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BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

In the matter of the Disciplinary Proceeding Against
THE HONORABLE JUDITH R. EILER

BRIEF OF JUDITH R. EILER

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Maybe I'm an oddball. When it comes to judges I expect them to be fair, impartial and well-versed on the law. Near as I can tell, King County District Court Judge Judith Eiler fits the bill. So why has she been hauled in front of the State Commission on Judicial Conduct? Well, seems Judge Judy isn't as warm and cuddly as some would like her to be. She stands accused of occasionally hurling a sarcastic comment from the bench. Even worse, it's said that Judge Judy has actually been rude to defendants, commenting to one that "if you drive like an idiot when you're late for work, you're going to have to pay for it." Oh, the humanity!

Ken Schram, KOMO 4 News¹

I. INTRODUCTION

King County District Court Judge Judith R. Eiler appeals a determination by the Commission on Judicial Conduct (the Commission) ordering censure, and recommending her suspension for 90 days without pay. The Commission found that Judge Eiler violated the Code of Judicial Conduct Canons 1, 2(A), 3(A)(3), and 3(A)(4). The Commission based its recommendation on three conclusions:

- (1) Judge Eiler's "persistent and repetitive" pattern of behavior adversely impacted the integrity of the judiciary;

¹ <http://www.komonews.com/news/34820674.html>

- (2) Judge Eiler failed to modify her conduct in accordance with the desires of the Commission; and
- (3) Judge Eiler failed to recognize that her courtroom behavior and demeanor constituted a threat to public confidence in the integrity, impartiality of the judiciary, and to the administration of justice.

See Commission Decision, p. 17. Judge Eiler disputes the Commission's conclusions and recommended sanctions. First, the Commission's conclusions were based on insufficient, biased, or speculative evidence. Second, the recommended sanction is disproportionate to Judge Eiler's alleged "demeanor" violations, standing in stark contrast to an extensive body of uniform case law. Judge Eiler's personality was put on trial, not her ability to ethically abide by the obligations of the judiciary. If her personality is responsible for the violation of a particular Canon, then the Commission's recommended punishment is still disproportionately severe. Furthermore, the Commission's decision to punish Judge Eiler on demeanor alone unfairly limits her right to free-speech and is not supported by the uniform authorities. Therefore, Judge Eiler respectfully respects the Court to overrule the Commission's findings and recommendation, abstain from ordering a suspension, and instead order no sanction or a sanction of reduced severity.

II. STATEMENT OF THE CASE

A. Judge Eiler's background.

Judge Eiler currently serves, and has served, as a King County District Court judge since 1992. While serving as a judge, she has been assigned over 19,000 small claims matters, and presided over more than 79,000 contested and mitigated matters. On a common day, Judge Eiler hears 12 full trials in the morning and afternoon.

Inside the courtroom, Judge Eiler labels herself "a tough, no nonsense judge," and was re-elected five times in King County on such a platform. Her tone and style is intended to be instructional and remedial, both to the litigants before her, and to those waiting on the same docket. Judge Eiler does not award deferments and dismissals easily, believing the lack of consequences is a disservice to litigants and to society. She is also focused on moving a great number of *pro se* litigants and claims through her courtroom in a fair and efficient manner, especially when she often has mere minutes to hear each case. Judge Eiler admits her tone and style can be harsh, and is in need of improvement. However, the Disciplinary Counsel's charges, and the Commission's recommended sanction, go well beyond any demeanor issues attributed to her. Disciplinary Counsel argued for removal of Judge Eiler, and hand-picked approximately 15

cases from Judge Eiler's courtroom to support its charges against her. This evidence is incomplete, consisting largely of short audio "sound-bites," not accompanied by written transcripts, and removed from proper context. For every case cited by the Commission as problematic, Judge Eiler has presided over thousands more without issue or complaint.

Outside of the courtroom, Judge Eiler's background is in education. The law, and teaching the law, has been her passion for many years. She taught at the Judicial College, and participated in numerous associations and chair positions, including work with the Court Rules Committee, the Governance Commit, and the Executive Committee of the King County District Court. Judge Eiler also taught at Seattle University School of Law, although was asked not to teach this year, due to the media coverage surrounding the Commission's charges. Her commitment to traffic-safety led her to the Washington Traffic Safety Commission, where she currently serves as a Commissioner, by appointment of Governor Christine Gregoire. Judge Eiler is also active with women's organizations and female judges' organizations throughout the state.

B. Procedural history.

On February 14, 2008, the Commission filed a Statement of Allegations against her. On April 14, 2008, an Amended Statement of Allegations was filed, with additional allegations of misconduct. The

allegations were based upon 15 complaints (some formal, some not, and some simply from the Commission itself) by litigants and attorneys who had appeared in Judge Eiler's court over the past several years. In response to the original Statement of Allegations, Judge Eiler acknowledged the seriousness of the allegations with a detailed response letter. In the letter, she explained her judicial philosophy and her continual efforts to keep pace with her crowded daily traffic infraction and smalls claims calendars. She also expressed an eagerness and willingness to improve her behavior.

On June 19, 2008, the Commission formally filed and published its Statement of Charges against Judge Eiler. Judge Eiler was charged with engaging in a practice of "rude," "impatient," "undignified," and "intimidating" treatment of *pro se* litigants and attorneys in her courtroom. See Amended Statement of Allegations, p. 1. Judge Eiler was further alleged to have interrupted litigants and their attorneys, addressing them in "angry," "disdainful," "condescending," and "demeaning" manners and tones. Id. As a result of this behavior, Judge Eiler was broadly alleged to have violated Canons 1, 2(A), 3(A)(3), and 3(A)(4) of the Code of Judicial Conduct.

The history between Judge Eiler and the Commission extends back to February 4, 2005, when Judge Eiler entered into a Stipulation,

Agreement, and Order of Reprimand in CJC Matter No. 4148. The pattern of conduct complained of in that action included allegations that Judge Eiler interrupted litigants, and generally treated them in an angry, abusive, and condescending manner. In the Stipulation and Agreement, Judge Eiler agreed her behavior was inappropriate, and also agreed to participate in behavior therapy, with an emphasis on sensitivity training. Judge Eiler completed this training, and a Certificate of Completion in accordance with the Stipulation was entered on August 4, 2006. See In re Eiler, CJC Matter 4148-F-136 (2004).

C. Evidence Presented at the Commission Hearing.

A four day Commission hearing was held in November, 2008. During the hearing, the Disciplinary Counsel based its case on partial audio transcripts from selected hearings, and on testimony from former *pro se* litigants who appeared in Judge Eiler's courtroom. These witnesses were unhappy with the legal outcome of their respective cases, and objected to the treatment they received from Judge Eiler. Of the tens of thousands of cases heard by Judge Eiler throughout her career, evidence presented against her at the Commission hearing consisted of approximately 15 cases. This is far less than even a fraction of one percent of the cases and matters heard before Judge Eiler during the relevant time frame. This evidence is summarized as follows:

1. Harris Fence Co. v. Sutherland, 64-005870 (11/7/2006)

Neither a transcript of the hearing, nor a complete audiotape was provided by the Disciplinary Counsel. Although the trial in question lasted 42 minutes, only a brief excerpt was played at the hearing. Tr., p. 370. During the hearing, Ms. Sutherland had her monetary liability for a breach of contract claim reduced, but was still found to owe money. Tr., p. 378. Ms. Sutherland testified she "felt" Judge Eiler "mocked" her, and expected more consumer advocacy and "user friendliness" inside small claims court. Tr., p. 372; 380. Judge Eiler gave both sides ample opportunity to speak, interrupting Ms. Sutherland in an effort to determine the amount of money owed. Tr., p. 893. On that day, Judge Eiler heard six trials in the morning and six in the afternoon. She had three more trials to hear after this case. Tr., p. 897.

2. Chulman v. Shoreline Const. Co., 63-001844 (2/9/2007)

and

3. D'Hondt and Peck v. Irwin and Western Moving, 63-00158 (2/9/2007)

No transcript was provided by the Disciplinary Counsel for these two hearings, but an audiotape excerpt was played. Between these two cases, Judge Eiler admonished a litigant for asking her court clerk questions. Judge Eiler stated that litigants were not allowed to ask legal

questions to court clerks, who could be terminated or reprimanded for dispensing legal advice. Judge Eiler explained this to the litigant, stating: “you wouldn’t want me to fire her, would you?” Judge Eiler testified she made this statement to dissuade the litigant, and did not intend to threaten the court clerk, who she was attempting to protect from interruption. Judge Eiler was apologetic to the clerk and acknowledged her error. Tr., pp. 527-531.

4. State v. Elizabeth Alexandra, I05466708 (9/7/2007)

The Commission determined there was insufficient evidence that Judge Eiler violated the Code of Judicial Conduct by changing a court order. *See Commission Decision*, p. 11. Therefore, this case is no longer a proper basis for any sanction against Judge Eiler.

5. State v. Sandra Hinman, IT0030832 (9/7/2007)

The Disciplinary Counsel did not provide a transcript, but provided a brief audio except. On the recording, Judge Eiler made a joke, “I’ve had breakfast. Won’t bite much.” Judge Eiler testified she directed her comments at two attorneys, requesting them to approach the bar so she could better hear them. Tr., p. 925. No complaint was filed.

6. State v. Christian Matesan, IT0030811 (9/7/2007).

The Disciplinary Counsel did not provide a transcript, but provided a brief audio except. Judge Eiler had a courtroom full of litigants and

attorneys. She called some attorneys forward, and to get their attention, whistled, tapped the countertop, and told them to pay attention. No complaint was filed.

7. TLT Flooring v. Empire Today, 53-007973 (9/20/2007).

The Disciplinary Counsel did not provide a transcript, but provided a brief audio except. The actual hearing lasted 45 minutes. On the recording, Judge Eiler made comments such as “don’t put words in my mouth,” “don’t interrupt the other side,” and “wise counsel would do otherwise.” No complaint was filed.

8. State v. Evan Harlan, IO69654 (2/04/2008).

A transcript and audiotape was provided for the hearing. Evan Harlan, age 16, received a traffic infraction for driving 57 mph in a 35 mph speed zone. Tr., p. 114. Evan’s father wanted him to contest the ticket, and testified his other children had successfully contested or mitigated their tickets. Tr., p. 139. Evan made a personal appearance in Judge Eiler’s courtroom, but circumvented court rules and written instructions to do so. Tr., pp. 120-122. When Evan’s father attempted to speak on behalf of his son, Judge Eiler interrupted him: “He’s not a puppet. You don’t get to move his mouth.” Tr., pp. 115; 884. The father admitted he was attempting to speak on his son’s behalf. Tr., p.119. Judge Eiler did not grant a deferment, because of Evan’s excessive speed.

Tr., p. 889. She testified to being dismayed at parents who help their children avoid responsibility for their actions. Evan testified he continues to get tickets, and learned nothing from the experience. Tr., pp.152-153.

9. State v. Anita Taylor, I05514482 (9/21/2007).

No transcript or audible tape of this hearing was provided by the Disciplinary Counsel. However, the record indicated Ms. Taylor received a citation for driving 80 mph in a 60 mph speed zone. When contesting the ticket, Ms. Taylor explained to Judge Eiler that she had been late to church when she was cited. Tr., p. 928. Judge Eiler, a lector at her own church, joked "What would Jesus do?" Tr., p. 517. She also reduced the amount of the fine. No complaint was filed by Ms. Taylor.

10. Tan v. Ho, Inc., 73-001746 (01/14/2008).

The Disciplinary Counsel did not provide a transcript, but provided a brief audio except from the 30 minute hearing. Mr. Tan felt he did not get a full opportunity to present his case for damage to his Lexus automobile by the dealership. Judge Eiler testified that Mr. Tan was articulate, but had a limited understanding of the law, and she ruled against him for two reasons. First, his warranty did not cover the damage in question. Second, the car had not been properly maintained. Tr., pp. 865-867. Because the full transcript was not provided, it is impossible to determine if Judge Eiler considered all the evidence.

11. State v. Jeremiah Walker, IO5569754 (02/04/2008).

A transcript and audiotape of the hearing was provided by the Disciplinary Counsel. Mr. Walker received a citation for driving 15 mph above the posted-speed, and for not wearing his seatbelt. Mr. Walker explained he was from out-of-state, was not familiar with Washington law, and was driving at the speed of other traffic. Judge Eiler told Mr. Walker that "he was a mature adult, so everybody doing it doesn't cut it, period. Duh." Tr. 518. No complaint was filed.

12. State v. Brian Hablutzel, IO5405813 (02/05/2008).

A transcript and audiotape of the two-minute hearing was provided. Mr. Hablutzel sought mitigation of his traffic citation because was driving at the speed of other traffic. Judge Eiler cautioned that driving at the speed of other traffic was not wise, but nonetheless reduced the ticket. In doing so, she told him, "If you have an idiot behind you that is acting aggressively, slow down, let them go around you and they collect the ticket. You speed up, you collect it." No complaint was filed.

13. State v. John Law, IO5282732 (02/05/2008).

A transcript and audiotape of the three-minute hearing was provided. Mr. Law received a ticket for speeding and lacking insurance. He challenged the ticket, stating he had not seen the original officer's statement (contained on the front (p. 1) of a 2-sided citation) and he held

up only the 2nd page of the citation rather than the full copy he had been provided. Judge Eiler stated, "Yes, that would be part of what you get, so don't be smart about just the back of the ticket." Mr. Law's charge of lacking insurance was dismissed. No complaint was filed.

14. State v. Dennis Ford, IO5669069 (03/03/2008).

A transcript and audiotape of the one-and-a-half minute hearing was provided. Mr. Ford was cited for driving 19 mph over the legal limit. He told Judge Eiler, "Your honor I have no excuse. This is my first stop in about 15 years." Judge Eiler responded humorously and with sarcasm, "But, oh, what a ticket it is." Tr., p. 923. Judge Eiler reduced his ticket, but instructed him to change his driving behavior. No complaint was filed.

15. State v. Adam Manning, IO5608421 (03/03/2008).

A transcript and audiotape of this two-minute hearing was provided. Mr. Manning was cited for driving 22 mph over the speed limit, and wanted his fine reduced, stating he had been late for work. Judge Eiler reduced the ticket, but told him, "I will reduce it down to \$200. If you drive like an idiot because you are late for work, you are going have to pay for it." No complaint was filed.

Beyond these transcripts and audiotapes, additional evidence was presented by three witnesses testifying on matters not encompassed in the

Commission's Statement of Charges. Two of these witnesses, Tamara Mazanti (State v. Mazanti, No. 556612) and Charles Babb (Babb v. McCartan, No. Y3-001512), testified regarding 2002 and 2003 cases. Their complaints constituted the Commission's 2004 charges against Judge Eiler. These charges were resolved by the Stipulation and Agreement entered in 2004. However, the Disciplinary Counsel intended to encapsulate these past complaints into the current punishment.

The third witness, Patricia Freeman, was a *pro se* defendant in a small claims case, Redmond Plumbing v. Freeman, No. 73-001675. Ms. Freeman is a retired attorney with no small claims experience. She brought three large trial notebooks into a small claims trial. Tr., p. 246. Her claim involved a fence line dispute and alleged injuries to her dog. Tr., 264-265. During trial, Ms. Freeman felt that Judge Eiler interrupted her and was testy. Despite a two hour trial, she also felt unable to present her entire case. Tr., p. 259. She lost her case. Judge Eiler acknowledged she was, at times, stern with Ms. Freeman. However, her decision was well-reasoned, and Ms. Freeman lacked a written contract to support her allegations.

D. The Commission decision.

Based on the evidence presented, the Commission presented its conclusions of law:

The Commission on Judicial Conduct determines by clear, cogent and convincing evidence that under Count One of the Statement of Charges, the Respondent has violated Canons 1, 2(A), 3(A)(3) and 3(A)(4) of the Code of Judicial Conduct (CJC).

See Commission Decision, p. 10. The Commission concluded Judge Eiler violated each Canon in Count One, but also acknowledged that Judge Eiler did not flagrantly or intentionally violate her oath of office. Id. at p. 13. Despite this conclusion, the Commission stated that Judge Eiler failed to maintain the integrity and independence of the judiciary, in violation of Canon 1. Id. at p. 10. In violation of Canon 2(A), the Commission highlighted that Judge Eiler failed to promote public confidence in the integrity and impartiality of the judiciary. Id. In violation of Canon 3(A)(3), the Commission highlighted that Judge Eiler failed to be “patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom judges deal in their official capacity.” Id. at pp. 10-11. And last, in violation of Canon 3(A)(4), the Commission highlighted that Judge Eiler failed to “accord [...] every person who is legally interested in a proceeding, or that person’s lawyer, [a] full right to be heard...” Id. at p. 11. As a result of these violations, the Commission recommended Judge Eiler be censured and suspended for 90 days without pay. See Commission Decision, p. 17.

The Hon. John McCarthy, a former district court and now superior court judge, was the only judge on the Commission panel of nine members. He filed a Minority Opinion dissenting with the majority:

The evidence presented at the hearing does not establish or attempt to establish that Judge Eiler was unfair, was partial or did not make the right decisions. In fact, her decisions are acknowledged by all to be fair, impartial and factually and legally correct.

[...]

I do believe however that Judge Eiler sounded loud and intimidating in her tone and style and, interrupted several witnesses, more than an appropriate number of times. I believe however that the interruptions were a demeanor issue as opposed to a violation of Canon 3(A)(4) which requires a "full right to be heard."

[...]

My ultimate finding is that Canon 3(A)(3) was violated as to some hearings, that there is a pattern of this conduct and that the sanction should be Censure, primarily because similar conduct has resulted in prior discipline.

See *Minority Opinion of Commission Member John McCarthy*, pp. 1, 3-4.

Judge McCarthy voiced concern over Judge Eiler's tone and style, stating it occasionally violated Canon 3(A)(3). Id. at p. 3. However, he also concluded Judge Eiler did not violate the other Canons. "There is no evidence that Judge Eiler was lacking in integrity, independence, or impartiality which are the principles of these Canons." Id. at p. 4. Instead, Judge McCarthy suggested the Commission decided that a

violation of Canon 3(A)(3) "automatically" violated Canons 1 and 2(A) when it issued its decision and recommended sanction. Id. (Emphasis added). Judge McCarthy recommended the appropriate sanction for Judge Eiler constituted censure without suspension. "My ultimate finding is that Canon 3(A)(3) was violated as to some hearings, that there is a pattern of this conduct and that the sanction should be Censure [...] I further recommend that no suspension be imposed because of the factors to be considered and that remedial sanctions can appropriately be imposed." Id. (emphasis added).

Judge Eiler moved for reconsideration of the Commission's decision, requesting censure only, or alternatively a reduction in suspension. Her request was in accordance with the opinion voiced by Judge McCarthy. The Commission denied Judge Eiler's motion, and Judge Eiler thereafter filed a Notice of Contest.

III. STATEMENT OF THE ISSUES

- (1) Whether "clear, cogent, and convincing" evidence supports the Commission's decision that Judge Eiler violated the Canons of Judicial Conduct?
- (2) Whether the Commission's recommended sanction of censure and suspension for 90 days without pay is disproportionate to Judge Eiler's alleged misbehavior?
- (3) Whether the Commission's decision abridges Judge Eiler's First Amendment right to freedom of speech?

IV. ARGUMENT

A. Standard of Review.

The Commission's recommendation is reviewed *de novo*. In re Disciplinary Proceedings Against Anderson, 138 Wn.2d 830, 843, 981 P.2d 426 (1999); CJCRP 26(a). The Commission's findings do not bind the Court. In re Anderson, 138 Wn.2d at 843; In re Disciplinary Proceedings Against Turco, 137 Wn.2d 227, 246, 970 P.2d 731 (1999); DRJ 9(c). The Court should conduct its own independent inquiry, asking whether the evidence clearly and convincingly proves that a respondent acted in such a manner as to prejudice the administration of justice and bring the judicial office into disrepute. In re Matter of Deming, 108 Wn.2d 82, 88, 736 P.2d 639 (1987). The Commission bears the burden of proving its allegations of ethical violations by clear, cogent, and convincing evidence. In re Disciplinary Proceedings Against Sanders, 135 Wn.2d 175, 181, 955 P.2d 369 (1998); CJCRP 7. A contention is proven by clear, cogent, and convincing evidence only if it is "highly likely" to be true. CJCRP 7.

B. The Commission Placed Judge Eiler's Demeanor on Trial.

1. There is No Evidence that Judge Eiler Lacked the Integrity, Independence, or Impartiality Demanded by Canons 1 and 2(A).

The Commission determined Judge Eiler violated Canons 1 and 2(A) by clear, cogent, and convincing evidence.

CANON 1

Judges shall uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining and enforcing high standards of judicial conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.

CANON 2

Judges should avoid impropriety and the appearance of impropriety in all their activities.

(A) Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The Commission's decision states that Judge Eiler violated her obligation of integrity, independence, and impartiality, and failed to "recognize that her courtroom behavior and demeanor constituted a threat to public confidence." See Commission Decision, p. 17. Comments to these Canons suggest that the demeanor of a judge, by itself, does not constitute a violation. The comments to Canon 1 states: "the integrity and

independence of judges depends in turn upon their acting without fear or favor.” See Comment to Canon 1. The comments to Canon 2 instruct judges to “distinguish between proper and improper use of the prestige of office in all of their activities.” See Comment to Canon 2. The type of impropriety contemplated by these Canons is not in any way related to the demeanor charges against Judge Eiler.

There is no evidence supporting the Commission’s decision that Judge Eiler violated Canons 1 and 2(A). No evidence suggests that Judge Eiler ruled on the basis of self-interest or on other impermissible grounds. There is no evidence establishing that Judge Eiler’s decisions were erroneous, or that she failed to comply with the law. To the contrary, evidence is clear that her decisions were legally and factually correct. No one has challenged her integrity, independence, or impartiality. The Commission’s decision that Judge Eiler violated Canons 1 and 2(A) should not stand. As Judge McCarthy instructed, “This is truly a demeanor case only.” See Minority Opinion Findings of Fact and Conclusions of Law, p. 20.

2. There is Not Clear, Convincing, and Cogent Evidence that Judge Eiler violated Canon 3(A)(4).

The Commission determined Judge Eiler violated Canon 3(A)(4) by clear, cogent, and convincing evidence. Canon 3(A)(4) provides that

“Judges should accord to every person who is legally interested in a proceeding, or that person’s lawyer, full right to be heard according to law....” The Commission cannot satisfy its burden of establishing this violation by clear, cogent, and convincing evidence.

The full right to be heard is not unlimited, especially on fast-paced and congested traffic infraction and small claims dockets. None of the witnesses who testified against Judge Eiler presented any evidence at the Commission hearing that was not presented in Judge Eiler’s courtroom. No evidence indicates a litigant was ever refused access to Judge Eiler’s courtroom, or refused the ability to present evidence. In many of the cases charged against Judge Eiler, she gave the parties more time than normal, sometimes as much as 2 hours, despite still having 12 similar cases scheduled. Tr. 794-797. Many of the witnesses did not like the resolution of their case, or otherwise resented being found to have committed a traffic infraction, or being forced to pay a fine. Most wanted a judge fully-vested in their emotional feelings about their case.

Judge Eiler’s tone and demeanor was at times crisp, firm, and tough. Based on the limited time available to hear each case, it is not surprising that Judge Eiler interrupted several witnesses, several times. These issues go to her demeanor, and not her ability to give each litigant

before her a "full right to be heard." The Commission's decision that Judge Eiler violated Canon 3(A)(4) should not stand.

3. The Commission's Decision That Judge Eiler's Demeanor Violated Canon 3(A)(3) is Supported by Scant Evidence.

The majority of evidence presented against Judge Eiler consisted of short, partial audio recordings. The probative value of this evidence is limited, and the overall context of how Judge Eiler communicated, and was received by litigants, is lacking in many hearings, because of gaps in the evidence. The microphone capturing Judge Eiler's voice was directly in front of her, while the other litigants were located much farther away. Tr. 789-790; 940-941. In only a few of the cases were complaints actually brought by a litigant appearing in Judge Eiler's courtroom. The other cases making up the cases cited in the Statement of Charges were brought by court employees or Commission investigators who must have listened to hours and hours of recordings to find those audiotape excerpts. In total, the evidence against Judge Eiler consisted of fragments from approximately 15 cases she presided over. In her career, she has been assigned over 19,000 small claims matters, and presided over more than 79,000 contested and mitigated matters. At its worst, the Commission's evidence against Judge Eiler is a

selective snapshot of her demeanor and tone. On this basis, censure and suspension without pay is inappropriate.

The case against Judge Eiler is based on her delivery of justice, and communication with litigants, in a fast-paced, high-volume court with a limited amount of time to hear litigants, consider the evidence, and make correct decisions. Judge Eiler's tone and style is intended to instruct and to move cases efficiently through her courtroom. Witnesses on behalf of Judge Eiler, including attorneys and court employees, describe her as an "efficient, tough, strong, crisp, no nonsense, brisk but fair, straight-shooter." Tr. 173, 651, 761. Some litigants will always be offended by the decision or manner that a judge conducts themselves, or communicates with them. Some measure of balanced objectivity discerns between a best practice, or perfect judge, and an actual Canon violation. The Commission's decision that Canon 3(A)(3) was violated is built upon its objections to Judge Eiler's demeanor, and these objections in turn were based on an extremely small selection of complaints and evidence. The recommended sanction of censure and suspension without pay is disproportionate. As noted by Judge McCarthy in his dissenting opinion, remedial

sanctions can be appropriately imposed, and other factors favorable to Judge Eiler at most demand a punishment without suspension.

C. The Commission's Recommendation of Censure With Suspension is Disproportionally Severe.

1. By Itself, Improper Demeanor is an Insufficient Basis to Impose Both Censure and Suspension.

Under the uniform weight of authority, no judge has ever been suspended or removed for the type of demeanor evidence that was presented against Judge Eiler. Courts consistently order much less severe reprimands for much more egregious behavior. See Complaint Against Jack B. Lindner, 271 Neb. 323, 710 N.W. 2d 866 (2006) (reprimand without suspension for derogatory, racist remarks to defendant); Complaint Concerning The Honorable John J. Kirby, 354 N.W. 2d (1984) (censure without suspension for public drunkenness, conducting court while intoxicated, and treating female attorneys inappropriately); In the Matter of Judicial Disciplinary Proceedings against the Honorable Robert Michelson, 225 N.W.2d 843, 591 N.W. 2d 843 (1999) (reprimand without suspension for rude and sexist commentary, and calling a litigant's daughter a "slut")

Where Courts have specifically imposed the sanction of censure and suspension for a judge's inappropriate demeanor, the evidence of bad

demeanor was always accompanied by other serious improprieties or moral turpitude. See In Re Moore, 464 Mich. 98, 626 N.W. 2d 374 (Mich. 2001); In re Inquiry Concerning a Judge, Mark H. Badgett, 362 N.C. 202, 657 S.E.2d 346 (N.C. 2008); In re Coffey's Case, 157 N.H. 156, 949 A.2d 102 (N.H. 2008). Without other impropriety, a sanction of censure and suspension is excessive for demeanor violations alone.

The judge in In Re Moore was censured and suspended for six months without pay based on (1) extremely bad demeanor (see generally, 464 Mich. 98); (2) sexist commentary to female attorneys and spectators (Id. at 107; 111); (3) stereotypical racist comments (Id. at 110); (3) inappropriate commentary on the evidence (Id. at 103; 105); (4) inappropriate commentary during *voir dire* (Id. at 106-107); (5) inappropriate commentary on the credibility of witnesses (Id. at 109); (6) threats to physically gag a criminal defendant with tape (Id. at 114); (7) abusive threats to a criminal defendant during sentencing (Id. at 106); and (8) directing his own witness examination at trial (Id. at 109).

In sanctioning the judge in In Re Moore, the court noted the judge's conduct "frequently resulted in appellate reversal of trials over which had had presided," and that such conduct undermined public confidence in the judiciary. Id. at 133. The judge's demeanor included

sexism and racism, and was pervasive enough to impact the fair resolution of the cases he presided over.

In In re Inquiry Concerning a Judge, Mark H. Badgett, the judge was censured and suspended for 60 days based on bad demeanor, lack of impartiality, repeated conflicts of interest, retaliatory conduct against the district attorney's office, use of power to gain personal favors, and coercing a guilty plea from a criminal defendant. Id., 362 N.C. at 203. More egregiously, the judge lied to judicial misconduct investigators under oath. Id. at 208-09. "We hold that these actions constitute an improper or wrongful use of the power of his office acting intentionally or with gross disregard for his conduct and in bad faith. This being so, we further hold that respondent is guilty of gross misconduct." Id. at 210.

In the cases discussed above, both judges received sanctions similar to Judge Eiler (*i.e.* censure and suspension). Their levels of misconduct were far more egregious, and were based on gross misconduct. The behavior exhibited by these judges exceeded even the worst evidence presented by the Disciplinary Counsel against Judge Eiler. More importantly, both judges in the cases discussed above were found to have committed serious improprieties involving judicial prejudice, moral turpitude, or self-dealing. The Canons were designed to prevent these abuses. No such evidence was presented against Judge Eiler. In

comparison, the Commission's recommended sanction for Judge Eiler is unwarranted, and based solely on her tough demeanor.

2. Censure Without Suspension is a Severe Sanction, Reserved for Severe Misbehavior.

"Censure is the most severe disciplinary action the commission can issue." See *CJCRP Terminology*. Censure is only appropriate where the conduct of a respondent "detrimentally affects the integrity of the judiciary, [and] undermines public confidence in the administration of justice...." *Id.* Where Courts impose the sanction of censure (without suspension), judges have exhibited inappropriate demeanor, in addition to judicial prejudice, bias, sexism, or other extremely inappropriate behavior. See *In re Pilshaw*, 286 Kan. 574, 186 P.3d 708 (Kan. 2008); *In re Landry*, 157 P.3d 1049 (Alaska 2007); *Honorable John J. Kirby, supra*.

The judge in *In re Pilshaw* was censured based on her bad demeanor, inability to control her temper, improper commentary to the jury, and other behavior that may have potentially tainted the jury pool in a felony criminal case. 286 Kan. 574, 575-77. "The respondent's failure to control her temper and frustrations and her conduct toward potential members of the jury in open court greatly detracted from the honor and dignity of the judiciary. Her actions negatively impacted the proper administration of justice in a felony criminal case over which she

presided.” Id. at 580. The judge’s conduct led to a motion for a mistrial and a claim of error on appeal by the defendant. Id. at 580. The judge’s actions went beyond her demeanor, and adversely affected the outcome of the cases she presided over.

The judge in In re Landry was censured for poor demeanor, *ex parte* communication, failing to disqualify himself from a matter he presided over that presented a conflict, and habitually making sexist comments to female employees and litigants before him. 157 P.3d 1049, 1051. The judge’s sexual harassment included racy notes to female employees, describing one court clerk as a “shameless hussy,” and commenting on other physical attributes and attire of females in his presence. Id. The judge’s *ex parte* contact and failure to disqualify himself from a particular trial gave “rise to circumstances suggesting that he gave preferential treatment to the defendant....” Id. The judge’s conduct went beyond demeanor alone.

3. Reprimand is an Appropriate Sanction for Improper Demeanor.

“Reprimand is an intermediate level of disciplinary action the commission can issue.” See CJCRP Terminology. Judge Eiler’s “pattern or practice of rude, impatient, undignified and intimidating treatment of *pro se* litigants, attorneys and court personnel,” as alleged by the

Disciplinary Counsel, is more akin to the behavior of numerous other judges who have received a reprimand, not censure, for their actions. See Miss. Comm. on Jud. Performance v. Sutton, 985 So.2d 322 (Miss. 2008) (reprimand for *ex parte* contact, and for verbally abusing a litigant); In re Complaint Against Lindner, 271 Neb. 323, 710 N.W.2d 866 (Neb. 2006) (reprimand for making harsh, angry, and derogatory reference to a defendant); In the Matter of Judicial Disp. Proceedings Against Michelson, 225 Wis.2d 221, 591 N.W.2d 843 (1999) (reprimand for intemperate, discourteous, and undignified comments concerning litigant); Complaint Against Jack B. Lindner, 271 Neb. 323, 710 N.W.2d 866 (2006) (reprimand for making derogatory remarks to defendant); In re Horan, 85 N.J. 535, 428 A.2d 911 (N.J. 1981) (reprimand for failing to conduct a trial in a patient, dignified, and courteous manner, exhibiting bias, and for making insulting remarks to a litigant).

Here, Judge Eiler has not been accused of, nor does the evidence indicate, any activities or specific verbal statements on behalf of Judge Eiler that warrant sanctions. No evidence suggests Judge Eiler was dishonest during her investigation, otherwise lied to the Commission, or attempted to conceal the truth. No evidence suggests she exhibited sexism or racism, or used foul language in her courtroom. No evidence suggests she presided over matters presenting a conflict-of-interest, or participated

in improper *ex parte* communication with litigants. And no evidence suggests that she ever applied the incorrect rule of law, or decided a case on improper factual or legal grounds. Instead, the Commission basis its recommended sanctions on her demeanor alone. Her demeanor, by itself, warrants punishment less severe than a censure with unpaid suspension.

D. Judge Eiler's Courtroom Speech is Protected by the First Amendment.

Judges in Washington, though elected officials, “remain citizens who are entitled to enjoy the rights and freedoms guaranteed by the First Amendment, including the right to freedom of speech, yet are forbidden from being biased or partial, or appearing to lack impartiality.” In re Matter of Disciplinary Proceeding Against Sanders, 135 Wn.2d 175, 182, 955 P.2d 369 (1998).

The interest embodied in Canon 1 of the Code of Judicial Conduct calls upon judges to preserve the integrity and impartiality of the judicial by establishing, maintaining and enforcing high standards of judicial conduct. This interest is compelling. Id. at 187-188 (citations omitted). The First Amendment requires that a restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression. Id. (citations omitted).

A judge does not surrender First Amendment rights upon becoming a member of the judiciary. Id. at 189. In a system such as Washington's, in which judges are elected, they are, in effect, always seeking reelection. If a person does not completely surrender his or her right to freedom of speech upon being a candidate, then we cannot expect the candidate to do so once elected to judicial office. Id. at 189-190.

Judge Eiler was elected to office five times on a judicial platform of toughness with fairness. She is keenly aware of the promise she made to her constituents when they elected her service on the bench.

The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. Rickert v. Public Disclosure Comm'n, 161 Wn.2d 843, 845, 168 P.2d 826 (2007). Here, the Commission essentially seeks to control the manner and method of how Judge Eiler performs her job as an elected public official and, as a result, has a chilling effect on Judge Eiler's right to free speech. The Commission should not be permitted to substitute its judgment for that of an elected public official. This chilling effect would result in judges being fearful of engaging in courtroom decision-making, for which they were elected. There is no compelling government interest here to censor such free speech. Mere preferences by the Commission that an elected official perform his/her public function in a certain manner is not a compelling

government interest so as to override First Amendment protection. Moreover, even if there were a government interest, it is not advanced in any significant manner by charging Judge Eiler under the Code.

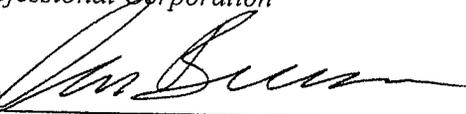
The First Amendment guarantees Judge Eiler's right to freedom of speech, subject to the limitations of the Code of Judicial Conduct. Strict scrutiny requires that any violation Judge Eiler of the Code of judicial conduct be by clear and convincing evidence of conduct that threatens or compromises the integrity, appearance, or impartiality of the judiciary. That burden has not been met.

V. CONCLUSION

Based on the foregoing argument and authority, the Court is requested to overturn the Commission's recommended sanction of censure and 90 day unpaid suspension. Demeanor evidence is the only evidence presented against Judge Eiler indicative of Canon violations. The Court is respectfully requested to vacate the findings and recommendation of the Commission or in the alternative order a more proportionate sanction. Violations of the Canons cannot be properly premised on demeanor alone. The public demands that judges be tough. This Court should not be tough on tough judges. Public confidence in the judiciary so dictates, and holding otherwise would serve to undermine public confidence in the judiciary.

RESPECTFULLY SUBMITTED this 21st day of August, 2009.

STAFFORD FREY COOPER
Professional Corporation

By: 

Anne M. Bremner, WSBA #13269
Attorney for Hon. Judith R. Eiler

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served in the manner noted below true and correct copies of BRIEF OF JUDITH EILER on the following individual(s) in the manner noted:

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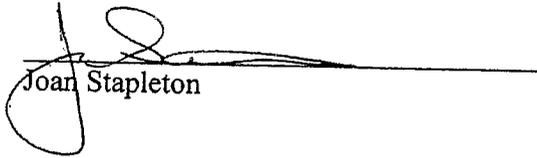
VIA MESSENGER

Mike Pontarolo
Presiding Officer
Commission on Judicial Conduct
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VIA FAX

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CLERK

Dated this 21st day of August, 2009, at Seattle, Washington.


Joan Stapleton

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Attached for filing please find the Brief of Judith Eiler in Case No. 200,701-5

Thank you!

Joan S. Stapleton

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