

For example, shortly after the release of the Gansler report from the Office of Attorney General, the Judicial Conduct Board advised the press and the public that its examination of future referred cases will be conducted in conformity with its recently announced "Statement of Policy Regarding Electronic Communications," effective October 5, 2016.¹⁹ Significantly, we noted what the JCB stated about its Policy, specifically that it "sets forth the Board's tentative intention with respect to how it will interpret and enforce the Code, the Rules, and the Constitution with respect to allegations of judicial misconduct stemming from the use of electronic communications in the future."

The JCB is to be commended for taking the initiative in crafting a detailed, practical, and principled policy as to the use of electronic communications. Of course, it is self-evident that detailed canons or codes should not be necessary to warn those who are bestowed with the privilege of wearing the black robes of justice that they should not engage in extra-judicial conduct which is manifestly "inappropriate," ethically wrong or compromising, in substance or appearance.

But we add another important caveat. As the Board's prefatory statement noted: "While the Board seeks to provide guidance with the issuance of this Statement of Policy, it is noted that the Statement of Policy does not have the force and effect of law and is binding on neither the members of the judiciary nor the Board."

We thus return to our initial observation and premise: only the Supreme Court can establish the rules of conduct that will regulate and guide judicial behavior. Thus, we recommend that, in light of recent events and ethical issues, the Supreme Court should authorize the re-examination of relevant judicial ethical codes to address the need for practical ethical guidance for our jurists.²⁰ ❖

10. PUBLIC TRUST AND CONFIDENCE:

Maintaining the public's trust and confidence is integral to the credibility of the judicial branch and the public's respect for the rule of law. It is essential that the judicial system foster a culture that promotes ethical behavior and processes. Concrete steps should be taken to promote integrity, transparency, fairness, and accountability.

Almost 50 years ago, Professor Selwyn Miller authored a law review article on public confidence in the judiciary. He began his article with a sobering quote from Honoré de Balzac — “To distrust the judiciary marks the beginning of the end of society.”¹

Miller's observations are as relevant today as they were then. “Public trust and confidence” is an often-used expression in today's culture. But, we might ask, how do you define public trust and confidence? How do you even measure the public's trust and confidence? What factors influence public trust and confidence? More fundamentally, why is public trust and confidence important to our democracy?

In the intervening years since Miller's article, much has been written and discussed about public trust and confidence in the courts. There have been commendable attempts to define, measure, and promote it. The National Association of Court Management (“NACM”), for example, has identified public trust and confidence as a “core competency,” noting that court leaders should strive to promote public trust and confidence “by creating and promoting an organizational culture that fosters integrity, transparency and accountability for all court processes and proceedings.”²

In 2014, the National Center for State Courts (“NCSC”) addressed the importance of this core competency by conducting an interesting survey. Its essential conclusion was that courts must remain vigilant by addressing public perception of problems that can undermine the public's trust and confidence in the courts. While noting that the public's perception of the judicial system was generally positive, it identified some lurking dangers, such as the influence of partisanship and political deal-making that would undermine the impartiality of the court system.³ In that regard, one is reminded of Professor Miller's note of caution when he said “...for even one rotten judicial apple can go far toward spoiling the entire judicial barrel.”⁴

Proceeding from the conceptual to the practical, one is faced with the difficulty in ascertaining the individual or cumulative effect of the Orie Melvin-McCaffery-Eakin episodes on the perceptions of the “public” — such as the general citizenry, the community of jurists, the broader legal community of attorneys, the academic legal community, the multi-dimensional media, as well as the judiciary's sister branches of government. How does one calculate the harm, short or long-term,

with regard to the many problems — actual or perceived — that have arisen in connection with the reported instances of manipulation of processes, conflicts of interest, secrecy, competitive exercise of disciplinary jurisdiction, repeated demonstrations of disrespectful or biased attitudes toward women and minorities, and potentially compromising relationships and inappropriate communications among members of the bench and bar?

The public's perception of the judiciary's fairness and impartiality — and the consequential level of respect for the rule of law — must be legitimate concerns for the future of the judicial system and its leaders. The perception of reality is reality. A sensational news story or a scandal with state-wide resonance escalates the threat and challenge to the judicial system, especially in a volatile atmosphere of cynicism and distrust for government. The bottom line is that the public's perception, which can accurately reflect or distort reality, is necessarily influenced by what government *says* and *does*.

Words can be important in highlighting the judiciary's core values (such as integrity, impartiality, and independence). Messages can provide direction and comfort in times of crisis. Chief Justice Saylor, for example, issued a brief public statement of concern when the Eakin matter was referred to the Judicial Conduct Board. Likewise, Justice Todd, on more than one occasion, offered extended comments about the seriousness of the email controversy and, in a communication that was eventually disclosed to the public, identified necessary steps to address the on-going damaging controversy. We note that when the Michigan Supreme Court experienced turbulence stemming from the apparent criminal conduct of one of its justices (who was forced to eventually resign), the Chief Justice issued an extended comment to assure the public of the Michigan Supreme Court's moral vision and dedication.⁵

Words are important. But actions are more important than words. Actions, to exert a positive effect, must be aligned with core ethical principles. In that regard, there are many whose actions can positively influence public perception. We briefly identify those actors and steps that can promote public trust and confidence in the judicial system, including the affiliated disciplinary institutions and processes.⁶

Supreme Court and disciplinary bodies:

- Establish fair, open, and transparent processes for applications and appointments to the Judicial Conduct Board and the Court of Judicial Discipline.
- Implement clear protocols and procedures to promote integrity, accountability, and fairness, specifically with respect to conflicts of interest and recusals.
- Promote greater openness and transparency through rules and procedures that reveal how the judicial system acts with integrity and impartiality.
- Recognize the respective constitutional responsibilities for judicial discipline

through an approach that stresses comity and cooperation.

- Promote a culture of individual and institutional integrity through education and training, especially in matters that concern both judicial and personal conduct (such as conflicts of interest, use of social media, relationships and communications between the bench and bar) that the canons of conduct do not clearly or effectively address. Also train non-judicial disciplinary staff.
- In the prosecution and adjudication of judicial discipline cases, provide clarity, fairness, and predictability regarding sanctions sought and imposed.
- Communicate with the public, especially in times of uncertainty or crisis, without compromising judicial independence or impartiality.

Executive and Legislative Branches:

- Cooperate with the judiciary in establishing processes to identify and select qualified and representative candidates to the disciplinary bodies.
- Respectfully monitor the actions of the judicial branch and provide the needed check and balance to address institutional deficiencies or problems.
- Assess whether there is a need to review and revise the Constitution with respect to the membership and appointment of the disciplinary bodies.
- Provide adequate funding to support the judicial branch and the disciplinary bodies, especially the Judicial Conduct Board, in fulfilling their constitutional responsibilities.

Media, bar associations, good government groups, and scholars:

The actions taken by government in the pursuit of its democratic values influence the public's trust and confidence in the courts. But non-governmental actors, particularly the media and bar associations, can also play a critical role in the public's perception of the courts. Investigative reporting by the media, resolutions and committee work of state and local bar associations, watch-dog monitoring and recommendations by good government organizations, as well as scholarly commentaries, are important sources of information for the public and can serve as catalysts for reform.

It was the intensive investigative reporting by the media, for example, that played a critical role in providing valuable information to the public about judicial behavior and institutional irregularities in the Eakin matter. By speaking truth to power, the media revealed ethical and process issues that require sustained attention and reform.

Unfortunately, there is a growing tendency of the media to report on the judiciary only when there is a scandal, a crisis, or sensational case. Declining revenues, the proliferation of competitive news sources, and inadequate staff levels have served

to compromise severely the ability of the media to report fully on the judicial branch of government. Nevertheless, there remains a pressing need for greater news coverage of the judicial system's operations, including its disciplinary processes and actions. Accurate information is critical for an enlightened electorate.

While we have identified many problematic issues that deserve careful analysis (such as the disciplinary application and appointments process, disclosures of conflicts of interest, guidelines governing recusals, uncertain parameters governing private and professional conduct of jurists, adequacy and fairness of the prosecutorial and judicial processes regarding the imposition of interim disciplinary sanctions, transparency and accountability), there are also many commendable judicial initiatives and good works, both local and statewide, that should be reported. Such coverage ultimately benefits the electorate and influences the public's perception of — and trust in — the judicial branch of government.

Professor Miller's observation remains relevant today: "Greater knowledge *could* lead to greater confidence." ⁷ And greater confidence, in turn, can promote credibility and respect for the rule of law.

CONCLUSION

In the aftermath of difficult and turbulent events, there is a natural impulse to react with relief and a false sense of security — the storm has passed and now our daily business-as-usual routines can be resumed. Eventually, the illusion is exposed. History does repeat itself, often in unanticipated ways. When we wrote our report on judicial discipline in 2011, little did we realize that the judicial system would be subsequently besieged by three separate episodes of supreme misconduct.

If this report were a compass, it would point toward reflection and reform. The report has focused on two themes of integrity — institutional and individual. It is thus appropriate to end with words of caution about these concerns from two justices who were front row witnesses to the events described in this report.

In response to former Judge Del Sole's report, then-Justice Correale Stevens issued a separate press statement emphasizing the need for collective reform. He said: "The entire judicial disciplinary process is being questioned as a result of recent events. It is time for the judicial, legislative and executive branches of government to come together, with public input, and discuss reform of that process."

Justice Debra Todd also issued a separate statement to the Del Sole report. She focused the spotlight on individual responsibility and integrity, stating: "It should be abundantly clear that all of our Commonwealth judges are expected to conduct themselves, in both their personal and professional lives, in a manner that promotes the public's trust and confidence in the judiciary. Our citizens deserve nothing less."

ENDNOTES

INTRODUCTION

- ¹ *The Federalist* No. 22 (Alexander Hamilton).
- ² See Pa. Const., art. V, § 18 (amended 1993). The Constitution allocates responsibilities for judicial discipline among the Judicial Conduct Board (investigation, prosecution), the Court of Judicial Discipline (interim suspensions, adjudication of cases brought by the Judicial Conduct Board), and the Supreme Court of Pennsylvania (appellate review of final orders from the Court of Judicial Discipline). *Id.*
- ³ There have been a few notable high-profile cases in other states involving the forced resignation, removal, or discipline of a supreme court justice because of misconduct.

Chief Justice Roy Moore (Alabama) was removed from office in 2003 for refusing to comply with a federal court order regarding the removal of a 10 Commandments monument on public grounds. Moore was then elected as Chief Justice in 2013. But in 2016, Moore was suspended without pay for the duration of his term in connection with his issuing an administrative order to the state's lower court judges not to issue same sex marriage licenses in contravention of the United States Supreme Court's pronouncement in favor of same sex marriages.

In Michigan, Justice Diane Hathaway left office in 2009 after being charged with criminal mortgage fraud, a felony, to which she later pleaded guilty.

In Texas, Judge Sharon Keller of the Texas Court of Criminal Appeals, the state's highest court in criminal matters, the State Commission on Judicial Misconduct charged Keller with five counts of misconduct in connection with her conduct in a stay-of-execution matter. After a public warning by the Commission, the charges were later dismissed by a special court in 2010. Keller was fined \$100,000 by the Texas Ethics Commission for her failure to disclose \$2 million in assets.
- ⁴ *In re Cunningham*, 538 A.2d 473 (Pa. 1988).
- ⁵ *In re Larsen*, 616 A.2d 529 (Pa. 1992) (relieving Larsen of all duties with pay); 655 A.2d 239 (Pa.Ct.Jud.Disc. 1994) (suspending Larsen without pay). Larsen was convicted on April 9, 1994. He was impeached and removed from office on October 4, 1994.
- ⁶ See Interbranch Comm'n on Juvenile Justice, *Interbranch Commission on Juvenile Justice Report* (2014), available at www.pacourts.us. See *infra* Recommendation No. 8, note 4.
- ⁷ See, e.g., *U.S. v Sullivan*, No. 2:13-CR-00039, 2013 WL 3305217, at *1 (E.D. Pa. July 1, 2013). Judge Sullivan was the subject of a number of court proceedings, including *In re Sullivan*, 104 A.3d 323 (Pa. 2014) (vacating a suspension order and restoring Sullivan's compensation); *In re Sullivan*, 135 A.3d 1164 (Pa.Ct.Jud.Disc. 2016) (finding Sullivan violated

applicable codes of conduct and Pennsylvania Constitution); *In re Sullivan*, No. 2 JD 13 (Pa. Commw. Ct. 2016) (Mullen, J., dissenting) (removing Sullivan from office).

NARRATIVE

- ¹ The factual chronology comes from articles that appeared in general circulation newspapers, primarily The Philadelphia Inquirer. In addition, information was obtained from the following: Robert L. Byer, *Report of Special Counsel Concerning Review of Email Messages Involving Supreme Court Justices and Office of the Attorney General from 2002-2012* (Dec. 19, 2014), <http://www.pacourts.us/assets/files/resource-58807/file-4191.pdf>; Del Sole Cavanaugh Stroyd LLC, *Report of Special Counsel Regarding the Review of Justice Eakin's Personal Email Communications* (Oct. 30, 2015), <http://www.pacourts.us/assets/files/setting-4370/file-4748.pdf?cb=4f25b4>; *In re Eakin*, 13 JD 2015 (Pa. Commw. Ct. 2016) (containing the Judicial Conduct Board's proposed stipulations in its Pre-trial Memorandum); Letter from Francis J. Puskas, II, Deputy Chief Counsel, to Honorable Jack A. Panella, Conf. Judge (Feb. 22, 2016) (on file at <http://www.pacourts.us/assets/files/setting-4647/file-4987.pdf?cb=22e10c>) (responding to questions raised by the presiding judge in *In re Eakin*).
- ² See *In re Melvin*, No. 384 Jud. Admin. Docket (Pa. 2012).
- ³ See *In re McCaffery*, No. 430 Jud. Admin. Docket (Pa. 2014).
- ⁴ It was later revealed by the Judicial Conduct Board in its letter brief of February 22, 2016 to the Court of Judicial Discipline, *supra* note 1, that Eakin's self-report was very limited in its disclosures and did not report all the relevant e-mails.
- ⁵ The Supreme Court unanimously rejected, on procedural grounds, Kane's later attempt to reverse her suspension order on February 5, 2016.
- ⁶ It is unclear whether these e-mails, as well as the serial releases of numerous e-mails shortly thereafter, were included in Kane's 2014 disclosures. The JCB asserted in a pre-trial memo that the OAG, in fact, did not provided the JCB with all the e-mails exchanged between Eakin and the OAG staff. Kane's response was that she made a full disclosure.
- ⁷ One month later, the press revealed an attempt by Justice Eakin to engineer last-minute appointments in the courts of the First Judicial District (Philadelphia), before the three newly-elected justices were to assume their responsibilities on the Court. The Supreme Court rejected Eakin's proposal.
- ⁸ See *In re Eakin*, No. 13 JD 15 (Pa. Commw. Ct. 2015).
- ⁹ Former Canon 2A applied because it was the ethical precept applicable at the time of Eakin's alleged misconduct. Canon 2A

was substantially incorporated in the new Code of Judicial Conduct, Rule 1.2, effective July 1, 2014 (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety”).

¹⁰ See *In re Eakin*, *supra* note 8.

¹¹ *Id.* At the time of the CJD’s decision and order, Eakin’s salary was \$203,409.

¹² See Buckley Sandler LLP, *Report of Special Deputy Attorney General Douglas F. Gansler on Misuse of Commonwealth of Pennsylvania Government E-mail Communication Systems* (Aug. 18, 2016), https://www.attorneygeneral.gov/uploadedFiles/MainSite/Content/Related_Content/PressReleases/Gansler_Report_web.pdf. The report identified and reviewed 352,000 potentially inappropriate documents, including 145,000 e-mails between 2008-15. The report identified more than 11,930 inappropriate e-mails exchanged between prosecutors, OAG personnel and more than 25 employed in the Pennsylvania judicial system. *Id.* at 21–23. Of the inappropriate materials, 25% contained obscenity or nudity; 75% contained offensive material, e.g. racism or sexism. *Id.* at 21. The report identified 45 senders of inappropriate e-mails in the following volumes: judges (more than 160), assistant district attorneys (more than 35), senior executive branch officials (more than 30), and members of the General Assembly (approximately 5). *Id.* at 23. As previously indicated, identities were redacted by Attorney General Beemer. *Id.*

¹³ *Id.* at 7.

¹⁴ *Id.* at 47–49.

¹⁵ *Id.* at 50.

¹⁶ In a footnote to his opinion, Judge McHugh stated: “The fact that two Pennsylvania Supreme Court justices recreationally viewed - on state computers and on state time - numerous depictions of graphic sexual violence with captions degrading African Americans and endorsing abuse of women is cause for grave concern given [Hill’s] background and its potential relevance to her claims for relief.” *Hill v. Wetzel*, No. 12-2185, 2016 WL 6657389, at *11 n.6 (E.D. Pa. Nov. 10, 2016).

RECOMMENDATION NO. 1:

¹ A.B.A., *Pennsylvania: Report on the Judicial Discipline System* (2011).

² See A.B.A., *supra* note 1, at 19–21.

³ Pa. Const., art. V, §§ 18(a)(3)–(b)(2) require political party parity.

⁴ S. 1083, Gen. Assemb., Reg. Sess. (Pa. 2015).

RECOMMENDATION NO. 2:

¹ Pennsylvanians for Modern Courts, *Report and Recommendations for Improving Pennsylvania’s Judicial Discipline System* (2011) [hereinafter PMC Report].

² See Nat’l Dist. Attorneys Ass’n, *National Prosecution Standards* § 1-3.3 (3rd ed. 2009).

³ See, e.g., American Society of Radiologic Technologists, <https://www.asrt.org> (last visited Jan. 6., 2017); Council of Non-Profits, <https://www.councilofnonprofits.org> (last visited Jan. 6, 2017) (illustrating model conflict of interest/disclosure forms and policies).

⁴ The Pa. Code, Title 207, Chapter 61: Rules Governing the Conduct of Members of the Court of Judicial Discipline, Rules 5(A)(6), (B) (adopted Nov. 1, 1994), <http://www.pacode.com/secure/data/207/chapter61/chap61toc.html>.

⁵ See Cal. Policy Declarations of the Comm’n on Judicial Performance, §3.13 (approved June 30, 2010), http://cjp.ca.gov/files/2016/08/CJP_Policy_Declarations.pdf; N.Y. State Comm’n on Judicial Misconduct: Policy Manual, §§ 1.3, 1.4 (2016), <http://www.scjc.state.ny.us/Legal.Authorities/NYSCJC.PolicyManual.June2016.pdf>.

⁶ See Pa. Code, Title 207, Chapter 21: Internal Operating Procedures, Rule 111, http://www.pacode.com/secure/data/207/chapter5021/207_5021.pdf.

⁷ See Pa. Const., art. V, §§ 18(a)(5), (b)(3).

⁸ We also recognize that for the judicial members of the Court of Judicial Discipline, they would be subject to their respective codes of judicial conduct governing recusal and disqualification and that such codes are paramount.

⁹ See Pa. Const., art. V, §§ 18(a)(5), (b)(3).

¹⁰ See Complaint at ¶89, *In re Eakin* (Pa. Commw. 2015) (No. 13 JD 15).

¹¹ Judicial Conduct Board of Pennsylvania Operating Procedures, OP 2.09(c) (2016).

¹² 136 S.Ct. 1899, 1905 (2016).

¹³ We recognize that in cases and controversies, Pennsylvania case law makes the jurist the sole arbiter as to recusal. See, *Commonwealth v. Jones*, 541 Pa. 361, 663 A.2d 142 (1995)

¹⁴ See Michigan Court Rules of 1985, Rule 2.003(D).

¹⁵ *Pennsylvania Code of Judicial Conduct*, Canon 2.3(A). With respect to proceedings, the Code of Conduct, Rule 2.11, also provides that “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances...” Rule 2.11(A)(1)–(A)(6). Comment (1) to the Rule notes: “Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.”

¹⁶ Pa. Const., art. V, § 18(a)(5), (b)(3).

¹⁷ In its letter brief (pp. 12-13) of February 22, 2016 in the Eakin matter, the Judicial Conduct Board argued that the judicial decision process encompasses decisions that are both legal and administrative. As the Board noted, a full view of the term judicial decision-making process “necessarily includes whether a judge’s conduct in a given case could have had any influence over a judge’s decisions in their administrative role.”

Particularly with respect to the significance of a judge’s administrative responsibilities, the Board explained: “It is obvious that a given judge’s administrative role in the Unified Judicial System is proportional to that judge’s particular place in the Unified Judicial System. A Supreme Court Justice, like Justice Eakin, sits at the apex of the Unified Judicial System; the Supreme Court exercises the full power, both legal and administrative, of the judicial branch of the Commonwealth’s government...Justice Eakin’s emails, when viewed against the backdrop of his administrative responsibilities as a Supreme Court Justice, raise the specter of the appearance of influence over his administrative responsibilities...[T]he breadth of a Supreme Court Justice’s administrative responsibilities is broad; the authority that they exercise over the Unified Judicial System is such that they have the power to regulate the personal conduct of each and every state court system employee and judicial officer through their rule-making power.” *In Re: J. Michael Eakin, Justice of the Supreme Court of Pennsylvania*, No. 13 JD 15 (Pa.Ct.Jud.Disc., February 22, 2016) on file at <http://www.pacourts.us/assets/files/setting-4647/file-4987.pdf?cb=22e10c>.

RECOMMENDATION NO. 3:

¹ *American Bar Association, Pennsylvania Report on the Judicial Discipline System* (2011).

² *Model Rules of Judicial Disciplinary Enfr t r. 2(2)* (Am. Bar Ass’n 1995).

³ *Id.*

⁴ The Judicial Conduct Board’s operating procedure 4.03 addresses the subject of “non jurisdiction,” stating: “The authority of the Board is expressly limited to judicial officers of the Commonwealth of Pennsylvania.” *Judicial Conduct Board of Pennsylvania Operating Procedures*, OP 4.03 (2016). The provision includes all senior judges and notes: “Judges of the Federal Court, administrative agencies, and those performing the functions of a hearing officer or master are not within the jurisdiction of the Board.” *Id.*

⁵ *In re Melograne*, 812 A.2d 1164, 1167 n.2 (Pa. 2002). The concurring and dissenting opinion, authored by Justice Saylor and joined by Justice Nigro, disagreed with Chief Justice Cappy’s dictum on constitutional grounds. *Id.* at 1170–71. The dictum addressed an issue that was waived. See also *In re Interbranch Comm’n on Juvenile Justice*, 988 A.2d 1269, 1280 n.13 (Pa. 2010) (finding dictum that resignation before the filing of charges does not divest Court of Judicial Discipline of jurisdiction “to determine whether the judicial officer had engaged in judicial misconduct”). The Court of Judicial Discipline cited *In re Melograne* in *In re Eakin*, No. 13 JD 15 at 4 (Pa. Commw. Ct. 2016), but Eakin’s case is jurisdictionally distinguishable because disciplinary charges were filed before Eakin resigned.

RECOMMENDATION NO. 4:

¹ Pa. Const., art. V, § 18(b)(5).

² *In re Eakin*, No. 13 JD 15 at 27 (Pa. Commw. Ct. 2016).

³ *Id.* at 28 n.15.

⁴ *Id.* at 28 n.16.

⁵ See Fla. Rules of Judicial Admin. Rule 2.310(c) (identifying taxable costs); NM. R.J. Stds. Comm. Rule 36(c) (Judicial Standards Commission Rules, Rule 36).

⁶ See 967 A.2d 460, 468 (Pa.Ct.Jud.Disc. 2008). The judge was ordered to pay restitution to a defendant for the legal expenses he incurred when the judge issued a “stay away” order at the request of an acquaintance without conducting an evidentiary hearing or providing notice. *Id.*

⁷ See, e.g., *In re Kinsey*, 842 So. 2d 77 (Fla. 2003); *In re Judicial Campaign Complaint Against Moll*, 985 N.E.2d 436 (Ohio 2012).

RECOMMENDATION 5:

¹ See Pennsylvanians for Modern Courts, *Report and Recommendations for Improving Pennsylvania's Judicial Discipline System*, 11–12 (2011). See also A.B.A., *Pennsylvania: Report on the Judicial Discipline System* at 53 (2011) (recommending that the Court of Judicial Discipline should develop procedures to enhance consistency in the imposition of sanctions).

² Pa. Const., art. V, § 18(d)(2).

³ The exception would be when the Supreme Court independently intervenes to take administrative action against a jurist before the Judicial Conduct Board has filed a petition for interim relief.

⁴ Judicial Conduct Board of Pennsylvania Operating Procedures, OP 8.05 (2016).

⁵ See, e.g., *In re Larsen*, 655 A.2d 239 (Pa.Ct.Jud.Disc. 1994); *In re Melvin*, 57 A.3d 226 (Pa.Ct.Jud.Disc. 2013); *In re Jaffe*, 814 A.2d 308 (Pa.Ct.Jud.Disc. 2003).

⁶ See *In re Larsen*, 655 A.2d at 247. It should be noted that both Justices Orie Melvin and Eakin were accorded pre-suspension hearings. The constitutional process required for termination are distinct from the issue of what rights should be accorded to a public employee or officer when interim, pre-suspension action is taken, as noted in *In re Melvin*, supra.

⁷ See *In re Eakin*, No. 13 JD 15 at 27–28 (Pa.Ct.Jud.Disc. 2016).

⁸ *Gilbert v Homar*, 520 U.S. 924, 932 (1997) (rejecting the public employee's argument that the interest in maintaining public confidence could have been accommodated by suspending him with pay until he had a hearing).

⁹ Similarly, many provisions from other states provide that if a jurist is convicted or pleads guilty, the jurist is suspended without pay. Our research indicates that there are other states (Texas, Florida, and West Virginia) that have adopted a “with or without pay” approach similar to Pennsylvania's. Information as to other state practices was obtained from the National Center for State Court's through the gracious assistance of Cynthia Gray.

Of noteworthy historical interest on this point is the Pennsylvania Supreme Court's viewpoint in 1988 (before the 1993 constitutional amendments to Article V, sec. 18) regarding the suspension with pay of jurists charged with federal felonies in the so-called “Roofer's Union scandal.” While the Court noted that the Pennsylvania Constitution, at that time, did not specifically authorize the suspension of a jurist without pay, Chief Justice Nix's opinion made the following observation:

“As the language of [Judicial Inquiry and Review Board's] Rule 24 expressly states, the suspension was not intended to serve as a sanction for the alleged misconduct but rather was designed to serve as a means to avoid harm to the public and/or to pre-

vent the erosion of public confidence by actions of the charged jurist until there can be a final determination as to the validity of the charges and the imposition of an appropriate punishment. Indeed a contrary view would create serious due process questions since the validity of the accusations have yet to be finally determined. It is for this reason that this Court did not accept the Board's recommendation as to the stopping of the pay of these judges during the interim suspension...” *In re Cunningham*, 538 A.2d 473, 475 n.1 (Pa. 1988).

¹⁰ The General Assembly could also act to establish clarity and consistency as other states have done. A constitutional amendment is another option. In addition, we have noticed that, not infrequently, the Judicial Conduct Board will file a petition for interim relief without taking a position on the issue of compensation. Whether the actions of the Board at the preliminary stage reflect a reasoned directive by the Board, the application of an unarticulated policy, or legal uncertainty as to the preferable scope of interim action in a given case, we are unable to ascertain. All of this underscores our concerns about the policy and practice governing interim suspensions and the need for clarity, predictability, and transparency.

RECOMMENDATION 6:

- ¹ See Pa. Code, Title 207, Chapter 5: Trial Procedures, Rule 502.
- ² See *Model Rules of Judicial Disciplinary Enforcement* r. 23 (Am. Bar Ass'n 1995).
- ³ A.B.A., *Pennsylvania: Report on the Judicial Discipline System*, 49 (2011).
- ⁴ *Id.*

RECOMMENDATION 7:

- ¹ On December 9, 2016, the Supreme Court issued a per curiam order, No. 719, in which it established the minimum general requirements for a program of continuing judicial education, including three (3) hours of continuing education in judicial ethics and nine (9) hours of continuing education in judicial practice and related areas as defined by the Continuing Judicial Education Board of Judges. Pennsylvania Continuing Judicial Education, 204 Pa. Code § 31.4 (2016)
- ² Pennsylvania government has a commendable record of taking the issue of discrimination seriously. In 1999, then-Chief Justice John Flaherty initiated a three-year study that culminated in 2003 with a 550-page Final Report on the topic of racial, gender, and ethnic discrimination. See The Pennsylvania Interbranch Commission for Gender, Racial, and Ethnic Fairness, www.PA-Interbranchcommission.com (last visited Jan. 7, 2017).

Thereafter in 2004, the three branches of Pennsylvania's gov-

- ernment cooperated in establishing the Interbranch Commission for Gender, Racial and Ethnic Fairness. The Commission has been an active advocate in informing the public about and opposing discrimination. Ultimately, the Supreme Court of Pennsylvania adopted a policy on non-discrimination and equal employment opportunities. Supreme Court of Pa., *Policy on Non-discrimination and Equal Employment Opportunity* (2008), <http://www.pacourts.us/assets/files/setting-435/file-214.pdf?cb=1d0a4c>.
- ³ See *infra* Recommendation 9(C). In his report, former Judge Del Sole noted: "...jurists should not send or be part of networks that regularly exchange insensitive emails or similar materials because such conduct could cast both the jurist and judiciary in disrepute or could cause a reasonable person to question the impartiality of the judge and the judicial system." Del Sole Cavanaugh Stroyd, *Report of Special Counsel Regarding The Review Of Justice Eakin's Personal Email Communications*, 25 (Oct. 30, 2015), <http://www.pacourts.us/assets/files/setting-4370/file-4748.pdf?cb=4f25b4>. Judge Del Sole's concerns were echoed by Judge McHugh in a recent post-conviction case. *Hill v. Wetzel*, No. 12-2185, 2016 WL 6657389, at *11 n.6 (E.D. Pa. Nov. 10, 2016).
- ⁴ See Florida Rules of Judicial Administration 2.320(e), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/\\$FILE/Judicial.pdf](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/$FILE/Judicial.pdf) (stating that non-compliance may constitute neglect of duty); and Washington State Mandatory Continuing Judicial Education Standards, available at https://www.courts.wa.gov/court_rules/word/GAGR26STANDARDS.doc, sec. 5(3)(non-compliance may result in sanctions).
- ⁵ See, e.g., Washington State Mandatory Continuing Judicial Education Standards, *supra*, sec. 5(1) ("AOP shall publish and report the names of all judicial officers who do not fulfill the requirements." Non-compliance information is also published on the Washington State Courts' web site.); and Alabama's "Rules for Mandatory Continuing Judicial Education for Municipal Court Judges, Municipal Magistrates/Clerks and Probate Judges," available at judicial.alabama.gov (fact of non-compliance open for public view and inspection).
- ⁶ A.B.A., *Pennsylvania: Report on the Judicial Discipline System*, 34–35 (2011) (recommending formal mandatory training of the Judicial Conduct Board for all new appointees and biannually for others). The report also recommended that the Board's chief counsel and staff should be permitted to attend national programs on judicial conduct and ethics, if resources permit. *Id.*
- ⁷ Our immediate points of reference are to the disciplinary matters of Justices Orie Melvin, McCaffery, and Eakin. But, as noted in the Introduction of this report, there have been other high-profile instances of judicial misconduct, including the Roofer's Scandal, Justice Rolf Larsen, the kids-for-cash scandal in Luzerne County, and the ticket-fixing scandal in Philadelphia Traffic Court.
- ⁸ See Buckley Sandler LLP, Report of *Special Deputy Attorney General Douglas F. Gansler on Misuse of Commonwealth of Pennsylvania Government E-Mail Communication Systems*, 47 (Aug. 18, 2016), https://www.attorneygeneral.gov/uploadedFiles/MainSite/Content/Related_Content/PressReleases/Gansler_Report_web.pdf.

RECOMMENDATION 8:

- ¹ See Pennsylvanians for Modern Courts, *Report and Recommendations for Improving Pennsylvania's Judicial Discipline System* (2011) [hereinafter *PMC Report*].; A.B.A., *Pennsylvania: Report on the Judicial Discipline System* (2011).
- ² See *PMC Report*, *supra* note 1, at 15.
- ³ *In re Interbranch Comm'n on Juvenile Justice*, 988 A.2d 1269 (Pa. 2010).
- ⁴ See *Interbranch Comm'n on Juvenile Justice, Interbranch Commission on Juvenile Justice Report*, 45 (2014), available at www.pacourts.us. The Commission consisted of 11 members, chaired by the Hon. John M. Cleland. *Id.* The commission issued 20 recommendations. *Id.*
- ⁵ See Pa. Const., art. V, § 18(a)(8).
- ⁶ We note that the Supreme Court in *In re Interbranch Commission on Juvenile Justice* indicated that "there may be instances where deliberations of the JCB may be subject to disclosure." 988 A2d at 239.
- ⁷ See Judicial Conduct Board of Pennsylvania Operating Procedures, OP 2.09 (2016).
- ⁸ The current version of the Judicial Conduct Board's IOP 5.01 should be compared to the prior version. New material is underlined and deleted material is indicated by [brackets]. The current IOP states: "Consistent with Article V, sec. 18(a)(8) of the Pennsylvania Constitution, and subject to Rules 14 and 18 of the Judicial Conduct Board Rules of Procedure, all complaints, processes, deliberations and records of the JCB shall be treated as [strictly] confidential, and not public information, and shall not be divulged in any context or in any forum except when otherwise authorized by the Board or in response to a court order. [In support of the broad privilege of confidentiality concerning the Board's work, see PA. Const. Art. V, sec. 18(a)(8).]" See also *PMC Report*, *supra* note 1, at 15.

⁹ Interbranch Comm’n on Juvenile Justice, *Interbranch Commission on Juvenile Justice Report*, 44 (2014), available at www.pacourts.us (recommending that the JCB “undertake to revise and update its Web site.”). The problem of easy electronic accessibility to vital public information is not limited to judicial discipline. Ethics expert, attorney Sam Stretton, for example, has expressed his frustration regarding the availability of information in the attorney discipline area. He maintains that without a good research system, there is a due process and fairness issue. Samuel C. Stretton, *Disciplinary Cases Are Not Easily Accessible*, *The Legal Intelligencer* (Oct. 6, 2016), <http://www.thelegalintelligencer.com/id=1202769399304/Disciplinary-Cases-are-Not-Easily-Accessible?slreturn=20170007103445>.

¹⁰ See Buckley Sandler LLP, *Report of Special Deputy Attorney General Douglas F. Gansler on Misuse of Commonwealth of Pennsylvania Government E-Mail Communication Systems*, 24 (Aug. 18, 2016), https://www.attorneygeneral.gov/uploaded/Files/MainSite/Content/Related_Content/PressReleases/Gansler_Report_web.pdf.

¹¹ See PMC report, *supra* note 1, at 24.

RECOMMENDATION 9:

¹ See Pa. Const., art. V, § 1.

² See Pa. Const., art. V, § 2. See also Pa. Const., art. V, § 10(a) (addressing the Supreme Court’s power over judicial administration).

³ The former disciplinary body was called the Judicial Inquiry and Review Board, often referred to as “JIRB.” See A.B.A., *Pennsylvania: Report on the Judicial Discipline System* (2011) (providing a good explanation of the respective judicial disciplinary responsibilities and processes); John S. Summers & Rebecca S. Melley, *The Court of Judicial Discipline: A Review of the First Twenty Years*, Pa. B. Ass’n Q., 1–9 (Jan. 2013).

⁴ See, e.g., Governor’s Judicial Reform Comm’n, *Report of the Governor’s Judicial Reform Commission*, 73–114 (1988), <http://www.pacourts.us/assets/files/setting-2040/file-1833.pdf?cb=2c2495>. Phyllis W. Beck, then a judge on the Pennsylvania Superior Court, Pennsylvania’s intermediate appellate court, was the chair of the Governor’s commission. *Id.* at vi.

⁵ See *In re Bruno*, 101 A.3d 635 (Pa. 2014) (identifying eight judicial disciplinary cases in which the Court had intervened).

⁶ *Id.*

⁷ See Pa. Const., art. V, § 18(d)(2).

⁸ See *In re Bruno*, 101 A.3d at 676. See also *In re Avellino*, 690 A.2d 1138 (Pa. 1997); *In re Avellino*, 690 A.2d 1145 (Pa. 1997); *In re Franciscus*, 369 A.2d 1190 (Pa. 1977).

⁹ See *In re Bruno*, 101 A.3d at 678.

¹⁰ Cf. *In re Avellino*, 690 A.2d at 1139 (addressing the procedural Rule to Show Cause process).

¹¹ Judicial Conduct Board of Pennsylvania Operating Procedures, OP 8.02 (2016) (providing for such confidential settlements in lieu of filing formal charges). Upon Justice McCaffery’s resignation, the Supreme Court vacated its suspension order as moot.

¹² Of the five justices participating in the McCaffery suspension, there was one dissent (Justice Todd). Thus, since 1992, the Supreme Court has taken extraordinary action, issuing interim suspensions in three instances involving the conduct of one of its colleagues: Justice Rolf Larsen (1992), Justice Joan Orié Melvin (2012), and Justice Seamus McCaffery (2014). Criminal charges had been filed in the Larsen and Orié Melvin cases. See also *In re Bruno*, 101 A.3d 635 (Pa. 2014).

It is also worth noting that the 1993 amendment to the Pennsylvania Constitution established a separate tribunal for disciplinary proceedings involving the supreme court justices. The Judicial Reform Commission adopted the report and recommendation of its Judicial Discipline Sub-Committee regarding the creation of a two-tier judicial disciplinary system with a special tribunal to judge the conduct of the justices. Governor’s Judicial Reform Comm’n, *Report of the Governor’s Judicial Reform Commission*, 111–12 (1988), <http://www.pacourts.us/assets/files/setting-2040/file-1833.pdf?cb=2c2495>. The report said: “The Committee believes that if there is to be public confidence in the judicial discipline system, Justices of the Supreme Court should not be permitted to judge one of their number. It is unreasonable to expect impartiality in such a situation and, in any event, the appearance of favoritism or hostility is unavoidable. It is further unreasonable to expect that a harmonious working relationship between the justices could survive if an appeal by one of them were to be sustained with, however, one or more dissents.” *Id.* at 111.

The report was a catalyst for the 1993 constitutional amendments, which completely restructured the judicial disciplinary framework. Pa. Const., art. V, § 18. It created a special tribunal to judge the alleged misconduct of the supreme court justices. Pa. Const., art. V, § 18(c)(1).

¹³ See, e.g., Bruce Ledewitz, *An Addendum in Light of Recent Developments*, 53 Duq. L. Rev. 561, 566 (2015) (criticizing the Supreme Court’s intervention in the Bruno and McCaffery cases as judicial over-reaching).

¹⁴ *Model Rules of Judicial Disciplinary Enft r. 23* (Am. Bar Ass’n 1995) (highlighting it is in accord with an interventionist approach). MRJDE 15(1) provides: “Without the necessity of commission action, the highest court may immediately place a judge on interim suspension upon notice of the filing of an

indictment, information or complaint charging the judge with a ‘serious crime’ under state or federal law.” *Model Rules of Judicial Disciplinary Enf’t* r. 15(1) (Am. Bar Ass’n 1995). The commentary to the rule states: “The integrity of the judicial system demands prompt action whenever a judge has been formally charged with a serious crime. Consequently, the highest court should bypass the normal commission procedure and act directly to temporarily suspend the judge pending final determination of the charges.” *Model Rules of Judicial Disciplinary Enf’t* r. 15(1) cmt. (Am. Bar Ass’n 1995). In our view, however, given Model Rule 15’s exceedingly broad definition of “serious crime” and its expansive authorization of high court intervention, we cannot recommend the rule for serious consideration. Such an interventionist approach would be plainly incompatible with the Pennsylvania Constitution and would create significant practical and legal problems.

¹⁵ The Court exercised such restraint when it eventually referred the Eakin matter to the Judicial Conduct Board.

¹⁶ See, e.g., *In re Solomon*, 66 A.3d 764, 764-65 (Pa. 2013) (appointing a master to assess the impact of judges’ misconduct on adjudicated cases of juveniles); *In re Interbranch Commission on Juvenile Justice*, 988 A.2d 1269, 1270-71 (Pa. 2010) (establishing the Interbranch Commission on Juvenile Justice). And, as noted herein, the Court conducted internal investigations in the McCaffery and Eakin matters.

¹⁷ See also Steven Esack, *McCaffery Suspension May Pit King’s Power Against Will of the People*, *The Morning Call* (Oct. 22, 2014, 9:40 PM), <http://www.mcall.com/news/local/investigations/mc-pa-mccaffery-suspended-porne-email-reaction-20141022-story.html>. Professor Ledewitz has been consistently vocal in his views about the Court’s exercise of its King’s Bench power in judicial disciplinary matters. Bruce Ledewitz, *An Addendum in Light of Recent Developments*, 53 Duq. L. Rev. 561, 563-64 (2015). We note that a legislative proposal, S.J. Res. 1083, Gen. Assemb., Reg. Sess. (Pa. 2015), attempts to eliminate the Supreme Court’s King’s Bench authority. Given the value of King’s Bench authority to the judicial system in non-disciplinary matters, we believe that a wholesale elimination is seriously problematic.

¹⁸ See Pa. Judicial Conduct Board, *Annual Report* (2015), <http://judicialconductboardofpa.org/wp-content/uploads/2015-Annual-Report-Judicial-Conduct-Board-of-Pennsylvania.pdf> (regarding the board’s substantial caseload and annual dispositions given their limited resources).

¹⁹ See Pa. Judicial Conduct Board, *Judicial Conduct Board Statement of Policy Regarding Electronic Communications* (effective October 5, 2016), <http://judicialconductboardofpa.org/wp-content/uploads/Statement-of-Policy-Regarding-Electronic-Communications.pdf>.

²⁰ See, e.g., Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 Pepp. L. Rev. 575, 575-614 (2006).

RECOMMENDATION 10:

¹ Arthur Selwyn Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 L. & Contemp. Probs. 69, 69 (1970) [hereinafter Miller, *Public Confidence*].

² See Nat. Ass’n for Court Mgmt., *Competency: Public Trust and Confidence*, <https://nacmcore.org/competency/public-trust-and-confidence/>.

³ Letter from GBA Strategies to National Center for State Courts, *Analysis of National Survey of Registered Voters* (Dec. 4, 2014) (on file at <http://www.ncsc.org/~media/Files/PDF/Topics/Public%20Trust%20and%20Confidence/2014-State-of-State-Courts-Survey-12042014.ashx>).

⁴ Miller, *Public Confidence*, *supra* note 1, at 70.

⁵ Michigan Supreme Court Chief Justice Robert P. Young issued the following statement upon Justice Hathaway’s 2013 resignation: “When any elected official is charged with serious misconduct, the public’s faith in its governmental institutions can suffer. The federal criminal fraud charges levied against Justice Hathaway and her departure from the Supreme Court bring to a close an unhappy, uncharacteristic chapter in the life of this Court. The last eight months have cast an unfortunate shadow over the Court. Going forward, my fellow justices and I, and this Court as an institution, will do what we have always strived to do: to uphold the highest ethical standards, render the best public service in promoting the rule of law for everyone, and do our utmost to deserve the trust the public has placed in us.” Wikipedia, https://en.m.wikipedia.org/wiki/Diane_Hathaway (last visited Jan. 7, 2017).

⁶ Public trust and confidence in government is also an international issue. Consistent with the recommendations made herein, the Organization for Economic Cooperation and Development (“OECD”), an international organization of 35 members, identified specific governmental actions that can influence and promote public trust and confidence, including: effective management of conflict of interests, higher standards of behavior, limiting undue influences, building safeguards to protect the public interest, and establishing processes that are open, inclusive, and fair, noting that integrity is essential. See OECD, *Government at a Glance*, 19-37 (2013), http://www.ab.gov.tr/files/ardb/evt/OECDGovernment_at_a_Glance_2013-.pdf.

⁷ Miller, *Public Confidence*, *supra* note 1, at 93 (emphasis original).

PENNSYLVANIANS FOR MODERN COURTS

Two Penn Center, Suite 1140, 1500 JFK Blvd., Philadelphia, PA 19102

Phone: (215) 569-1150 • Fax: (215) 569-9153

Email: info@pmconline.org • www.pmconline.org