IN THE SUPREME COURT
OF THE STATE OF MISSOURI

IN RE,	)	
THE MATTER OF THE HONORABLE BARBARA T. PEEBLES,	)	Case No. SC92811
Respondent.	)	Oral Argument Requested

RESPONDENT BARBARA T. PEEBLES' BRIEF AND OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE COMMISSION ON RETIREMENT, REMOVAL AND DISCIPLINE

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JURISDICTIONAL STATEMENT

On August 30, 2012, the Commission on Retirement, Removal and Discipline sustained five counts of judicial misconduct against Respondent, the Honorable Barbara T. Peebles, and recommended the sanction of removal. The Missouri Supreme Court has exclusive jurisdiction to review the findings, conclusions, and recommendations of the Commission, and specifically, has the ultimate responsibility to "remove, suspend, discipline or reprimand any judge of any court." Article V, §24.3, Mo. Const. (as amended 1982); *In re Hill*, 8 S.W.3d 578, 581(Mo. banc 2000).

STATEMENT OF FACTS

Respondent was and is an associate circuit judge in the City of St. Louis, who presided over the "bulk docket" of Division 25 of the Twenty-Second Judicial Circuit (T19). [1] She was charged in a nine-count Second Amended Notice, and after a hearing was found to have violated the rules or canons set out in five of the counts (E1; A1). The facts adduced with respect to the five counts sustained by the Commission are as follows.

[1] "T" denotes the Hearing Transcript. "A" denotes the Appendix to the Brief, which contains the Commission's Findings of Fact, Conclusions of Law and Recommendation. "E" refers to Hearing Exhibits, which have been made part of the record.

Steven Ohmer is the presiding judge of the 22nd Judicial Circuit (T18). He has held this position for a year and a half and at one time did a stint in Division 25 (T18). All felony cases begin in Division 25, which is where initial appearances, bond appearances, and preliminary hearings are handled, and where grand jury indictments are received (T20, 25). Cases can be dismissed in Division 25, get disposed of, or get moved to Division 16 for trial (T20). Ohmer described Division 25 as "very busy," with a "very intense docket" (T19-20). Fifty to 100 cases come through the division daily, and according to Ohmer, managing the division means juggling various dockets, including the confined docket, the preliminary hearing docket, the grand jury docket, and the to- be- set docket (T23). Circuit divisions generally convene at 9:00AM; when Ohmer sat in Division 25, it was his practice to start the docket at nine o'clock (T24).

In March or April of 2011, several attorneys approached Ohmer "about the timeliness of Division 25," complaining that Respondent took the bench most mornings at 10:30AM (T24-26).[2] Ohmer spoke with Respondent about it and was under the impression she was going to start coming in earlier (T27). He testified to his own experience, that "when I was in 25, the lawyers like to come in that division early, and they could get things done and get about their business" (T26). He also recalled complaints concerning a vacation she took to China in October, 2011(T33). He explained, "Normally when a judge goes on vacation or goes wherever, we cover our

[2] Respondent had begun her rotation in Division 25 at the start of 2011 (T703-04).

divisions. We used to have visiting judges, we used to have senior judges, but with the budgets, we don't have that so we have to manage it ourselves" (T34). Before Respondent left for China, she informed Ohmer that she "had her dockets covered" (T34). He took this to mean that other judges would be filling in to cover the confined docket and that all the other cases had been cleared (T35). This is in fact what Respondent did during a period in August when she was off the bench on medical leave (T44). In November of 2011, Circuit Clerk Jane Schweitzer advised Ohmer that a Post-Dispatch reporter was asking to review a number of Division 25 court files from the time when Respondent was in China (T38). Schweitzer provided the files and shortly thereafter, Ohmer met with the reporter, who advised him that the files "showed dismissals and continuances" during the time Respondent was away (T41). The files contained orders that appeared to contain Respondent's signature (T46). When Ohmer asked Respondent about it, she told him that she had instructed her clerks to continue the non-confined dockets prior to her trip to China; however, because she had been unsure that she could make the trip due to issues with her visa, she did not issue this instruction until the first week in October, leaving insufficient time for her clerks to clear all the dockets (T47-48). Ohmer questioned Respondent's clerk, Whitney Tyler, about the signed orders, and Tyler told him she had simply "stacked" the dismissal and warrant files and put them on Respondent's desk for Respondent's signature upon her return (T49).

Ohmer understood that it was Tyler's practice on a usual day to handle many dismissals herself, particularly those pertaining to delays from the grand jury; if a case had been continued twice before the grand jury with no indictment returned, she would "dismiss" it on the third try, as was customary in Respondent's court (T53). Ohmer took issue with this practice, explaining that whether to dismiss a case is a matter of discretion because other circumstances might come into play, such as a missing witness or one who had been "shot" (T53). Capias warrants were another problematic area; he indicated that if the clerk were to issue a capias but hold it for the judge's signature, defendants could be "running around out there" – albeit on bond – when they had failed to make a court appearance (T57-58). He characterized this as a "huge problem for public safety," and stated that clerks "facilitating the docket" is "to me, what is amuck" (T53).

On the question of timeliness, Ohmer did allow that "[i]t is each judge's court and I respect that" (T29). He never received complaints about "Peebles' policy of having her clerk call the docket," stating, "I can't really say that I know of a policy" (T33). Ohmer also said it is never appropriate to destroy or remove a document from a file, unless it had simply been placed in the wrong file (T65).

On cross-examination, Ohmer stated that the only complaints he received about Respondent concerned her tardiness (T86). There was no specific rule requiring judges to be on the bench by a certain time; he just thought they should "be there because of

volume and to expedite the dockets" (T85). He knew of no cases where an officer or a circuit attorney was unable to find Respondent, to get an arrest warrant or search warrant or new complaint signed (T85). Nor did he ever receive complaints concerning her temperament, her knowledge of the law, or her rulings in court, and in fact he received compliments from lawyers concerning her rulings from the bench (T86). Nor was he aware of any dilatoriness in her rulings (T92). He agreed that her practice of taking the bench after 9:00AM never affected the outcome of cases nor resulted in prejudice to any party (T92). He also agreed that if attorneys knew of her practice of taking the bench after 10:00AM and failed to time their appearances accordingly, it was "on them" (T91). He was also very clear that there was no accusation that Respondent's clerks had used her signature stamp to issue warrants for people's arrest (T98). Indeed, if any stamps were used by the clerks, the files were set aside for Respondent's later signature (T98). To his knowledge, the clerks never acted as judges by authorizing arrest warrants or dismissals, or in setting bonds (T102). He stated that he had not received any specific complaints of cases being continued over a party's objection in Respondent's absence (T112). Any contested continuances, he conceded, would have been deferred to Division 16 for consideration there by Judge Garvey (T112).

A number of attorneys testified for the Commission. David Stokely was a private defense attorney who appeared in Division 25 almost daily (T142). He cited

Respondent's usual practice of taking the bench at 10:30AM; from 9:00AM to 10:30AM, her lead clerk, Whitney Tyler, would call the docket, which meant "announcing" continuances, dismissals and capias warrants (T144). He said Tyler "basically decided if the state was going to get a continuance, or if it was going to get dismissed, things like that, when we were going to do the new dates" (T146). However, any contested continuance was decided by the judge, and anytime Tyler used a stamp to enter a dismissal, Respondent would approve it when she took the bench (T153-54).

According to Stokely, "Whitney basically did the general housekeeping;" when she finished, Respondent would come out, conduct the rest of the day's business, and "at the very end they would review the entire docket, so the judge didn't have any blanks on her lines as to what was going on" (T155). Sometimes Respondent was in her chambers while Tyler called the docket; other times she was not (T143). He agreed that by Tyler calling the docket, it "eliminated a lot of routine matters" (T154). Stokely also said that Respondent's practice of taking the bench late did not inconvenience him; he just conducted business elsewhere and returned when he knew Respondent would be on the bench (T147).

Assistant Circuit Attorney Patrick Carmody gave similar testimony, that Tyler would "call the docket," including granting continuances and dismissing cases (T293). She would also "call capias" (T293). However, if any of these matters were contested, "Whitney would say, 'Wait for the judge'" (T294). He also lauded Respondent's

practice of calling private attorneys' cases first so as to accommodate their schedules and praised her for routinely issuing timely rulings (T151). Sometimes Respondent was in her chambers when Tyler was calling the docket; other times she was not (T143).

Assistant Public Defendant Ramona Gau cited Respondent's practice of taking the bench around 10:30AM each day, which kept many people waiting (T308). She described it as "a waste of time" (T313). Tyler would call the docket in the meantime, and "[a]nything that could be handled where there was – if the client was not present or if there was not an indictment yet and everyone knew it was going to be continued, or if there had already been so many continuances on a particular case, there were rules in there that all the attorneys knew, okay, this is getting continued, or I expect this to get dismissed" (T309). She said she didn't know of any other judges who let their clerks handle the docket the way they did in Division 25, although she could only draw comparisons to circuit, not associate circuit, courts (T314). She also testified that Respondent was polite, professional, and consistent in the way she ruled from the bench (T315).

Other attorneys testified to Respondent's practice of taking the bench after 10:00AM; that fifty or more people might be waiting for her in the courtroom; and that she failed to apologize (T143, 181, 292). Attorney Adeyinka Faleti usually showed up at 9:10AM, and Respondent would take the bench "most days" between 10:05 and 10:20AM (T214). Once she came out around 9:40AM (T214). When Faleti asked if the

judge was around, she was told she was in chambers or in the building; other times she was told she was not in the building (T214-16). She did not know whether Respondent was in chambers when the docket was called (T216). She never heard Respondent apologize for taking the bench when she did (T216). Another attorney testified to going back into chambers some mornings around 9:50AM and finding Respondent not there (T292). According to at least one attorney, by the time the judge came out, the majority of cases had been cleared and roughly 20 to 30 people remained (T181). One attorney referred to Respondent's practice of taking the bench later than others a "quirk" that you'd just "try to work around" (T163). He also said the process developed in Division 25, whereby "Whitney was able to do the housekeeping, and then the judge would show up and finish the docket as to those people who needed a judge on the bench," was well-designed and efficient, without a lot of "lag time" in between (T165).

Assistant Public Defender Chad Oliver recounted appearing in Division 25 on behalf of a confined client, Thomas Williams, in the fall of 2011 (T355). The case had been continued twice before, and he was there to request a dismissal. Citing a "general unwritten rule" which "predated Judge Peebles, Judge Stelzer being the previous judge in Division 25," he described the well-understood policy, "that if the state had requested two previous continuances and on the third setting date or the third appearance date the state was still not ready to proceed either with indictment or with a preliminary hearing, that the defendant could move orally and a Motion to Dismiss

would be granted for failure to prosecute, and that's what I was there for on that date" (T357). Respondent was not in the courtroom but Tyler was there calling the docket; he discussed the dismissal with her but was informed by Tyler that the case would not be dismissed because one of the continuances had been charged to the defendant, and she continued the matter to November 30 (T357-58). Oliver tried to tell Tyler his office had not requested any continuances, and Tyler told him, "I am denying your motion" (T361). Oliver memorialized the action on a preprinted form; presented his handwritten form to Tyler for a file-stamp; copied it; then gave Tyler the original form and the assistant prosecutor a copy, keeping copies for himself (T359; E26).[3] On November 30th, Respondent dismissed the matter (T363).

Oliver conceded that on the day he sought the dismissal from Tyler, he could have taken the matter to Judge Garvey or another judge for dismissal, but "chose to argue his case before Whitney Tyler" (T372). He also agreed, after being shown a transcript of a conversation he'd had with an investigator for the Commission in the instant proceedings, that Mr. Williams suffered no prejudice as a result of Tyler

[3] Exhibit 26 reads, "The court issued a warrant against this defendant for these charges on July 19, 2011 and the warrant was served on July 24, 2011. The court granted the state three previous continuances over defense counsel's objection. The court clerk denied this motion without a judge present and without allowing defense counsel an opportunity to argue the motion" (T373; E26).

deferring the case until November 30, 2011 for dismissal by the judge at that time. In fact, Williams had two other cases – both felonies – pending before Judge Garvey at the time he picked up the case which was the subject of the dismissal request; Williams pled open to the other felonies but was in custody pending sentencing. When asked by the investigator specifically, whether Williams served any additional time because of Tyler's action, Oliver told him, "The short answer to that question is no additional time and here's why. Mr. Williams had pled guilty to two of the three cases, this one being the third, and the judge who was sentencing Mr. Williams requested a sentencing assessment before, and that in and of itself required Mr. Williams to stay in jail longer" (T388-89).

Whitney Tyler testified, describing her Division 25 duties as making "sure that the docket ran properly, prepare the courtroom for the next day, issue warrants, bond forfeitures, continue cases, basically just run the courtroom so that way it's prepared for her" (T461). She explained that the courtroom had a ready supply of pre-signed arraignment and continuance forms for use by attorneys; the judge had signed one at the beginning of the year and a set of copies was always available (T462-63). [4] The first time she used Respondent's signature stamp was when Respondent was in China (T463). Tyler would call the docket each day at 9:30AM (T463). Respondent was not

[4] The practice of using stamped and pre-signed continuance and arraignment forms had gone on for years in Division 25, including by then-Presiding Judge Stelzer (T496).

always back in chambers (T463-64). Tyler would announce continuances, but if an attorney wanted a dismissal they had to see the judge (T464, 467). The sheriff would make a first call on the capias; they would wait for defendants to show up and do another call later in the docket (T465). If the defendant was still absent, they would call the capias (T465). The only time Tyler continued a matter herself was when it was uncontested, explaining, "[The] only time I continued a case before she was on the bench is if they didn't have an indictment. If they were on bond and they had an attorney and the state was asking for a long date,[5] then we would go ahead and give them a continuance date. So that way the private attorney wouldn't have to sit around and wait for the judge, because they would get – they would get a continuance anyway" (T473). Whenever she did this, she would go over the continuances with the judge at the end of the docket (T473).

Because there was little notice prior to Respondent's departure for China, not all cases could be continued; Tyler estimated that to continue the entire non-confined docket would have required contacting over 200 attorneys (T469). Before Respondent left, she instructed Tyler to handle the docket "the way she usually did;" Tyler testified she continued the cases which would routinely be continued and had the sheriff call the

[5] "Long dates" and "short dates" were supplied by the Circuit Attorney's Office; long dates fell sometime the following month, and short dates were one or two weeks' out (T527).

capias (T468; 501). She would stamp these and set them aside for the judge's review (T495). In fact, "When she came back from China, the ones that I had put in her office the first week for her to sign, they were on my chair Monday morning" (T501-02).

Tyler never dismissed a case that was not subject to the "three continuances" rule, but would ask the moving attorney to sit and wait for the judge (T467). The only time she called dismissals herself was during the first few days of Respondent's China trip, and these were "based on the case" (T467). She relied on a text from Respondent, instructing her to handle them by the case (T469). She discontinued the practice after Judge Garvey told her he "didn't agree" with her doing it and her supervisor told her "she didn't think it was appropriate" (T468).

Recounting the incident with Chad Oliver, Tyler recalled Oliver wanting a dismissal for a client in custody, and she "told him I couldn't dismiss the case" (T476). Oliver wrote out a memo and she file-stamped it (T476-77). When the case came up later on the docket, Tyler read over Oliver's previous memo and pointed it out to the judge; Respondent asked, "Who wrote this?" and Tyler "told her who put it in the file, and she snatched it out of the file" and crumbled it up (T481). Tyler stated, "There was a courtroom full of people at the time" of Respondent's action, and she and Respondent were speaking in a normal tone of voice (TT482).

Tyler was subsequently notified by Jane Schweitzer, sometime in 2012, that the circuit attorney's office wanted to speak with her "regarding some paperwork that was

in a file" (T482). Tyler was not advised of any formal investigation, just that someone from the circuit attorney's office "would be coming to me shortly, and she [Schweitzer] just wanted – wanted me to be aware" (T482). Tyler could not recall when she received the phone call from Schweitzer, only that it was in the year 2012, sometime while it was still cold outside (T482). Later that day, Respondent came by Tyler's cosmetology salon for a prearranged hair appointment (T483). Tyler told her, "The circuit attorney's office was wanting to question me about that particular piece of paper that was in the file" (T483). According to Tyler, Respondent then said, "This is something we're going to keep between us, it's something we're going to take to our graves" (T484).

The first time Tyler spoke with investigators, she denied knowing anything "about a piece of paper" (T485). She subsequently told them Respondent tore it out of the file (T485-86). Throughout the investigation, and again at the hearing, Tyler maintained that Respondent never pressured her "to keep quiet about that piece of paper" (T492).

A reporter for the Post Dispatch got wind that a document might be missing from a court file, and the Circuit Attorney's office began an investigation (T532). It is not clear from the record when the investigation began, but Rachel Smith, the attorney in charge, testified that on February 15, 2012, she viewed the court file in State v. Williams and "ascertained that there were documents potentially missing;" she did, however, locate a copy of Exhibit 26 in the Circuit Attorney's file (T533-35). On

March 13, 2012, Smith had a "face-to-face" with Tyler, and Tyler told Smith she believed the document to be in the court file (T535). On March 15, 2012, Smith had a second conversation with Tyler in the presence of Tyler's attorney, at which time Tyler told Smith that Judge Peebles had destroyed the document (T536, 540). Respondent then became a suspect in a criminal investigation into tampering and obstruction of justice (T536). Smith received phone calls from Respondent concerning the matter, and returned a call which her office recorded (T536-37; E29[6]). In the conversation, Respondent characterized the document as an order and indicated she was angered that an attorney would "put something in a court file that said 'order'" (T541; E29).[7] However, Respondent also readily admitted that if the investigation was about a missing piece of paper, then "I did it, I tore the paper out" (T545). Smith agreed that Respondent "didn't want anyone else blamed for that conduct" and took sole responsibility for the act (T545).

[6] Exhibit 29 is a transcript of the recorded conversation.

[7] A copy of the form maintained and typically used in Division 25 for dismissal motions, can be found in Respondent's Exhibit I. This form contains a signature line to be signed by the moving attorney, as well as a signature line for the judge. Exhibit 26 contained no signature line for the judge, and was unsigned by any attorney (T362-63; E26).

With respect to the form of Exhibit 26, and specifically regarding the fact that that it was unsigned, Smith stated that there was nothing wrong with the document, noting, "It's like a proposed order" (T542).

Smith stated Respondent was never charged with a crime; Smith wrote a letter to the Commission informing them that "[n]o criminal charges will be filed against Judge Peebles absent additional evidence" (T543-44).

Respondent also presented evidence before the Commission. One attorney testified that there were no marked differences in Division 25 after Respondent took over the division; even with prior judges, the clerks would hand out dates on routine matters (T586). The only change was that court started later (T587). He never asked Tyler for dismissal of a case and stated that he "would not expect the clerk" to dismiss a case (T589). He said it was inconvenient to wait for the judge, but he never observed her to be rude or inconsiderate, and further, that he found her to be a thoughtful judge who took her job seriously (T592, 576). Another attorney described Respondent as businesslike and efficient (T607-08). She credited Respondent with instituting ledgers and forms, particularly for bond reductions (T607-08). Still another, Terry Niehoff, described her as pleasant and professional, and said that Division 25 was "one of the better ones" that year (T655). He was particularly impressed by a new policy allowing attorneys to surrender clients on felony warrants Tuesdays through Thursdays and conducting bond reductions at the same time (T655). He conceded that it was

"frustrating" and "annoying" to have court start late, but he learned to work around it by appearing in other divisions first (T657-58). In a discussion with Respondent in chambers, Respondent explained that her purpose in taking the bench when she did, was so her clerks could take care of basic things like settings (T657).

Niehoff identified Exhibit I as the boilerplate "Motion to Dismiss for Failure to Prosecute" form kept in Division 25 for attorneys' use (T662). He did not recognize the form on which Exhibit 26 had been was drafted, and stated that it differed from the courtroom form because the signature line was in a different place and it did not contain a "CC" to the sheriff's office, which would be necessary if a case were dismissed and a defendant was to be released from custody (T663-64). He indicated it was illogical and naïve for an attorney to argue a dismissal motion to a clerk; if the judge was not available to rule on it, the issue was simply taken next door to Judge Garvey, or to the presiding judge (T665-67). Dismissal of cases for non-prosecution was a practice followed by judges predating Respondent (T665). He also said that the written language in Exhibit 26 "made no sense," questioning why any attorney would "be wanting to argue the motion before the clerk" (T664).

According to Respondent's bailiff, Respondent customarily took the bench at 9:30 or 9:35AM; worked at least until 5:00PM; and took lunch in her chambers (T688-90). He could recall only one time when she took the bench after 10:30AM (T688). He was unclear in his testimony as to what time Respondent would arrive at the courthouse

each morning, but he'd see her come in or the clerk would let him know, and he would call for the confined defendants (T686-87).

Respondent testified as follows. She was licensed to practice law in 1992, following which she worked as an assistant city counselor, then as an assistant circuit attorney, both in the City of St. Louis (T694). In 1998 she was selected by the court en banc to be the first St. Louis drug court commissioner (T697). In 2000, she was appointed by then- Governor Carnahan to the associate circuit court (T698). At the time of her testimony, she had started her second rotation through each of the divisions, including the felony bulk docket; the misdemeanor bulk docket; both jury trial divisions; and the civil docket handling bench trials (T699-700). She liked to alternate between the civil and the criminal divisions, "to get to meet a new group of lawyers and learn some new practice" (T703). She described Division 25 as the pretrial division for all felonies, and in 2011 she began her second rotation through that division (T699, 704).

Respondent instituted new procedures in Division 25 designed to increase efficiency; she began using boilerplate forms for uniformity, because she is a "stickler" for "formality" (T705). She also discussed courtroom procedures with both of her clerks (T704).[8] She stated that each judge handles his or her courtroom differently, but

[8] Respondent had two clerks, Tyler, who was chief courtroom clerk, and Kelly Weeden.

that her personal method was to have Tyler take care of preliminary matters each day, before Respondent took the bench (T722). She stated,

> All judges do it differently…Some judges want their bailiffs to call the docket before they're out there. Some judges take the bench and go through [it] themselves. Some other judges have the clerks responsible for the docket. My practice was to have the clerk, the head clerk, who was Miss Tyler, take care of all the preliminary matters before I took the bench.

(T722).

Respondent explained that Tyler "never made decisions, she made announcements;" once Respondent took the bench, there was a second call on each case on the docket, with an opportunity for counsel to present argument on contested matters (T722-23). Tyler would "mark the docket" the first time she made the announcements, then when Respondent took the bench, "We would start from the beginning, from the very first docket and start everything all over again" (T722). Tyler was not allowed to use Respondent's signature stamp on discretionary matters unless instructed to by Respondent (T724).[9]

[9] Judges' instructions were always in writing. Respondent was asked once for her stamp by the jury supervisor, to use on show cause hearings; Respondent allowed it and modified her written order to include this (T724).

Respondent arrived at the courthouse around 9:15AM most mornings (T748). While Tyler was in the courtroom calling routine matters, Respondent was tending to "time sensitive" matters in chambers, which included meeting with clerks from the bond department, who would come in with a "stack of new warrants" for her signature; signing fugitive warrants so fugitive officers could go into the field to apprehend defendants; and reviewing capias warrants from the preceding day's drug court (T750). Far from being a "static" division, Division 25 was unpredictable, with pressing and and competing matters requiring her daily attention (T760).

Respondent testified that her practice of having the head clerk call the docket and dispose of preliminary matters was identical to the system she followed during her previous rotation in Division 25 (T721).

Concerning her China trip, Respondent testified that in hindsight she would have continued the dockets, although at the time this was not possible because her visa was approved too late (T725). She arranged to have judges cover her confined dockets and discussed with Tyler how to handle the other matters (T725). Judge Garvey was just down the hall, and Respondent informed both Garvey and Ohmer of her vacation plans (T726). Tyler texted her in China to ask how to handle dismissals, and Respondent told her, "Whitney, everything, the process will continue as it always have done" (T726). Respondent testified, "In my mind I'm thinking that there is no issue here because there were judges to cover my docket," because she knew a judge would be there each

morning to cover the confined docket (T725). She also knew that Tyler "could go see a judge" (T729). Respondent admitted, however, that she did not specifically instruct Tyler, before leaving, what to do if a lawyer came to her with a motion (T729).

Respondent stated that Exhibit 26 was not written on the usual courtroom form but appeared to be written on a form used by the public defender's office (731). It also contained no signature line or place for a bar number, so there was no way to identify who made the motion (T731). When she first saw the document, she did not know Chad Oliver had filed it "because the attorney did not sign it" (T732). She stated,

> I took the file and I turned to this motion, and immediately when I glanced at it, I was just – I was just shocked. I was absolutely shocked, and I was furious because I felt like, why is any attorney signing this [sic] or writing all this rhetoric on here. You do not make an argument with a clerk. You make an argument with the judge (T772).

Her thoughts upon reading the document were that it was "just some memorialization of a discussion between a clerk and a lawyer," which did not need to be in the court file (T772).[10]

[10] Because the rules require that a motion be signed by the moving party, and Exhibit 26 was unsigned, it made sense that Respondent took it to be a proposed order rather than a motion. Moreover, it is customary for judges to leave proposed findings and orders out of the court file once a ruling has been made, to avoid confusion.

She also explained, "I'm very particular about court forms and court orders, and that's why I took the time to draft the orders that I thought were legally appropriate" (T733). Moreover, Exhibit 26 had a line printed, "So Ordered," with no judge's signature on it, so she did not know if it was an order or possibly a proposed order (T733). She continued,

> I was angry and upset because I was frustrated that it was even in the file, and I thought the pleading itself was fraught with so much danger, honestly, I thought, looking at this, if one is not careful it looks as if this is an order to dismiss the case and release the defendant from custody, and it's those types of inappropriate forms that end up in court files that cause the court system tremendous problems. Particularly on a dismissal, I'm thinking in my mind, what if someone saw this and believed that this case was dismissed and released the defendant in error, and that's unconscionable.

(T734).

Respondent denied telling Tyler the incident was one they would "take to their graves," but probably said something like, "I'm done with that, I don't want to hear any more about that" (T735). She did not know she was under investigation but had heard rumors, so she called Rachel Smith because she did not want Tyler blamed for something she had done (T737). She stated, "I told Rachel every single thing I knew about that file. I did not hide anything from her, and in fact, I wasn't even quite sure we

were talking about the same thing because I hadn't seen the paper in such a long time" (T738). [11] The document was not in front of her at the time of the telephone conversation and she was going from memory, not sure whether it had been a motion or an order (T738).

The Commission sustained five of the nine counts charged to Respondent, to wit: That Respondent made public statements to a newspaper reporter about a pending criminal case (State v. McCall) (Count 1)[12]; that she habitually took the bench late,

[11] Respondent saw Exhibit 26 on November 30, 2011, when she removed it from the file in the courtroom (T357). She spoke with Smith on March 19, 2012 (E28, E29).

[12] Respondent conceded this point in an early letter to the Commission, E3, in which she stated, "With regret, I admit some of the statements attributed to me in the article amounted to public comment on a pending case, in violation of Canon 3D(9). It was a misfeasance on my part, but not done with any intent to circumvent Canon 3D(9)." She acknowledged her mistake again at the hearing, admitting that, in response to criticism concerning a bail order in the matter, she gave a statement to a Post Dispatch reporter (T716-17). She testified, "I've stated to the Commission in my response, I realize that my public statements on that pending case were inappropriate. I realize that, and I have said that throughout, but it was certainly not my intention to violate any rules of ethics. I was responding to a very difficult situation that I had been put in for the very first time in my legal career" (T717). She was particularly distressed by criticism from the

causing inconvenience to parties appearing in her court (Count 4); that she displayed a pattern of conduct in having her clerk call the docket and "advise" parties of continuance dates, dismissals and capias warrants, often without supervision (Count 5); that she removed and destroyed Exhibit 26, failed to notify the parties of her actions, and encouraged the clerk not to be truthful to investigators about her actions (Count 6); and that, knowing she was under investigation, she made a statement to Assistant Circuit Attorney Smith, mischaracterizing Exhibit 26 as an order, and that such an explanation showed lack of candor and cooperation in the investigation (Count 9) (E1; A21-24). The sanction recommended by the Commission was Respondent's removal from the bench (A25).

POINTS RELIED ON

I.

Respondent objects to the factual findings of the Commission, with regard to Count 4 of the Second Amended Notice and as set forth on page 21 of its Findings of Fact, Conclusions of Law and Recommendation, that her choice to take the bench most mornings an hour or more late constituted "tardiness" and was a "discourtesy" to parties appearing in her court, as the evidence showed that

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circuit attorney that she had been soft on crime, being a former prosecutor herself (T716).

each judge handles his or her courtroom differently; that Respondent specifically instituted this policy so that her clerks could attend to uncontested matters involving standard continuances, dismissals and capias warrants, in large part so that these matters could be expedited for the convenience of the parties; and that if Respondent was not on the bench, she was generally available in chambers to consult with counsel, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

In re Hill, 8 S.W.3d 578 (Mo. banc 2000);

In re Baber, 847 S.W.2d 22 (Mo. banc 1993);

In re Duncan, 541 S.W.2d 469 (Mo. banc 1993).

II.

Respondent objects to the factual findings of the Commission, with regard to Count 5 of the Second Amended Notice and as set forth on pages 21 and 22 of its Findings of Fact, Conclusions of Law and Recommendation, that Respondent's practice of allowing her clerks to call the docket with respect to continuances, dismissals and capias required that her clerk dispense "advice" to attorneys and further, that it was conducted in the absence of supervision, both during normal

work days and specifically during the time Respondent was in China, as the evidence showed that during those times when Respondent was not absent from the country and her clerks were calling the docket, they were ministering to uncontested and non-discretionary housekeeping matters which were ratified by Respondent that same morning when she took the bench, and that during the period when Respondent was in China, the clerks had prearranged orders as to which matters to handle and which to defer to other judges in the courthouse, and moreover, that each morning during her absence another judge was physically present in courtroom, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

In re Hill, 8 S.W.3d 578 (Mo. banc 2000);

In re Baber, 847 S.W.2d 22 (Mo. banc 1993);

In re Kohn, 568 S.W.2d 255 (Mo. banc 1978).

III.

Respondent objects to the factual finding of the Commission, with regard to Count 6 of the Second Amended Notice and as set forth on pages 22 and 23 of its Findings of Fact, Conclusions of Law and Recommendation, that the reason she

destroyed Exhibit 26 was because it highlighted the lack of supervision of the clerks and placed Respondent and the clerks in a bad light, as the evidence showed that the act was precipitated by Respondent's confusion and frustration over the presence of an unsigned, ambiguous and potentially misleading document in the court file and further, while Respondent's act in physically destroying Exhibit 26 rather than striking it and entering a corresponding order in the record was inappropriate and ill-advised, Respondent objects to the conclusion of the Commission that said act amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

In re Hill, 8 S.W.3d 578 (Mo. banc 2000);

In re Baber, 847 S.W.2d 22 (Mo. banc 1993);

In re Duncan, 541 S.W.2d 469 (Mo. banc 1993).

IV.

Respondent objects to the factual findings of the Commission, with regard to Count 9 of the Second Amended Notice and as set forth on pages 24 and 25 of its Findings of Fact, Conclusions of Law and Recommendation, that her motivation in telling Assistant Circuit Attorney Smith that Exhibit 26 was an order and not a motion, was "to establish a defense based on a false premise" by

attempting to portray the document as something it was not, and moreover, that this mischaracterization by Respondent constituted a failure of candor and cooperation, as the evidence showed that Respondent's confusion over the origins and intent of the document was genuine and not unreasonable, and moreover, that Respondent undertook to cooperate with the investigation, in that she initiated contact with Attorney Smith and took personal responsibility for destroying the document, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

In re Hill, 8 S.W.3d 578 (Mo. banc 2000);

In re Baber, 847 S.W.2d 22 (Mo. banc 1993);

In re Duncan, 541 S.W.2d 469 (Mo. banc 1993).

V.

Respondent objects to the recommended sanction of removal by five of the six members of the Commission, as set forth on page 25 of its Findings of Fact, Conclusions of Law and Recommendation, because even if this Court sustains the findings and conclusions of the Commission and condemns or admonishes Respondent's practice of taking the bench late; allowing her clerks to call the docket; providing insufficient supervision to her clerks on an ongoing basis or

while she was absent from the bench in China; improvidently or erroneously removing Exhibit 26 from a court file; or exercising a lack of candor and cooperation in the investigation into the removal of the document, her actions are all appropriately addressed or punished by a sanction less than removal; and moreover, because she has not been found guilty of a criminal offense nor found to exhibit fundamental defects in character or temperament which would disqualify her from judicial service, the sanction of removal is neither just nor necessary to the public's continued confidence in the judicial system.

In re Elliston, 789 S.W.3d 469 (Mo. banc 1990);

In re Baber, 847 S.W.2d 22 (Mo. banc 1993);

In re Buford, 577 S.W.2d 809 (Mo. banc 1978).

ARGUMENT

I.

Respondent objects to the factual findings of the Commission, with regard to Count 4 of the Second Amended Notice and as set forth on page 21 of its Findings of Fact, Conclusions of Law and Recommendation, that her choice to take the bench most mornings an hour or more late constituted "tardiness" and was a "discourtesy" to parties appearing in her court, as the evidence showed that each judge handles his or her courtroom differently; that Respondent specifically

instituted this policy so that her clerks could attend to uncontested matters involving standard continuances, dismissals and capias warrants, in large part so that these matters could be expedited for the convenience of the parties; and that if Respondent was not on the bench, she was generally available in chambers to consult with counsel, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

A. Standard of Review.

The Supreme Court independently reviews the evidence and the Commission's fact findings. *In re Hill*, 8 S.W.3d 578, 581 (Mo. banc 2000), citing *In re Buford*, 577 S.W.2d 809, 813 (Mo. banc 1979). Where credibility is at issue, the Court gives substantial consideration and due deference to the Commission's ability to judge the credibility of witnesses appearing before it. *In re Briggs*, 595 S.W.2d 270, 271 (Mo. banc 1980). Because a disciplinary proceeding is civil rather than criminal, the charges must be proved by a preponderance of the evidence. *In re Duncan*, 541 S.W.2d 469, 472 (Mo. banc 1976).

The Supreme Court is not required to adopt the recommendation of the Commission in a judicial disciplinary proceeding, and the ultimate responsibility to

impose any sanction, or no sanction, is entrusted to the Court. Mo. Const. art. V, § 24; *In re Baber*, 847 S.W.2d 800, 802 (Mo. banc 1993).

B. Discussion.

Article V of the Missouri Constitution sets forth qualifications for judges of the Supreme Court, courts of appeals, circuit courts, and probate and magistrate courts. See *In re Fullwood*, 518 S.W.2d 22, 26 (Mo. banc 1973). Section 24 of Article V authorizes disciplinary action against a judge for the "commission of a crime, or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude, or oppression in office." See *In re Baber*, *supra* at 802; Mo. Const. art. V, § 24.3. No discipline may be imposed absent a finding that the respondent has violated at least one of these constitutional standards. *In re Voorhees*, 739 S.W.2d 178, 180 (Mo. banc 1987).

The Code of Judicial Conduct establishes standards against which judicial activity is measured. *In re Elliston*, 789 S.W.2d 469, 475 (Mo. banc 1990). Violations of these canons, if established, constitute "misconduct" or "oppression in office" within the meaning of Article V, § 24. *In re Elliston*, *supra* at 475; *In re Kohn*, 568 S.W.2d 255 (Mo. banc 1978). The Preamble to Rule 2 states:

> Although the black letter of the rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a

> reasonable and reasoned application of the rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

Rule 2, Preamble, Section (6) (eff. Jan.1, 2012).

In sustaining Count 4, the Commission found that Respondent committed the actionable conduct of tardiness and of inconveniencing parties that appeared in her court. Among the canons which Respondent was found to have violated, are:

- A judge shall at all times act 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 (Rule 2, Canon 1, 2-1.2);
- A judge shall uphold and apply the law, and shall perform all duties of judicial office promptly and efficiently (Rule 2, Canon 2, 2-2.2);
- A judge shall perform judicial and administrative duties competently and diligently (Rule 2, Canon 2, 2-2.5);
- A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom he deals in an official capacity (Rule 2, Canon 2, 2-2.8);

- A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct so that the integrity and independence of the judiciary will be preserved (Rule 2.03, Canon 2A).[13]

While accounts differed as to the time Respondent would take the bench each morning, it appears that it was never promptly at 9:00AM. However, the evidence also showed that there was no rigid rule in place prescribing a "start time," and even the presiding judge allowed that judges were afforded some latitude and that practices among them vary (T85).

Moreover, while many attorneys were understandably frustrated, particularly when they showed up close to 9:00AM, others conformed to the court's schedule and conducted business elsewhere in the early part of the morning (T163,657-58). Additionally, while attorneys with contested matters were required to wait for Respondent, others had their matters resolved in short order, by the clerk calling the docket (T151, 154, 165). By one attorney's account, a docket that began with close to 60 people was winnowed down to one circuit attorney, one public defender, five to ten private attorneys and some police officers by the end of the docket call (T181).

[13] Many of the canons identified under each count of conviction are duplicates, or have been renumbered.

Thus, while some might accuse Respondent of "tardiness," others might simply understand her system in the spirit in which it was intended: That the clerk would take care of preliminary matters so that these matters could be expedited and cleared (T146, 154, 155, 293). Respondent's practice of taking the bench mid-morning was never driven by indolence or lack of regard for members of the bar or public, but was a purposeful effort to streamline routine matters. [14]

Finally, by all accounts Respondent is a well-meaning individual. Her intention was never to cause consternation or delay to members of the bar or public; she believed in the systems she instituted and believed they would facilitate the operation of the division.

Comment (1) to Rule 2, Canon 2-2.2 provides in pertinent part, "In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary costs or delay." Comment (4) to that canon provides, "A judge may make reasonable accomodations to afford litigants the opportunity to have their matters fairly heard." Comment (2) to Rule 2, Canon 2-2.5 provides, "A judge should seek the necessary docket time, court staff,

[14] Respondent also wanted to give members of the private bar, many of whom appeared in her court, the opportunity to conduct business in other divisions before showing up in Division 25 (T763).

expertise, and resources to discharge all adjudicative and administrative responsibilities."

The matters disposed of by Clerk Tyler on the early call docket obviated long waits and only affected those attorneys whose matters were uncontested. For all other counsel, Respondent made herself available by mid-morning or sooner, and those cases were fairly heard. No one seeking access to or redress by the court was denied that opportunity, and for all others their routine matters were called early and dealt with. Respondent performed her judicial duties and devised a system to expeditiously address administrative duties. She was not in violation of the above rules.

Further, in regard to whether Respondent's conduct in taking the bench later than 9AM constituted "tardiness," Respondent submits that the burden of proving this has not been met. The term has no legal meaning or standard and is vague and perjorative. Moreover, while the record supports a finding that Respondent took the bench anywhere from 9:30AM to 10:30AM, the question of "inconvenience" was another matter. Many witnesses testified that they simply accommodated Respondent's schedule, and no one was unable to find her or reach her on substantive matters (T85, 147, 153-54, 294).

In *In re Kohn*, 568 S.W.2d 255 (Mo. banc 1978), respondent was found by the Commission to have violated Canon 3A(3) based on a pattern of inconveniencing

attorneys by making himself unavailable. The Court refused to sustain the finding, stating,

> The Commission found Judge Kohn discourteous in that he was inaccessible and difficult to contact. Attorneys were required to work their way through an array of underlings, who insulated him from counsel, creating unnecessary delays in their work. The testimony of two witnesses supports this finding. Numerous witnesses, including six presented by the Commission, testified they had no trouble arranging to see respondent, and seemed reconciled to the necessity for advance appointment. All witnesses testified that Judge Kohn's demeanor to them in personal contacts and in the courtroom was courteous. We find that the burden of showing violation of the Canons as to this charge was not met.

In re Kohn, supra at 262.

While Respondent's habits were aggravating to some, to others they were simply idiosyncratic. Respondent can certainly amend her courtroom start time, or do what other judges do and take the bench simultaneous with announcements. In any event, her actions here do not demonstrate dereliction of duty or rampant discourtesy.

II.

Respondent objects to the factual findings of the Commission, with regard to Count 5 of the Second Amended Notice and as set forth on pages 21 and 22 of

its Findings of Fact, Conclusions of Law and Recommendation, that Respondent's practice of allowing her clerks to call the docket with respect to continuances, dismissals and capias required that her clerk dispense "advice" to attorneys and further, that it was conducted in the absence of supervision, both during normal work days and specifically during the time Respondent was in China, as the evidence showed that during those times when Respondent was not absent from the country and her clerks were calling the docket, they were ministering to uncontested and non-discretionary housekeeping matters which were ratified by Respondent that same morning when she took the bench, and that during the period when Respondent was in China, the clerks had prearranged orders as to which matters to handle and which to defer to other judges in the courthouse, and moreover, that each morning during her absence another judge was physically present in courtroom, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

A. Standard of Review.

Respondent adopts and incorporates herein as part of this point, the Standard of Review set out in Point I above.

B. Discussion.

In sustaining Count 5, the Commission found that Respondent committed the actionable conduct of "frequently requiring" her clerk to call the docket and "advise" attorneys of continuance dates, dismissals and capias, and that her clerk did so without proper supervision, in the usual course and while she was on vacation in China (A21-22). In essence, the Commission found that Respondent improperly delegated tasks to her clerk. Among the canons which Respondent was found to have violated under this count, are:

- A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards of conduct (Rule 2.03, Canon 1A);
- A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rule 2.03, Canon 2A);
- The judicial duties of a judge take precedent over all the judge's other activities (Rule 2.03, Canon 3A);
- A judge shall hear and decide matters assigned to the judge except those in which disqualification is required (Rule 2.03, Canon 3B(1));
- A judge shall be faithful to the law and maintain professional competence to it (Rule 2.03, Canon 3B(2));

- A judge shall require court staff, court officials, and others subject to the court's direction and control to act in a manner consistent with the judge's obligations under the judicial code (Rule 2, Canon 1, 2.12(A));
- A judge shall perform judicial and administrative duties competently and diligently (Rule 2, Canon 2-2.5(A)).

Respondent objects to the specific findings of the Commission, that she caused her clerk to "advise" attorneys and that she failed to "properly supervise" her clerk. Moreover, while she may have left her courtroom and her dockets inadequately staffed while in China, her oversights were due to careless assumptions rather than actionable misconduct.

Tyler handled only perfunctory, uncontested matters, characterized by witnesses as housekeeping matters (T154, 155, 165, 293, 309). She did not exercise discretion or mediate disputes, and if any party had an objection or an argument to make, they were instructed to wait for the judge (T112, 153-54, 294). Moreover, every call Tyler did make was reviewed and ratified by Respondent in short order that same morning (T153-55). The only time Tyler deviated from Division 25 protocol concerned the incident with Chad Oliver, when, instead of sending him to a judge (where the circumstances in support of a dismissal were in question), she acted on her own by tabling the discussion, and deferred the case until after Respondent's return.

No one – and certainly not Respondent – can argue with the fact that her unconfined dockets should have been continued prior to her departure, or, barring that, her trip cancelled. Respondent assumed that the judges handling her confined dockets -- and thus physically present in her courtroom each morning while she was gone -- would attend to any unforeseen or questionable matters. Unfortunately, that assumed that Tyler would know which cases required judicial attention – or that the judges covering the confined docket would remain in the courtroom long enough to attend to those matters.

Comment (1) to Rule 2, Canon 2.12 provides, "A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control." Respondent exercised supervision over Tyler's call docket, by reviewing it each day from the bench, and by limiting the scope of Tyler's announcements to cases where the outcome was prescribed. That she failed to anticipate every contingency and to impart unambiguous instructions to her clerk in advance of her China trip, demonstrates carelessness but not willful malfeasance.

Finally, it is necessary to note that the clerk's practice of calling the docket in Division 25 was widely known and was premised on standards set by prior judges, such as the dismissal of cases after three continuances by the state to obtain an indictment (T146, 309, 357, 586, 665). While countless attorneys had been privy to the Division 25 docket call, no one had complained about it, so Respondent had no notice – and no

reason to know-- that the way it was conducted might be improper. Indeed, the only admonishment Respondent received from the presiding judge concerned her late arrival on the bench; she was never specifically directed to be on the bench *at the very time* the docket was called, nor was she advised that her reviewing of the entries later, once she took the bench, was tantamount to insufficient supervision (T24-25). As the Court noted in *In re Kohn*, *supra* at 257, the question is "whether particular acts complained of rise to the level of misconduct" contemplated by Article V. If the docket call by the clerk is a violation of the canons, Respondent should not be punished for conduct tacitly endorsed over time. See also *In re Hill*, *supra* at 582, stating that, while the canons warn of general prohibited conduct, and "neither absolute certainty nor impossible standards of specificity are required," still, the "purpose is not to punish criminal conduct but rather to maintain standards of judicial fitness."

III.

Respondent objects to the factual finding of the Commission, with regard to Count 6 of the Second Amended Notice and as set forth on pages 22 and 23 of its Findings of Fact, Conclusions of Law and Recommendation, that the reason she destroyed Exhibit 26 was because it highlighted the lack of supervision of the clerks and placed Respondent and the clerks in a bad light, as the evidence showed that the act was precipitated by Respondent's confusion and frustration

over the presence of an unsigned, ambiguous and potentially misleading document in the court file and further, while Respondent's act in physically destroying Exhibit 26 rather than striking it and entering a corresponding order in the record was inappropriate and ill-advised, Respondent objects to the conclusion of the Commission that said act amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

A. Standard of Review.

Respondent adopts and incorporates herein as part of this point, the Standard of Review set out in Point I above.

B. Discussion.

In sustaining Count 6, the Commission found that Respondent committed the actionable conduct of removing and destroying a Motion to Dismiss (Exhibit 26) from the court file in State v. Williams, in order to conceal the fact that her clerk had acted without authorization in "ruling" on the motion. Among the canons which Respondent was found to have violated under this count are:

- A judge shall participate in establishing, maintaining and enforcing high standards of conduct and personally observing those standards of conduct so that the integrity and independence of the judiciary will be preserved (Rule 2.03, Canon 1);

- A judge shall respect and comply with the law and shall act in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Rule 2.03, Canon 2A);
- A judge shall be faithful to the law and maintain professional competence to it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism (Rule 2.03, Canon 3, B(2));
- A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, shall maintain professional competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business (Rule 2.03, Canon 3C(1));
- A judge shall require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge (Rule 2.03, Canon 3C(2)).

Respondent objects to the finding that she destroyed Exhibit 26 for the purpose of concealment.

Respondent testified that she tore the document from the file, because she was confused and uncertain as to its authorship and genesis; offended by its apparent failure to conform to her high standards for forms and pleadings; and concerned that its affect could be misconstrued (T731-33, 772, 774). The exhibit itself bears out this

reaction, as the document is hand-written, unsigned, and drafted on a form not maintained by the court (E26). Because it was unsigned and untraceable to any attorney, [15] it was irregular and deficient.

Moreover, if Respondent's purpose in removing the document was to conceal the purportedly unauthorized action of her clerk, she would arguably have destroyed Exhibit 26 in a less public fashion; that she ripped it from the file in the presence of a packed courtroom rather than in the privacy of her chambers indicates an absence of guile.

That said, Respondent's reaction in physically removing and crumbling up the document was inappropriate; [16] the document was filed-stamped and placed within the proper file. Thus, while her choice to remove it was questionable, there is no direct evidence that she did so to conceal its nature or content or hide the "fact" that "the court clerk denied the motion without a judge present" (E26). Moreover, Tyler's testimony that Respondent admonished her to keep quiet about the incident, by taking it

[15] Oliver also failed to affix a bar number or phone number to the document. Attorneys using boilerplate forms to memorialize proceedings in the courtroom are expected to identify themselves as the party preparing the document.

[16] Section 575.110 RSMo, provides that a person commits misdemeanor tampering if he "destroys, suppresses or conceals any public record" and does so with the purpose of impairing the availability of such record.

to her grave, must be taken with a grain of salt. The remark is uncorroborated; Tyler's own credibility was in issue; and Respondent explained that the only thing she expressed to Tyler was exasperation over the presence of an offensive, irregular document (T735).

More importantly, the document does not, on its face, indict Tyler for improper "judging" or Respondent for allowing it in her absence. Consequently, there was no incentive to suppress it. Tyler did not issue an "order" on a contested matter or cause the release of a defendant from custody; in fact, she did just the opposite – she continued the matter until such time as the judge had returned. Arguably she did what she always did – deferred a case that required argument to the court. The document was simply not a smoking gun.

IV.

Respondent objects to the factual findings of the Commission, with regard to Count 9 of the Second Amended Notice and as set forth on pages 24 and 25 of its Findings of Fact, Conclusions of Law and Recommendation, that her motivation in telling Assistant Circuit Attorney Smith that Exhibit 26 was an order and not a motion, was "to establish a defense based on a false premise" by attempting to portray the document as something it was not, and moreover, that this mischaracterization by Respondent constituted a failure of candor and

cooperation, as the evidence showed that Respondent's confusion over the origins and intent of the document was genuine and not unreasonable, and moreover, that Respondent undertook to cooperate with the investigation, in that she initiated contact with Attorney Smith and took personal responsibility for destroying the document, and further, Respondent objects to the conclusion that this conduct amounts to a violation of Supreme Court Rule 2 or Rule 2.03, or constitutes judicial misconduct under Article V, Section 24 of the Missouri Constitution.

A. Standard of Review.

Respondent adopts and incorporates herein as part of this point, the Standard of Review set out in Point I above.

B. Discussion.

In sustaining Count 9, the Commission found that Respondent committed the actionable conduct of mischaracterizing Exhibit 26 as "an improper order" as distinct from a motion, when she speaking to Assistant Circuit Attorney Smith, in order to "establish a defense," and that said statements demonstrated a lack of candor and cooperation. Among the canons Respondent was found to have violated under this count are:

- A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies (Rule 2, Canon 2, 2.16);

- 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 (Rule 2 Canon 1, 2-1.2).

Respondent objects to the finding that her choice of terminology in speaking with Prosecutor Smith was an attempt to obfuscate or excuse her actions with regard to Exhibit 26.

The record reflects that Respondent told Smith she took Exhibit 26 to be an order and was angry that an attorney "would put something in a court file that said 'order'" (E29). Exhibit 26 could reasonably be construed as a proposed order, which is likely what Respondent meant, and it is reasonable that others would construe it likewise. The interlineation that was written onto the form was squeezed immediately adjacent to the "So Ordered" line; moreover, the text of the interlineation indicated that the motion had been denied (E26). In addition, Respondent's conversation with Smith occurred some four months after she had last seen the document; she did not have the document in front of her when she spoke to Smith; and she was going on memory alone (T738). It was not unreasonable to recall the document as an order or a proposed order, and there is simply not enough verbiage in the conversation from which to infer that Respondent was attempting "to establish a defense based on a false premise" (A24).

In addition, unlike Tyler who prevaricated when she first spoke to Smith, Respondent at all times took full responsibility for removing the document (T737). She was candid in this regard and was emphatic in her testimony, that, "When I called Rachel Smith, I did it because it was the right thing to do, because I was not going to allow Whitney Tyler or anyone else to be blamed for any action I took" (T737). Clearly Respondent's reaction to seeing Exhibit 26 was imprudent and regrettable. It was not, however, an act of obfuscation or deceit.

It should also be noted that the circuit attorney has declined to prosecute Respondent criminally on the facts developed pursuant to their investigation. In the absence of evidence contradicting Respondent's explanation of events, it is urged that she be afforded the benefit of the doubt on this question.

V.

Respondent objects to the recommended sanction of removal by five of the six members of the Commission, as set forth on page 25 of its Findings of Fact, Conclusions of Law and Recommendation, because even if this Court sustains the findings and conclusions of the Commission and condemns or admonishes Respondent's singular act of commenting on a pending case to a reporter; taking the bench late; allowing her clerk to call the docket in an unsupervised manner and failing to secure her docket while she was on vacation in China;

improvidently or erroneously removing Exhibit 26 from a court file; or exercising a lack of candor and cooperation in the investigation into the removal of the document, her actions are all appropriately addressed or punished by a sanction less than removal; and moreover, because she has not been found guilty of a criminal offense nor found to exhibit fundamental defects in character or temperament which would disqualify her from judicial service, the sanction of removal is neither just nor necessary to the public's continued confidence in the judicial system.

The Commission found that Respondent committed the following acts of misconduct: Commenting on a pending court case to a newspaper reporter[17]; convening court at an inconvenient time; permitting her clerk to engage in the unsupervised practice of calling the docket and further, permitting the clerk to manage the courtroom alone while Respondent was in China; destroying a court document in an effort to conceal the unauthorized conduct of her clerk; and failing to take full responsibility for the destruction of the court document. Respondent submits that, even if each of these acts is sustained by this Court, removal is not an appropriate sanction.

[17] This conduct, in violation of Count 1, is proscribed by Rule 2.03, Canons 1, 2A and 3B(9). Canon 3B(9) provides that a judge shall abstain from public comment about a pending or impending proceeding.

Article V, § 27, which creates the Commission, dictates: "The Commission shall receive and investigate… all complaints concerning misconduct of judges…" and subparagraph 3 thereof, provides, "Upon recommendation by an affirmative vote of at least four members of the Commission, the Supreme Court en banc, upon concurring with such recommendation, shall remove, suspend, or discipline any judge…of any court."

The Supreme Court is the sole arbiter of whether judicial misconduct has occurred, and if so, what sanction, if any, should be imposed. See *In re Baber*, *supra* at 801 ("The ultimate responsibility to 'remove, suspend, discipline or reprimand any judge of any court' is entrusted to this Court"); *In re Elliston*, *supra* at 473 ("The Commission may not impose discipline. Only this Court may do that.") The purpose of judicial discipline is "not to punish criminal conduct, but rather to maintain standards of judicial fitness." *In re Hill*, *supra* at 582.

While disciplinary action is authorized "for the commission of a crime, or for misconduct, habitual drunkenness, willful neglect of duty, corruption in office, incompetency or any offense involving moral turpitude or oppression in office," the appropriate sanction is wholly within the discretion of the Court. See Mo. Const., art. V, §24.3. According to the Preamble to the Code of Judicial Conduct, "Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should

depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system." Moreover, even where misconduct is found, it need not be actionable. See *In re Kohn, supra* at 257 ("violations of the Code may be considered evidence of misconduct, though not necessarily misconduct per se.") The Court "does not consider any charge of which the respondent was found not guilty." *In re Baber, supra* at 801-02.

It is axiomatic, that "[i]ntelligence, ability and diligence are minimum qualifications of every judge." *In re Baber, supra* at 803. Moreover, "Intrinsic to all sections of [the Code] are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence" in the legal system. Rule 2, 2.01.

This Court has suggested that only acts that "are severe and pervasive enough [ ] necessitate [ ] removal from the bench." See *In re Baber*, *supra* at 803. Assuming misconduct is found here, there is no bright line for the appropriate sanction. In examining the Court's action in previous cases, it is apparent that removal has been meted out sparingly and only for the most egregious of misconduct. Suspension, likewise, may be inappropriate, for even where the Court has ordered that sanction, the misconduct far exceeded Respondent's actions here.

1. Cases where removal has been ordered.

In *In re Briggs*, 585 S.W.2d 270 (Mo. banc 1980), the Court ordered respondent's removal after sustaining numerous violations of misconduct related to improper political activities and administrative failings. He was found to have made contributions to the governor's election campaign; arranged or attended fundraisers and solicited campaign funds; made recommendations to the governor for appointments to state jobs; and held himself out as a "counselor" to the Bootheel region of the state. Extensive testimony showed, among other things, that he was "responsible for raising $40,000 for the Governor's election and that he had personally conveyed that amount to the Governor," and that he had "been the moving force in the Governor's election in the Bootheel and…that he and the Governor reached an agreement that he would be the clearinghouse, so to speak, for any appointments or employment that took place that affected that particular area of the state." *In re Briggs, supra* at 273. Testimony referred to respondent's "incessant efforts" to secure appointments, and in letters to the governor, respondent suggested individuals for appointment whom he said "were always available with their pocketbooks open." *In re Briggs, supra* at 276. The record also showed that respondent made quite a show of hand-carrying envelopes of fundraising proceeds directly to the governor's campaign director, and boasting, "This is us and how do you like us guys? We don't do bad down in the Bootheel, do we?" *In re Briggs, supra* at 273. The Court stated, "There can be no doubt respondent exercised his apparent prerogative relative to political appointments in Southeast Missouri… the

record discloses a running stream of contacts by Respondent with the Governor's…Office." *In re Briggs, supra* at 274.

It was also found that over a period of two years, respondent had allowed his clerk to take "endless liberties" with her office, including granting a driving privilege to her brother-in-law, a convicted felon, for which she "concocted" a file, replete with a "spurious order and docket sheet," to which she affixed the court's stamp; that she altered, "fixed," and reduced traffic tickets or set bonds in numerous traffic cases; and that she entered false minutes in court files. The Commission found, and the Court affirmed, that said conduct was the result of respondent's lack of supervision, exacerbated by the fact that he was only present in the courthouse one day a week and "infrequently on other occasions for the conduct of preliminary hearings." *In re Briggs*, *supra* at 277.

On the first set of charges alone, the Court found removal to be "appropriate," stating, "It is of paramount importance that both in practice and in the public mind, our judicial processes be neutral, fair, and free from improper influences. Respondent's excessive involvement in partisan political activities is inconsistent with the preservation of these values and as such mandates his removal from office." *In re Briggs, id.*

The Court also ordered respondent's removal in *In re Corning*, 538 S.W.2d 46 (Mo. banc 1976). It found that respondent "failed to rule on motions, trials and other

matters … with reasonable dispatch" in scores of cases, including one case where the defendant had been assessed a two-year sentence, and who still had not been sentenced almost four years after the verdict; was "habitually" late in arriving at the courthouse; failed to answer interrogatories from the Commission; maintained an improper affiliation with the Normandy Township Republican Club, including attending monthly dinner meetings; and disregarded numerous "strong warnings" from both the Court and the Commission regarding his dilatory practices. *In re Corning*, *supra* at 47, 51.

The Court found that removal was justified, based on respondent's willful neglect of duty; refusal to heed warnings to conform his conduct; and membership in a partisan club, a violation of then-Rule 2.28 prohibiting a judge from retaining a place on a party committee, and a violation of Section 29(f) of the Constitution, prohibiting judges from holding office in a political organization.

Lastly, in *In re Duncan*, 541 S.W.2d 564 (Mo. banc 1976), respondent was removed from the bench after committing a burglary of his neighbor's home. The Court explained, "The conduct of respondent if engaged in by a private citizen would be highly reprehensible. This conduct when engaged in by a judge is intolerable and

demonstrates an attitude that cannot be countenanced on the part of a person who sits in judgment of others." *In re Duncan*, *supra* at 571.[18]

2. Cases where suspension has been ordered.

Orders of suspension are far more common than orders of removal.

In *In re Elliston*, 789 S.W.2d 469 (Mo. banc 1990), the Court found respondent guilty of seventeen counts, ranging from threatening a judge with a writ if that judge refused to quash defendant's subpoena of respondent in a criminal case; berating attorneys for filing standard pleadings; refusing negotiated settlements and forcing cases to trial; humiliating attorneys in front of the jury; denying the motion of appointed counsel to continue a trial setting, which was fourteen days from the date counsel entered his appearance; denying water to attorneys in the courtroom; forcing counsel to make objections in open court, even at the risk of prejudice; "demeaning" an attorney for attempting to present evidence in a juvenile matter; and terminating a court employee who had supported respondent's opponent for election to the bench. Citing "a pattern of abusive and discourteous conduct [which] spans the length of Judge Elliston's judicial career," the Court summarized the testimony:

[18] The only other case of removal which counsel has been able to locate is *In re Baber*, *supra*, where respondent was reluctantly removed by the Court for mental incompetency.

> Those who felt his wrath said that Judge Elliston "attempted to humiliate me in front of my clients;" was "discourteous;" had a "short temper;" "seemed … early on in a motion or in a case to adopt a side and then further that side by being rude to the attorneys on the side he didn't like;" was "impulsive" and "very emotional;" was "discourteous, disrespectful to persons who appear before him;" was "discourteous, suspicious, vindictive…lacking common courtesy and decency to litigants and lawyers;" was "high-handed and abusive to lawyers and witnesses and judges and parties;" caused those who appeared before him a "feeling of anxiety plus a concern that his attitude on that particular day may affect the outcome of your case or may affect the welfare of the client." These are harsh words spoken by persons who felt their force. The transcript gives support to these assertions.

In re Elliston, *supra* at 480-81. The Court concluded,

> Nor can it be said that this pattern and practice is but an accumulation of isolated events, which, when taken together, show no more than that Judge Elliston is ill-mannered. Were we permitted to view these incidents that superficially, and in isolation, a public reprimand might be a sufficient sanction. However, a careful review of this case paints a darker picture. Lurking just below the surface is the portrait of a judge whose desire to even the score with those who confront him

personally or question his legal judgment clouds his judgment and jeopardizes the ability of litigants who appear before him to receive full and impartial justice. *In re Elliston*, *supra* at 481. With this said, the Court imposed a fifteen-day suspension without pay.

In *In re Buford*, 577 S.W.2d 809 (Mo. banc 1979), the Commission found respondent guilty of seventeen acts of misconduct, including improper use of the court's stamp; threatening attorneys with contempt for bringing certain pleadings; and making the disciplinary investigation public, and recommended removal. The Court admonished respondent on many of the acts but found him guilty of only one: agreeing not to certify a juvenile, if the juvenile's parents dismissed a federal civil rights action brought against the circuit judges, juvenile officers, and sheriff. The Court found the act had the appearance of a "trade-off," and "gave the appearance that his ruling on the motion to relinquish juvenile court jurisdiction and to certify the juvenile for trial as an adult could be had for the simple expedience of dismissing the federal court action." *In re Buford*, *supra* at 838.

With respect to the proceedings overall and the appropriate sanction, the Court stated,

> We feel it important to note that many of the pitfalls that have taken place could have been avoided had respondent formulated some reasonable rules and published them in order that the attorneys appearing in the counties of his circuit

would know what to expect in connection with the matters on file there. Respondent has indicated he intends to do this and this court expects it to be done.

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The court has also given serious consideration to the recommendation of the Commission. However, the court concluded that respondent is not guilty of constitutional misconduct sufficiently grave to warrant ouster. One cannot avoid the conclusion that respondent's personality grates on some of the attorneys. [ ] We believe that what has been said supra ought to persuade respondent to give great thought to his manner of conducting court and the business of his circuit as it is not in the interest of the administration of justice that repetitive conflicts occur.

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Suspension from office for long periods of time serves no good purpose because it means that another judge must do the work of the suspended judge, and long-term suspension may seriously impair the judge's ability to perform his duties when the suspension is over. Suspension for a reasonable period of time, however, serves the end of making it crystal clear that conduct complained of, and of which the judge has been found guilty, is serious and cannot be tolerated. It is substantially more than a public reprimand. The court believes that justice

> requires respondent be suspended from the office of circuit judge for a period of thirty days without compensation.

In re Buford, *supra* at 839-840.

Finally, in *In re Kohn*, *supra*, the Court found that respondent engaged in the following acts of misconduct: promulgation of overly rigid procedural rules which attorneys called "minutiae and a waste of time;" permitting discourtesy by his staff; unreasonably delaying cases under submission, including one that was under submission for three years and another for twenty-one months; participating in ex parte communications affecting pending litigation; and being inaccessible and difficult to contact.

The Commission recommended suspension, with some of its members advocating removal, due in large measure to respondent's "intransigent attitude" during the disciplinary proceedings. Instead, the Court imposed a censure, expressing its confidence that respondent would reexamine his procedures and henceforth extend respect to the attorneys appearing before him.

Finally, as this Court acknowledged in *In re Voorhees*, 739 S.W.2s 178, 180 (Mo. banc 1987), even the slightest of sanctions has lasting ramifications: "Any discipline of a judge, even a reprimand, is a serious matter, and should be imposed only for substantial reasons and with all due process rights preserved. A reprimand is a public denunciation which permanently scars the judge's record."

3. The Appropriate Sanction in this Case.

Of the counts before the Court, the most serious concern the calling of the docket by the clerk, and the removal of Exhibit 26 from the file. [19]

In her defense, Respondent can offer this: She instituted the docket call system because she believed it would expedite the flow of cases through her court. She further believed that, in reviewing every call made by her clerk, she was exercising adequate controls and supervision and was discharging her administrative and judicial responsibilities within the meaning of Rule 2.

With respect to the removal of Exhibit 26 and her subsequent conduct in the investigation, Respondent concedes that her act in removing the document was rash and improper but submits that her intent was not to conceal irregular courtroom operations. She reacted hastily and precipitously, and understands that to be led by emotion is antithetical to the neutrality and professional competence required of her.

Respondent also submits that any of her infractions, sobering as they might be, do not warrant removal from the bench. They do not rise to the level of pervasive and brazen misconduct, as exemplified in *Briggs*, nor the open corruption evidenced by the

[19] The other counts – speaking to a reporter and failing to secure her dockets before leaving for China, are acts that will not be repeated, and from which Respondent has learned humbling lessons. Respondent's practice of taking the bench late can be rectified with an admonishment from this Court.

respondent in *Corning*. She received no warnings from the Commission; has received none from this Court; and received only limited notice from the presiding judge, that her late arrival on the bench was causing consternation. Even her detractors acknowledged her timely rulings, her judicial temperament, her availability for substantive matters, and the courtesy she extended to the private bar. Respondent most certainly has the capacity to conform her conduct to the prescripts of Article V and Supreme Court Rule 2.

CONCLUSION

As set forth above, Respondent objects to several of the factual findings and legal conclusions of the Commission on Retirement, Removal and Discipline.

In the event the Court sustains all or part of the Commission's Report and finds actionable misconduct, Respondent urges that her conduct does not warrant her removal from the bench.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Susan S. Kister, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, which is no smaller than Times New Roman size 13 point. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 14,771 words, which does not exceed the 31,000 words allowed for an appellant's brief.

I further certify that the brief and attached appendix were filed with the Clerk of the Court by operation of the Court's electronic filing system, and that a copy of the brief and attached appendix were served on James M. Smith, Administrator and Counsel for the Commission on Retirement, Removal and Discipline, by operation of the Court's electronic filing system, at jim.smith@courts.mo.gov.

/s/Susan S. Kister
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