

The Court Of Judicial Discipline: A Review Of The First Twenty Years

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ABSTRACT

Judges are expected to do more than just apply and interpret the law accurately, but also to do so independently, impartially, and with integrity. To preserve the integrity of the judicial process, judges are also required not only to be actually fair to litigants and their counsel, but also to give the appearance of such fairness. In this Commonwealth, judges are bound by several sets of judicial ethics principles. All judges must comply with the Pennsylvania Constitution's broad ethical obligations, our trial and appellate court judges are required to follow the rather detailed Code of Judicial Conduct, and the Commonwealth's magisterial district and traffic court judges—who need not be lawyers—must follow the roughly parallel Rules of Governing Standards of Conduct of Magisterial District Judges.

The Court of Judicial Discipline, created as part of the 1993 amendments to the Commonwealth's Constitution, is the court authorized to hear formal complaints filed by the Judicial Conduct Board against judges alleging violations of the governing ethical principles. The Court is a trial court, comprised of eight

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members, with its own rules of procedure, which issues opinions making findings of fact and conclusions of law and imposes sanctions. The decisions of the Court are appealable to the Pennsylvania Supreme Court either by the Board or a sanctioned judge.

This article assembles the Court's jurisprudence since its inception twenty years ago. The first part provides a brief historical overview of judicial discipline in Pennsylvania and then describes the role of the Board and Court. The Board's and Court's procedures and caseloads are also highlighted. The second part divides the broad judicial ethics principles into nine substantive areas and summarizes the Court's rulings in each.²

OVERVIEW OF JUDICIAL DISCIPLINE IN THE COMMONWEALTH

Brief Historical Overview

On May 18, 1993, the Constitution was amended to create the Court of Judicial Discipline, empowered to adjudicate complaints against the state's judges and impose sanctions.

Although since 1776 the Constitution has included provisions for the discipline of judges, it was not until the 1968 amendments that an independent entity was created with the responsibilities of developing a body of judicial ethics law and adjudicating allegations of judicial misconduct. Instead, during the almost first two hundred years of the Commonwealth, judges were removed through impeachment by, variously, the General Assembly, Governor and Pennsylvania Supreme Court.³

The 1968 amendments, for the first time, created an independent institution for disciplining judges, the Judicial Inquiry and Review Board. Composed of nine members, that body was authorized to initiate complaints against judges and then make recommendations to the Pennsylvania Supreme Court, which were reviewed *de novo* by that Court. In 1987, Governor Robert P. Casey constituted a Judicial Reform Commission, led by Superior Court Judge Phyllis W. Beck, to review this system of judicial discipline. The Beck Commission, as it is known, proposed multiple changes, most notably that the prosecution and adjudication of judicial discipline complaints should be separated into different bodies.

The Beck Commission's report and recommendations were influential in encouraging leaders of the General Assembly to enact legislation recommending a constitutional amendment to change the judicial discipline system. On May 18, 1993, the Constitution was amended to create the Judicial Conduct Board, charged with prosecuting complaints against the state's judges,⁴ and the Court of Judicial Discipline, empowered to adjudicate—not just recommend—such complaints and impose sanctions.⁵ The Board and Court have jurisdiction over complaints concerning Su-

2. While this article surveys the key issues addressed by the Court, there are several other sources of guidance on judicial ethics, including the judicial ethics opinions of the Judicial Ethics Committee of the Pennsylvania Conference of State Trial Judges, available at <http://ethics.pacourts.us/>; guidance of the Special Court Judges Association of Pennsylvania, <http://www.scjap.org>; and the publications and resources of the American Judicature Society, available at <http://www.ajs.org/>.

3. The history of the judicial discipline process is outlined on the Court's website. See <http://www.cjdp.org/geninfo.html>.

4. See Pa. Const. art. V, §18(a).

5. See Pa. Const. art. V, §18(b).

preme Court justices, Superior Court judges, Commonwealth Court judges, Court of Common Pleas judges, as well as magisterial district judges throughout the Commonwealth and Philadelphia Municipal Court and Traffic Court judges.

According to the Pennsylvania Supreme Court, however, the Court does not have exclusive jurisdiction over the discipline of judges. Rather, going beyond what was recommended by the Beck Report, the Pennsylvania Supreme Court has ruled, rather awkwardly, that it has concurrent jurisdiction with the Court. The Supreme Court roots this original, concurrent jurisdiction in the Constitutional provision that the Supreme Court “shall exercise general supervisory and administrative authority over all the courts.”⁶ The Supreme Court has also reasoned that it is “entrusted with safeguarding the integrity of the judicial system; even the appearance of judicial impropriety can be cause for exercise of [its] King’s Bench jurisdiction.”⁷ According to the Supreme Court, the 1993 amendments to the Constitution that created the Court of Judicial Discipline “did not . . . purport to affect, restrict, or suspend *sub silentio* [the Supreme Court’s] King’s Bench powers.”⁸

The Supreme Court’s logic would appear to permit it to address all aspects of disciplinary complaints against judges while, in practice, the Supreme Court has exercised its non-appellate jurisdiction only over requests for interim suspensions of judges.⁹ Even this more limited assertion of concurrent jurisdiction raises several concerns. First, it stands the normal appellate process on its head as it allows the Supreme Court to signal its view on the merits of a disciplinary complaint in an interim suspension ruling before the trial court (Court of Judicial Discipline) hears the complaint. In a sense, therefore, the Supreme Court is influencing the trial court in a way that disturbs the normal impartiality that a trial court is expected to bring to the adjudication of a matter. While, of course, a trial court is expected to follow appellate court rulings, this typically occurs only when it follows the appellate court’s precedent or the appellate court’s remand.

Second, the Supreme Court’s original, concurrent jurisdiction undermines the right of review by a neutral appellate court. If a respondent judge is found by the Court of Judicial Discipline to have violated a standard of conduct, her only recourse is to the Pennsylvania Supreme Court, the very court that may have suspended her in the first instance.¹⁰

Third, an argument can be made that to the extent the Supreme Court addresses any judicial ethics complaint (including a request for interim suspension) in the first instance the Supreme Court is reducing the institutional authority of the Court of Judicial Discipline. That Court was created and designed specifically to address judicial ethics matters; by taking original jurisdiction, the Supreme Court may be viewed as impliedly signaling a lack of confidence in the Court.

Judicial Conduct Board: Investigating And Presenting Body

The Board is the independent state agency responsible for investigating allegations of judicial misconduct, disability, or impairment. It maintains a staff and is

6. Pa. Const. art.V, §10(a).

7. *In re Merlo*, 17 A.3d 869, 871 (Pa. 2011).

8. *Id.*

9. *See, e.g., id.* (suspension order entered by Supreme Court for the purpose of “ensur[ing] the smooth functioning of the administration of justice in this Commonwealth during the pendency of the misconduct charges”).

10. *See, e.g., In re Philadelphia Traffic Court Judge Robert Mulgrew*, Judicial Administration Docket No. 388 (Sept. 19, 2012); *In re Thomas M. Nocella, Court of Common Pleas Judge*, No. 391 (Nov. 9, 2012).

comprised of twelve members—three judges (one each from an appellate, common pleas, and magisterial district court), three attorneys, and six citizen members who are neither lawyers nor judges. The Board’s staff investigates complaints by, among other things, interviewing complainants, attorneys and witnesses, as well as reviewing pertinent documents. It reviews the results of the investigation and determines what, if any, action to take.¹¹

According to the Board, it may dismiss the complaint (“because it is clear that the allegations do not warrant disciplinary actions against the accused judge because no provisions of the Code of Judicial Conduct or the Rules Governing Standards of Conduct of Magisterial Judges have been violated”) or authorize a “full investigation” (“if there is clear and convincing evidence of misconduct”). After a full investigation, it may either dismiss the complaint (“because there is no probable cause of judicial misconduct”), issue either a “Letter of Caution” (“where the conduct did not rise to a violation of the Code or Rules but the conduct may lead to judicial misconduct if not corrected”) or “Letter of Counsel” (“where the evidence suggests that a violation of the Code or Rules was an isolated incident or the result of inadvertence”), or file formal charges with the Court of Judicial Discipline after concluding that there is probable cause of judicial misconduct.¹²

In recent years (2006-2011), the Board received an average of approximately 650 complaints per year. Table 1 displays the number of new complaints submitted to the Board, along with the number of judges and frequency of complaints.¹³

Table 1
Number of Complaints to Judicial Conduct Board
(2006-2011)

	Complaints		Judge Years	
	(#)	(%)	(#)	(%)
Appellate Judges	56	1.4	261	3.6
Common Pleas	2622	67.1	3037	41.6
Magisterial Judges	1161	39.7	3782	51.8
Other Judges	41	1.0	228	3.1
Judicial Candidates	28	0.7	0	0
TOTAL	3908	100%	7308	100%

These data, as an absolute matter, show that the vast majority of complaints received by the Board concerned common pleas judges (2622, 67.1%), magisterial district judges (1161, 29.7%), and, to a much lesser extent, appellate (56, 1.4%) and other judges (41, 1.0%). More strikingly, a significantly disproportionate number of complaints concern common pleas judges (67.1% of complaints v. 41.6% of judges). Table 2 is a snapshot for 2011, the most recent year for which complete data are available.¹⁴

11. The Judicial Conduct Board Rules of Procedure regulate its consideration of complaints. These Rules govern all aspects of the Board, including without limitation, the business of the Board; confidentiality and privilege; the taking of testimony, depositions and subpoenas. *See* Pa. Const. art. V, §18(a)(6) (“The board shall . . . establish and promulgate its own rules of procedure . . .”); *see generally* Judicial Conduct Board Rules of Procedure No. 1 *et seq.*

12. *See* Judicial Conduct Board 2011 Annual Report at 7-9, available at http://judicialconductboard.opfa.org/index.php/download_file/view/106/1/.

13. The source of these data is the Board’s Annual Reports for 2006 through 2011. The category “Other Judges” is comprised of the Philadelphia Municipal Court and Philadelphia Traffic Court Judges.

14. The authors have available on file tables for each year from 2006 through 2011.

Table 2
Number of Complaints to Judicial Conduct Board and Frequency
(2011)

	Complaints	Judges	Frequency of Complaints
Appellate Judges	6	41	14.6%
Common Pleas	472	548	86.1%
Magisterial Judges	218	666	32.7%
Other Judges	4	37	10.8%
Judicial Candidates	11		
TOTAL	711	1292	55.0%

These data provide a first approximation of the frequency of complaints against judges. Specifically, these raw figures suggest that the Board received a complaint concerning just over half (55%) of all judges. When you review the experience of each category of judge, moreover, the data suggest the astonishing fact that the Board received a complaint concerning more than 8 in 10 common pleas judges and 1 in 3 magisterial judges. These results should be viewed with caution because they assume that each complaint is against a different judge and that there are not multiple complaints against the same judge. While there may be clumping of complaints, i.e., multiple complaints against some judges and no complaints about many others, the Board does not publish statistics regarding the distribution of complaints against judges. Thus, while we think these calculated frequencies are biased upwards, it is unclear by how much.¹⁵

The Board dismisses the vast majority of complaints as unfounded. For example, in 2011, the Board closed 585 complaints by:

- Dismissing 492 (84.1%) complaints as unfounded after preliminary inquiry;
- Issuing 24 (4.1%) notices of full investigation;
- Dismissing 2 (0.3%) complaints as unfounded following further investigation;
- Dismissing 35 (6.0%) by letters of caution;
- Dismissing 3 (0.5%) by letters of counsel; and
- Filing formal charges against 8 (1.4%) judges.¹⁶

According to the Board, this approximate 90% dismissal rate is consistent with that of other jurisdictions.¹⁷

The Court Of Judicial Discipline: Adjudicating Body

The Court hears only formal charges filed by the Judicial Conduct Board. It is comprised of three judges from the appellate courts and the court of common pleas, one magisterial district judge, two non-judge lawyers, and two lay members of the

15. While individual complaints lodged with the Board are confidential, *see* Pa. Const. art. V, §18(a)(8), we recommend that the Board publish in future years a distribution analysis of the number of complaints against judges so that more meaningful frequencies may be calculated.

16. *Id.* at 4.

17. Judicial Conduct Board of Pennsylvania, *2011 Annual Report*, at 4 (July 27, 2012), available at http://judicialconductboardofpa.org/index.php/download_file/view/106/1/.

public. Since 1994, forty-eight different men and women have served as judges on the Court.¹⁸

From 1994 through October 2012, the Court received 71 formal complaints filed by the Judicial Conduct Board, an average of 3.8 per year.¹⁹ The majority of formal complaints were against magisterial district judges (60%, 42), while formal complaints against common pleas judges comprised 28% (20) of the docket. The Court received only four (6%) formal complaints against appellate judges (two justices of the Supreme Court (Larsen, Melvin) and two Superior Court judges (Lally-Green,²⁰ Joyce)). The remaining 5 (7%) formal complaints were against Philadelphia municipal court and traffic court judges.

To put the number of formal complaints in perspective, Table 3 displays the number of formal complaints by type of judge, number of judges (including senior judges) and two separate measures of the frequency with which the judges were charged. The first measure of frequency equals the number of formal complaints divided by the number of sitting judges in a given year.²¹ It allows one to approximate the likelihood that, over the nearly nineteen years that the Court has received formal complaints, the Board will formally charge a judge. Take appellate judges as an example: at any one time, there were approximately 41 appellate judges and, over the entire 18.75 year period examined, four were formally charged. This implies that the likelihood that the Board formally charged an appellate judge at anytime over the entire period was 9.8% and, in any given year, 1/18.75th of that, or 0.5%. Interestingly, those appellate judges were approximately 50% more likely to be charged than magisterial district judges (6.3%, 0.3%) and nearly three times the rate of common pleas judges (3.6%, 0.2%).

Table 3
Number of Formal Complaints to Court of Judicial Discipline and Frequency (1994-2011)

	Formal Complaints		Judges		Frequency of Complaints for Entire Period	Frequency of Complaints for One Year (x/18.75)
	(#)	(%)	(#)	(%)		
Appellate Judges	4	5.6	41	3.2%	9.8%	0.5%
Common Pleas	20	28.2	548	42.4%	3.6%	0.2%
Magisterial Judges	42	59.2	666	51.5%	6.3%	0.3%
Other Judges	5	7	37	2.9%	13.5%	0.7%
TOTAL	71	100%	1292	100%	5.5%	0.3%

The Court proceeds on the complaints pursuant to its Rules of Procedure, modeled in many respects on the Pennsylvania Rules of Civil Procedure. The Rules are divided into broad sections: general provisions, the initiation of formal charges, pre-trial proceedings, and trial proceedings.²²

18. See Court of Judicial Discipline, Judges of the Court of Judicial Discipline of Pennsylvania Since 1993, <http://www.cjdpa.org/geninfo/judges.html>.

19. The statistics cited here were compiled by the Court as of September 2012.

20. The complaint against Superior Court Judge Lally-Green was later withdrawn by the Board.

21. Although the number of judges in each category varied over the period, for consistency, we use the total number of judges as of 2011.

22. See generally Court of Judicial Discipline Rules of Procedure Nos. 101 *et seq.*

According to the Supreme Court, respondent judges are “granted constitutional rights afforded to criminal defendants.”²³ At trial, “the Board must prove the charges by clear and convincing evidence, and, ‘[i]n considering whether the evidence presented is clear and convincing, the court must find the witnesses to be credible, and the facts and details to be distinctly remembered . . . [t]he witnesses’ testimony must be sufficiently clear, direct, weighty, and convincing.”²⁴

There are, however, many differences from criminal proceedings, including the following. Most notably, the Board’s clear and convincing burden of persuasion is lower than the beyond a reasonable doubt standard. Further, the panoply of Commonwealth criminal laws is more specific than critical judicial ethics principles, such as the prohibitions against engaging in conduct that would bring “disrepute” to the judicial office or conduct that would create the “appearance of impropriety.” Finally, unlike in criminal proceedings, the Court may find that a respondent judge has violated a standard of conduct not charged by the Board in its complaint and impose a sanction on the basis of that uncharged violation.²⁵ This is so only where the respondent judge’s conduct underlying both the charged violation and the uncharged violation is the same, for in that case, “there [i]s no surprise; there [i]s no lack of notice; there [i]s no compromise of due process.”²⁶

Prior to full hearing on a formal complaint, “the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or [magisterial district judge] against whom formal charges have been filed with the court by the board or against whom has been filed an indictment or information charging a felony.”²⁷ The Board has filed 14 petitions for interim relief, seeking suspension with pay in 6 instances and suspension without pay in 8. Of the 6 petitions for suspension with pay, the Court granted 4 and denied 2. Of the 8 petitions for suspension without pay, 4 were granted; 2 were denied but the judges were suspended *with* pay; and 2 were never decided.

A formal complaint may lead to one of three outcomes: the Court finds for the respondent judge (*i.e.*, dismisses the charges), the Court finds for the Board (*i.e.*, finds a violation), or the Board withdraws its formal complaint.²⁸ Of the 71 formal complaints filed with the Court through September 2012, the Board withdrew 9 complaints, the Court found for the respondent judge on 12 occasions, and the Court found against the respondent judge 49 times. Hence, the Court found against the respondent judge on 80% of the complaints pursued by the Board and for the respondent judge 20% of the time.

23. *In re Lokuta*, 11 A.3d 427, 442 (Pa. 2011) (quoting *In re Berkheimer*, 930 A.2d 1255, 1258 (Pa. 2007)); see also Pa. Const. art. V, §18(b)(5) (“All hearings conducted by the court shall be public proceedings conducted pursuant to the rules adopted by the court and in accordance with the principles of due process and the law of evidence.”); *In re Ciovero*, 570 A.2d 57, 61 (Pa. 1990) (“[W]e have never held that a respondent jurist before the [Judicial Inquiry and Review Board, the predecessor of the Court,] is not clothed with the fundamental constitutional rights available to criminal defendants.”). Proceedings before the Court have been denominated “quasi-criminal” by the Supreme Court, see, e.g., *In re Berkheimer*, 930 A.2d at 1258, a label that is less useful than would be a comprehensive enumeration of the particular rights afforded to respondent judges in judicial misconduct proceedings.

24. *In re Merlo*, Nos. 93 MAP 2011, 94 MAP 2011, 2012 WL 4473287, at *6 (Pa. Sept. 28, 2012).

25. See, e.g., *In re Harrington*, No. 6 JD 04, 877 A.2d 570 (Pa. Ct. Jud. Disc. 2005), *aff’d*, 587 Pa. 407 (Pa. 2006).

26. *In re Jaffe*, 839 A.2d 487, 490 (Pa. Ct. Jud. Disc. 2003); see also *In re Berry*, 979 A.2d 991, 1003 (Pa. Ct. Jud. Disc. 2009) (“[T]he Board’s focus on one constitutional rule and this Court’s finding violation of another is not prejudicial because the underlying conduct is the same and the [r]espondent has been advised of what that was from the beginning of these proceedings.”).

27. Pa. Const. art. V, §18(d)(2).

28. See Pa. C.J.D.R.P. No. 502(F).

The Court is authorized to impose a range of sanctions, including removal, barring the judge from holding judicial office, suspension with or without pay, reprimand, and probation.²⁹ Any finding of a violation of the applicable standards by the Court exposes the respondent judge “to the full range of appropriate discipline.”³⁰ Over the years, the Court has imposed the following sanctions:

- Removal from office and bar from holding judicial office in the future—20 complaints³¹
- Suspend judges—11 complaints (9 without pay and 2 with pay)
- Reprimand—15 complaints
- Probation (generally, for periods of one to two years following suspension or a reprimand)—9 complaints

In providing a rationale for its sanctions, the Court has explained, “Unlike a criminal case in which the range of penalties is determined by the number of charges and the statutory sentence mandated for each offense upon which there is a finding of guilty, the scope of sanctions available to this Court is not so circumscribed.”³² “[I]n exercising [its] discretion in imposing disciplinary sanction, [the Court is] guided not by the number of ways the [r]espondent’s conduct has offended the Constitution or Code, but by the nature of the conduct itself and any mitigating or aggravating circumstances.”³³

The Supreme Court has explained that, in imposing sanctions, the Court is guided by its mission as “protector of the integrity of the judiciary and the public’s confidence in that branch of government.” *In re Melograne*, 812 A.2d 1164, 1168 (Pa. 2002).³⁴ Our review of the Court’s twenty year history in sanctioning judges, however, does not permit us to provide a clear description of what type of misconduct leads to what sanctions. While, of course, the Court’s sanctions are not as predictable as those found in criminal sentencing such as those based on sentencing guidelines, the goals of fairness and educating the judiciary and public about the consequences of misconduct counsel, among other things, that the Court should consider more

29. See Pa. Const. art. V, §18(d)(1). On two occasions, the Court disbarred a judge from practicing law (Larsen, Melograne). As of December 18, 2002, the Court was no longer authorized to impose this sanction. See *In re Melograne*, 812 A.2d 1164, 1169 (Pa. 2002) (“As [the Pennsylvania Supreme Court] has the exclusive power to discipline attorneys, the Court of Judicial Discipline lacked the authority to disbar Appellant. Such a sanction may be imposed only by this court.”) (emphasis omitted).

30. *In re Eagen*, 4 JD 01, 814 A.2d 304, 306-07 (Pa. Ct. Jud. Disc. 2002).

31. The Court removed from office four judges but did not bar them from holding judicial office (Singletary, Berkheimer, Larsen and Melograne) and barred one judge from holding office for five years but did not remove her from office (Harrington). In addition, the Court on one occasion barred a judge from accepting future assignments as a senior judge (Kelly).

32. *In re Eagen*, 814 A.2d at 306-07.

33. *Id.*

34. This function of the Court has been described by the Pennsylvania Supreme Court as “an equally— if not more—important function” in relation to “chasten[ing] the misbehaving judge.” *Id.*; see also *In re Berkheimer*, 930 A.2d 1255, 1259 (Pa. 2007) (“Disciplinary sanctions focus beyond the one who is charged, to the message sent to the public and the effect on the expectation of standards of behavior.”); Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 Just. Sys. J. 405 (2007) (“To maintain and restore public confidence in the integrity, independence, and impartiality of their judiciary, each of the fifty states . . . has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers. Although punishment plays an ‘undeniable role’ in judicial discipline, protecting the public, not sanctioning judges, is the primary purpose of the judicial conduct commissions.”) (internal citation omitted); Am. Bar Ass’n, *Model Rules for Judicial Disciplinary Enforcement*, Preamble, available at http://www.americanbar.org/groups/professional_responsibility/model_rules_judicial_disciplinary_enforcement/preamble.html (“The regulation of judicial conduct is critical to preserving the integrity of the judiciary and enhancing public confidence in the judicial system.”).

clearly and deliberately articulating its bases for sanctioning judges. Indeed, the Court has only identified twice, in 2004 and 2008, a non-exhaustive set of ten factors bearing on the sanction.³⁵

After the Court determines whether there has been a violation and, if so, the appropriate sanction, either a respondent judge or the Board may appeal a decision of the Court to the Supreme Court of Pennsylvania.³⁶ The Supreme Court's scope of review of appeals by respondent judges is governed by Article V, §18(c)(2) of the Pennsylvania Constitution:

On appeal, the Supreme Court or special tribunal shall review the record of the proceedings of the court as follows: on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and, as to sanctions, the scope of review is whether the sanctions imposed were lawful. . . .

Appeals by the Board are limited to questions of law.³⁷ Only 11 appeals have been taken from the Court's violation and sanction decisions, and the Supreme Court has largely affirmed the Court's decisions.³⁸

THE JUDICIAL ETHICS ISSUES ADDRESSED BY THE COURT OF JUDICIAL DISCIPLINE

The Constitution, the Code of Judicial Conduct (the "Canons"), and the Rules Governing Standards of Conduct of Magisterial Justices (the "Rules") codify the Commonwealth's judicial ethics provisions³⁹ With varying degrees of specificity, these provisions are designed to encourage and ensure that judges act with independence, impartiality and integrity.

35. These ten factors, applied by the Court in *In re Toczydlowski*, 853 A.2d 24 (Pa. Ct. Jud. Disc. 2004), and *In re Singletary*, 967 A.2d 1094 (Pa. Ct. Jud. Disc. 2008), are the following: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent and frequency of occurrence of the acts of misconduct; (c) whether the conduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires. This set of factors was established by the Supreme Court of Washington in *In re Deming*, 736 P.2d 639 (Wash. 1987).

36. If the case involves a justice of the Supreme Court, the justice "shall have the right to appeal to a special tribunal composed of seven judges, other than senior judges, chosen by lot from the judges of the Superior Court and Commonwealth Court who do not sit on the Court of Judicial Discipline or the [Judicial Conduct Board]." Pa. Const. art. V, §18(c)(1).

37. See *id.* §18(c)(3).

38. See *In re Merlo*, Nos. 93 MAP 2011, 94 MAP 2011, 2012 WL 4473287 (Pa. Sept. 28, 2012) (appeal by respondent judge, affirmed); *In re Lokuta*, 11 A.3d 427 (Pa. 2011) (appeal by respondent judge, affirmed); *In re Berkhimer*, 930 A.2d 1255 (Pa. 2007) (appeal by respondent judge, affirmed); *In re Harrington*, 899 A.2d 1120 (Pa. 2006) (appeal by respondent judge, affirmed); *In re McCarthy*, 839 A.2d 182 (Pa. 2003) (appeal by respondent judge, affirmed); *In re Melograne*, 812 A.2d 1164 (Pa. 2002) (appeal by respondent judge, affirmed in part); *In re Larsen*, 812 A.2d 640 (Pa. Special Tribunal 2002) (appeal by respondent judge, vacated sanction order); *In re Crahalla*, 792 A.2d 1244 (Pa. 2000) (appeal, affirmed); *In re Nakoski*, 758 A.2d 1155 (Pa. 2000) (appeal by Board, affirmed); *In re Cicchetti*, 743 A.2d 431 (Pa. 2000) (appeal by respondent judge, affirmed); *In re Hasay*, 686 A.2d 809 (Pa. 1996) (appeal by Board, affirmed in part, reversed as to moot discovery issues).

39. The Pennsylvania Code of Judicial Conduct is based upon the American Bar Association 1972 Model Code of Judicial Conduct. See James J. Alfini *et al.*, *Judicial Conduct and Ethics 1-6 to 1-7* (4th ed. 2007). Unlike twenty-six other states, Pennsylvania has not adopted the American Bar Association's Revised Model Code of Judicial Conduct. See American Bar Association Center for Professional Responsibility, State Adoption of Revised Model Code of Judicial Conduct, http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. Pennsylvania's Code of Judicial Conduct was last updated in 2005, and the Pennsylvania Bar Association in May 2012 established a

The Constitution sets forth several broad admonitions. Article V, §18(d)(1) states:

A justice, judge or justice of the peace shall be subject to disciplinary action pursuant to this section as follows:

- (1) A justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court

Three aspects of this provision are noteworthy. First, and not surprisingly, it establishes that a judge may be subject to disciplinary action if she violates the detailed array of ethical principles codified in the Canons and Rules. Next, it establishes three broad discipline standards: A judge may be disciplined for her “neglect or failure to perform the duties of office”⁴⁰ or “conduct which prejudices the proper administration of justice”⁴¹ or conduct that “brings the judicial office into disrepute.”⁴² Significantly, these prohibitions are in addition to those in the Canons and

task force to recommend updates and revisions. See Pennsylvania Bar Association, *Pennsylvania Bar Association Task Force to Recommend Revisions to the Pennsylvania Code of Judicial Conduct*, <http://www.pabar.org/public/news%20releases/pr051112.asp>. The Rules are also based, generally, on the 1972 Model Code of Judicial Conduct. When the Rules were adopted in 1973, the drafters noted that “[t]hose canons of the Code of Judicial Conduct of the American Bar Association thought applicable to justice of the peace have been paraphrased in these rules, and some of the former standards of conduct rules, which were thought to be more pertinent to justices of the peace in Pennsylvania than counterpart canons of the American Bar Association Code of Judicial Conduct, have been retained.” 3 Pa. Bulletin 275 (Feb. 10, 1973). The 1973 adoption of the Rules meant that Pennsylvania district justices—now termed magisterial district judges—“need now consult only these rules and will not be required to consult other sources as was the case heretofore.” *Id.*

40. When considering allegations of “neglect or failure to perform the duties of office,” the Court will look to “not only statutory and regulatory directive, but also those duties that are implied by law.” *In re Smith*, 1 JD 96, 687 A.2d 1229, 1233 (Pa. Ct. Jud. Disc. 1996). “[T]he duty to render decisions in cases that are ripe for resolution is an implied but essential duty of judicial office.” *Id.* “Neglect or failure” is found where the judge “(1) knows that the nonperformance of some act is likely to result in an omission on his or her part with regard to an important judicial duty, (2) has reason to believe that the nonperformance of some act is likely to result in an omission on his or her part with regard to an important judicial duty, but disregards the belief, or (3) does not realize that the nonperformance of some act is likely to result in an omission on his part with regard to a significant duty, when a judge of common sense would realize that the nonperformance of the act constitutes a deviation from a standard expected of judges.” *Id.* at 1236.

41. The legal standard for conduct that “prejudices the proper administration of justice” requires that the judge “acted with the knowledge and intent that the conduct would have a deleterious effect upon the administration of justice, for example, by affecting a specific outcome. See *In re Zupsic*, 893 A.2d 875 (quoting *In re Smith*, 687 A.2d at 1238).

42. The general standard for “disrepute” is long established. To prove a violation, the Board must establish “(1) the judicial officer has engaged in conduct which is so extreme that (2) has resulted in bringing the judicial office into disrepute.” *In re Smith*, 687 A.2d at 1238. The “Board must demonstrate a specific act or series of acts . . . which result in a decline of public esteem for the judicial office.” *Id.* “Even if a judicial officer’s actions could reasonably result in a lessening of respect for that judge, it cannot be assumed that the same actions would necessarily bring the judicial office itself into disrepute.” *Id.*

Significantly, however, the Court has yet to establish the level of intent required to violate the disrepute standard. See *id.* (noting the *mens rea* requirement as an “important issue[] for development”). The only subsequent decision purporting to address intent is *In re Singletary*, No. 3 JD 12, in which the respondent judge and the Board stipulated that the respondent judge stated that the offending act was accidental and the Board admitted that it had no facts to dispute this. Slip. op. at 7, ¶ 35. The Court’s opinion (i) stated “we do not believe Respondent,” *id.* at 17, and (ii) concluded that the *mens rea* requirement was satisfied where the Court concluded that Respondent “had better remember” that he had offending pictures “lest they ‘slip out’ at some inopportune (albeit unplanned) time. . . .” *Id.* The Court’s opinion, however, nowhere squarely addressed the level intent required for a violation of the disrepute provision. (Disclaimer: The authors were counsel to the respondent judge in this case.)

Rules, thereby giving the Court, subject to appellate review by the Supreme Court, broad latitude to define the scope of unethical conduct. The text of these prohibitions—and in particular, conduct that “prejudices the proper administration of justice” or that “brings the judicial office into disrepute”—are broad and vague, rendering them vulnerable to be highly elastic. While many types of constitutional provisions are inevitably so, it is plainly problematic to base a finding of unethical conduct and sanction on such broad and vague language. Finally, a judge’s conviction of a felony warrants discipline; this basis for sanctions rounds out the remainder of the Court’s power.

The subsections that follow distill the Court’s decisions interpreting the Constitution, the Canons, and Rules into eight substantive areas: (a) the obligation to perform judicial duties diligently; (b) the requirement that judges exhibit an appropriate temperament on the bench, off the bench in connection with judicial matters, and in their private lives; (c) limitations on the scope of permissible political activity; (d) the scope of permissible participation in charitable and community organizations; (e) judicial impartiality, disqualification, and recusal; (f) inappropriate attempts to influence cases pending before other judges; (g) judges’ obligations to regulate their financial and business activities; and (h) the consequences of a criminal conviction or involvement with illegal activity.⁴³

Diligence In Performing Judicial Duties

Just as the Rules of Professional Conduct require lawyers to be diligent, several Canons and Rules speak to judges’ diligence in performing their judicial duties. Generally, a judge is obligated to be present and prompt at court, timely dispose of pending cases, and adhere to the rules of procedure.⁴⁴

Specifically, according to Canon 3A(5), “[j]udges should dispose promptly of the business of the court.” Likewise, Rule 3A provides “[m]agisterial district judges shall devote the time necessary for the prompt and proper disposition of the business of their office, which shall be given priority over any other occupation, business, profession, pursuit or activity.” Canon 3B(1) states “[j]udges should diligently discharge their administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials”; Rule 5A is its counterpart in the Rules.⁴⁵

The Court has discussed the issue of intent outside of the disrepute context in *In re Whittaker*, 948 A.2d 279 (Pa. Ct. Jud. Disc. 2008), and in *In re Crahalla*, 747 A.2d 980 (Pa. Ct. Jud. Disc. 2000). However, at issue in those cases was not whether the respondent judge’s conduct was intentional or accidental, but whether the respondent judge was aware of the wrongness of his purposeful conduct. *See also supra note 35* (discussing the intent requirement for finding conduct that prejudices the proper administration of justice).

43. We have endeavored to catalog each case in which the Court has issued an opinion determining whether or not the governing standards have been violated. Many cases deal with multiple issues and this article focuses mostly on the principle issue(s) presented each case.

44. *See* Canon 3, Rules 3 and 5, Pa. Const. art. V, §18(d)(1) (judges are prohibited from “failure to perform the duties of office” or engaging in conduct that brings the “judicial office into disrepute”).

45. Other relevant Rules and Canons include: Canon 2A and B provide, respectively, “[j]udges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” and “[j]udges should not allow their family, social, or other relationships to influence their judicial conduct or judgment. . . .”; Rule 2A contains both provisions. Canon 3A(3), essentially identical to Rule 4C, provides “[j]udges should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and should require similar conduct of lawyers, and of their staff, court officials, and others subject to their direction and control.”

Repeated Absences And/Or Tardiness

The Court has disciplined judges who were repeatedly absent or tardy. For example, in *In re Merlo*, during a two-year period, the respondent judge “called off” 116 days, took 49 vacation days, and was habitually late; in truancy cases, a judge delayed adjudication of “no-show cases,” causing “a serious problem” for the school district.⁴⁶ In *In re Lokuta*, the respondent judge had a “custom of arriving 15, 20 minutes, or a half hour or an hour or more late for scheduled court sessions.”⁴⁷ And in *In re McCarthy*, the respondent judge “repeatedly drank to the point of extreme intoxication in bars close by his district justice office, often during the hours of the normal work day when members of his community could reasonably expect that he would be conducting the business of his judicial office.”⁴⁸ But where the respondent judge’s tardiness was limited and not combined with other misconduct, the Court has expressed reluctance to find a violation.⁴⁹

Failure To Timely Decide Pending Cases

Judges who fail to timely decide cases have repeatedly been found to violate the Canons or Rules.⁵⁰ In reviewing the timeliness of judges’ decisions, the Court has created a sixty-day rule. The Court considers sixty days to be “generally a reasonable time within which trial judges should dispose of matters that are ripe for disposition.”⁵¹ An unreasonable delay will be presumed when a matter has been ripe for disposition for six months.⁵² Once it is established that cases have been pending for more than six months, the Court will consider “whether a judge has some excuse for not complying with the duty.”⁵³ “When the Board offers proof of sufficient weight and credibility on the elements concerning duty and timing of decisions, a judicial respondent seeking to challenge the Board’s charge must offer evidence which justifies or excuses his non-compliance with the sixty-day time standard.”⁵⁴

Failure To Abide By Court Rules And Judicial Process

A final area of Court decisions relating to judges’ diligence in performing their duties involves judges’ failures to abide by applicable court rules and procedures.

Canon 3A(4), like Rule 4D, requires judges to “accord to all persons who are legally interested in a proceeding, or their lawyers, full right to be heard according to law, and, except as authorized by law, must not consider ex parte communications concerning a pending proceeding.”

46. Nos. 3 JD 10, 1 JD 11, 34 A.3d 932 (Pa. Ct. Jud. Disc. 2011).

47. No. 3 JD 06, 964 A.2d 988 (Pa. Ct. Jud. Disc. 2008).

48. No. 3 JD 02, 828 A.2d 25 (Pa. Ct. Jud. Disc. 2003).

49. See *In re Timbers*, No. 3 JD 95, 674 A.2d 1217 (Pa. Ct. Jud. Disc. 1996) (finding violations for two instances of tardiness, in connection with judge’s “condition of being impaired by or under the influence of alcohol” while on duty, but explaining that “isolated incidents of lateness in themselves usually do not give rise to sustainable charges of misconduct”).

50. See *In re Shaffer*, No. 3 JD 05, 885 A.2d 1153 (Pa. Ct. Jud. Disc. 2005) (decisional delays of six to thirty-four months in nine cases “not justified by either the factual or legal complexity of the issues”); *In re Smith*, 1 JD 96, 687 A.2d 1229 (Pa. Ct. Jud. Disc. 1996) (unreasonable and unjustified decisional delays of greater than sixty days in sixty-one pending cases); *In re Dagher*, No. 1 JD 95, 657 A.2d 1032 (Pa. Ct. Jud. Disc. 1995) (unjustified decisional delays of approximately eight months to seven years in six cases); *In re Fischer*, No. 7 JD 94 657 A.2d 535 (Pa. Ct. Jud. Disc. 1995) (failure to render timely decisions in two estate cases and nineteen petitions for termination of parental rights, as a result of an “extraordinary case load and time constraints”).

51. *In re Smith*, 687 A.2d at 1233-34.

52. *Id.*

53. *Id.*

54. *Id.*

For example, in *In re Arnold*, the respondent judge was disciplined for failing to docket a citation filed in her court against one of her sons.⁵⁵ On the other hand, the Court found no violation of the rules governing *ex parte* contact in *In re Hartman*, in which the respondent judge received a telephone call from a litigant, because the judge had not initiated the contact and there was no evidence that judge considered anything the party told him.⁵⁶ Similarly, the Court found no violation where the respondent judge had a conversation with her grandson about a traffic stop when he was a passenger in the stopped car, while the traffic stop was in progress, and the driver, her grandson's friend, later appeared before her as a result of the traffic stop, because her conversation with her grandson did not concern "a pending or impending proceeding" in her court.⁵⁷

Temperament

Whether on or off the bench handling judicial matters, and even as private citizens, judges are required to hold themselves to certain minimum standards of conduct. Such a broad reach is required, according to the Supreme Court, because "[t]he preservation of the authority of the office requires that judges conduct themselves so that public confidence in the judiciary is undiminished, and that judicial authority is therefore maintained."⁵⁸

The Constitution's "disrepute" prohibition expressly proscribes conduct that "brings the judicial office into disrepute, *whether or not* the conduct occurred while acting in a judicial capacity."⁵⁹ Canon 2A, likewise, expressly governs judges' conduct other than in the courtroom or in handling of judicial matters: "Judges should respect and comply with the law and should conduct themselves *at all times* in a manner that promotes public confidence in the integrity and impartiality of the judiciary." (Emphasis supplied.) As the note to Canon 2A explains, because "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges," judges "must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."⁶⁰

55. 2 JD 12, 51 A.3d 931 (Pa. Ct. Jud. Disc. 2012); *see also In re DeLeon*, 2 JD 08, 967 A.2d 460 (Pa. Ct. Jud. Disc. 2008) (on behalf of an acquaintance, judge issued *ex parte* "Stay Away Order" without notice to the defendant, a hearing, or an official record of any court proceeding); *In re Davis*, No. 2 JD 07, 954 A.2d 118 (Pa. Ct. Jud. Disc. 2007) (failure to hold hearings to determine defendants' financial ability to pay fines and costs); *In re Strock*, 3 JD 98, 727 A.2d 653 (Pa. Ct. Jud. Disc. 1998) (failure to properly manage "the fiscal affairs of the office of district [judge]" by appropriation of public funds for judge's personal use).

56. No. 5 JD 04, 873 A.2d 875 (Pa. Ct. Jud. Disc. 2005).

57. *In re McCutcheon*, No. 3 JD 03, 846 A.2d 801 (Pa. Ct. Jud. Disc. 2004).

58. *In re Smith*, 687 A.2d at 1238, *quoted in In re Hamilton*, No. 2 JD 06, 932 A.2d 1030, 1035 (Pa. Ct. Jud. Disc. 2007).

59. Pa. Const. art. V, §18(d)(1) (emphasis added).

60. The Supreme Court has stated that Canon 2 "addresses the judicial decision-making process and seeks to avoid the appearance of influence over judicial activities." *In re Cicchetti*, 743 A.2d 431, 441 (Pa. 2000). The Supreme Court made clear in *Cicchetti* that a judge should not be found to have violated Canon 2's exhortations regarding the integrity and impartiality of the judiciary based on conduct that is "independent of his decision-making duties." *Id.* Notwithstanding the clear language of Canon 2, in *dicta*, the Supreme Court curiously appears to have extended the judicial decision-making limitation of Canon 2 to cover its (and Rule 2A's) requirement that judges "shall respect and comply with the law." *In re Harrington*, 899 A.2d 1120 (Pa. 2006) (in affirming disrepute violation of judge who placed others' parking tickets on her car to avoid paying a meter, explaining that "the court's conclusion that Appellant's conduct violated Rule 2A . . . was improper, because that conduct did not implicate the judicial decision-making process."). The Supreme Court, however, appears to be re-examining this issue, having granted oral argument in the Board's appeal in *In re Carney* on the following issue:

Whether the CJD erred by holding that Respondent's conduct of displaying a handgun to two occupants of another vehicle while on Interstate Highway I-79, did not constitute a violation of Rule 2A of the Rules

Judicial Temperament

On The Bench

The Court's decisions reviewing judges' conduct on the bench involve classic judicial temperament issues—that is, when the judge presided over a trial or hearing, did she conduct herself in a way that embodied actual impartiality and fairness, as well as the appearance of impartiality and fairness? The focus of the Court's inquiries has been whether the judge acted patiently, respectfully and thoughtfully in presiding. Interestingly, no Court decision has involved an appellate judge, only one has reviewed a Common Pleas judge (*In re Lokuta*), and the remainder all concern magisterial district judges, governed by the Rules (not the Canons) and the Constitution's "disrepute" provision. Rule 4C, governing a judges' adjudicative responsibilities, provides "[m]agisterial district judges shall be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom they deal in their official capacity, and shall require similar conduct of lawyers, of their staff and others subject to their direction and control."⁶¹

In these decisions, the Court has found a violation of the Rules or the disrepute provision when a judge engages in rude, discourteous, demeaning, or similar conduct toward litigants, attorneys, court staff, or others present in the courtroom.⁶² Importantly, these cases typically involve a pattern of inappropriate conduct by the judge, rather than a single instance, although a single instance of misconduct has been sufficient when the judge subjected multiple defendants in different cases to intemperate conduct.⁶³

Off The Bench

A judge is also prohibited from acting inappropriately in his dealings with members of his staff, court employees, or others in the courthouse. The Court's decisions in this area primarily involve judges' conduct toward court employees who work either in chambers or in the courthouse. In finding violations, the Court has charac-

Governing the Standards of Conduct of Magisterial District Judges in that his conduct did not implicate the decision-making process.

See *In re Carney*, Order Granting Application for Oral Argument, No. 32 WAP 2011 (Pa. May 7, 2012).

61. Other applicable Rules include: Rule 1 states "[m]agisterial district judges should participate in establishing, maintaining and enforcing, and shall themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." Rule 2A, under the "impropriety and appearance of impropriety" heading provides "[m]agisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Rule 4A provides "[m]agisterial district judges shall be faithful to the law and maintain competence in it"

62. Compare *In re Merlo*, 34 A.3d 932 (in six cases, judge was rude and belittling to litigants and counsel); *In re Lokuta*, 964 A.2d 988 (over a period of time, judge was extremely combative, hostile, demeaning, condescending, and disrespectful to court reporters, clerks, administrators, and others in the courtroom); *In re Marraccini*, No. 2 JD 05, 908 A.2d 377 (Pa. Ct. Jud. Disc. 2006) (judge spoke to "twenty-some" defendants waiting for their cases to be called, after summarily dismissing their cases, in a manner that was "condescending, belittling and sarcastic" and asked them "if they were all morons and didn't they understand the English language"); *In re Zoller*, No. 3 JD 00, 792 A.2d 34 (Pa. Ct. Jud. Disc. 2001) (judge expressed displeasure at having to arraign a defendant on summary charges, including by the use of the term "f— bull—" and by being angry, agitated, loud, and confrontational); *In re Timbers*, 674 A.2d 1217 (while presiding over night court, judge was under the influence of alcohol to a degree that prevented him from properly performing his duties), with *In re McCutcheon*, 846 A.2d 801 (no violation where, after police sergeant appeared to provoke the respondent judge by demanding to know her verdict and then stormed out of the courtroom, the judge "was visibly offended and angered and in a raised voice ordered him to sit down," but did not shout and yell as alleged).

63. See *In re Marraccini*, 908 A.2d 377.

terized the respondent judges' conduct as intimidating, derogatory, insensitive, sexually charged, humiliating, and the like.⁶⁴

Extra-Judicial Temperament

The final category of "temperament" cases involves review of judges' behavior unrelated to their judicial duties. Doctrinally, the Court has relied predominantly on Article V, §18(d)(1)'s disrepute provision as a basis for finding violations in this area. These cases generally fall into three categories of "off duty" misconduct: instances in which a judge was excessively aggressive, employed racist language, or was found to be sexually inappropriate.

Judges' aggression, sometimes alcohol fueled, has resulted in violations.⁶⁵ Oddly, the Court did not, however, find a violation where, during a road rage incident while driving on an interstate highway, a judge displayed his handgun out the window of his car to the occupants of another vehicle.⁶⁶

Although the Board has pursued complaints arising from allegedly racist statements made by judges outside of the courthouse, the Court has not found violations in these cases. This is so because the Court found the conduct not to be intentionally racist,⁶⁷ and because the Board failed to prove that the judge actually made the allegedly racist statements.⁶⁸

The Court's record in sexual misconduct cases is not consistent. The Court has found violations where the evidence persuaded the Court that a judge engaged in a pattern of repeated, predatory sexual harassment. For example, *In re Cioppa*, the Court found a violation where the respondent judge attempted to trade rulings favorable to tenants in two different landlord-tenant cases before him for a "sexual *quid pro quo*."⁶⁹ In *In re Alonge*, the Court found a violation where the respondent

64. These cases have found violations of Article V, §18(d)(1)'s "disrepute" and "prejudices the proper administration of justice" provisions, as well as Canons 3A(3) and 3B(1), and Rule 4C. See *In re Lokuta*, 964 A.2d 988 (judge was "loud," "nasty," "out of control," "intimidating," and "oppressive" to her staff; her conduct was "bizarre" and "inescapable"); *In re Brown*, No. 4 JD 05, 907 A.2d 684, 685 (Pa. Ct. Jud. Disc. 2006) (judge "repeatedly used derogatory and demeaning terms when either referring to, or criticizing, his female employees"; he publicly criticized his secretaries; he engaged in loud outbursts of anger in chambers; and "used racially and ethnically insensitive and inappropriate terms in referring to minority members of the community" to his staff and members of law enforcement); *In re Berkhimer*, 4 JD 04, 877 A.2d 579 (Pa. Ct. Jud. Disc. 2005), *aff'd*, 930 a.2D 1255 (Pa. 2007) (magisterial district judge made sexually charged statements to female employees and showed to his office staff, or described, when they refused to look, pornographic images); *In re Timbers*, 674 A.2d 1217 (judge slapped a county employee on the buttocks without her consent, causing her to feel threatened and humiliated; at other times, he cursed at colleagues and non-court employees, and used threatening language toward a police officer). *But see In re Whittaker*, No. 1 JD 07, 948 A.2d 279 (Pa. Ct. Jud. Disc. 2008) (no violation where magisterial district judge asked whether employee in municipal building "got it all out" when she blew her nose; her response indicated that she was not offended by the statement and the general working atmosphere of the municipal building in which they worked was casual).

65. See *In re Hamilton*, 932 A.2d 1030 (judge started fistfight with off-duty police sergeant at golf course and then verbally assaulted sergeant's wife); *In re McCarthy*, 828 A.2d at 28-29 (judge "repeatedly drank to the point of extreme intoxication" and "on these occasions . . . was aggressive, confrontational, and abusive").

66. See *In re Carney*, No. 2 JD 2010, 28 A.3d 253 (Pa. Ct. Jud. Disc. 2011). This case has been appealed to the Pennsylvania Supreme Court, see *In re Carney*, No. 32 WAP 2011 (Pa.).

67. See *In re Nakoski*, No. 4 JD 98, 742 A.2d 260, 262 (Pa. Ct. Jud. Disc. 1999) (judge answered "yes" to continuing education instructor's question, in the course of discussing probable cause for a stop and search, as to whether it was unlawful or illegal to be a black man, and explained response with apparent statement that "They're all in jail. They're the ones doing all the robberies and burglaries," where response was extemporaneous, and class was attended exclusively by fellow district justices).

68. See *In re Manning*, No. 1 JD 97, 711 A.2d 1113 (Pa. Ct. Jud. Disc. 1998) (Board failed to prove that judge had derogatorily referred to two African-American women as "n——").

69. No. 4 JD 12, 51 A.3d 923, 929 (Pa. Ct. Jud. Disc. 2012).

judge stalked and threatened five young women over an extended period of time.⁷⁰ Similarly, the Court found a violation in *In re Cicchetti*, where the respondent judge repeatedly sexually harassed a probation officer assigned to the judge's courtroom by, among other things, "persistently endeavor[ing] to coerce [the probation officer] to engage in a sexual relationship with him," despite her consistent refusals, which resulted in his making her job performance difficult and threatening to have her father fired from his job.⁷¹ The Court, however, departed from requiring a pattern of intentional misconduct in finding that a Traffic Court judge who, on one occasion over the space of only several seconds, showed a courthouse employee two pictures of his penis that were on his cell phone, violated the Constitutional disrepute provision.⁷²

In two cases, the Court has concluded that no sexual misconduct occurred and therefore found no violation. In one, the Court was asked to review the bizarre conduct of a judge who handed acorns stuffed with condoms to women in a park, telling them: "They make a nice afternoon snack, try them. I'll be here tomorrow, let me know what you think."⁷³ Noting that the judge's conduct was "not funny" and "lack[ed] good judgment," the Court concluded that it did not amount to conduct that would bring the entire judiciary into "disrepute." In another, the Court concluded that consensual sexual activity between a judge and another adult did not violate any prohibition.⁷⁴

Political Activity

The ethical principles governing permissible and impermissible political activity attempt to navigate through the ethical implications of the Commonwealth's method of selecting judges, namely through partisan political elections. These principles, chiefly Canon 7 and Rule 15, as well as the Constitution's "disrepute" provision, regulate judges' campaigning for office as well as service while in office.

Conduct While Campaigning For Judicial Office

Candidates for judicial office are generally directed to "maintain the dignity appropriate to judicial office."⁷⁵ They are also specifically prohibited from:

- making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office";
- making "statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court";
- making statements that "misrepresent their identity, qualifications, present position, or other fact"; and
- soliciting or collecting campaign contributions.⁷⁶

70. No. 4 JD 09, 3 A.3d 771 (Pa. Ct. Jud. Disc. 2010).

71. No. 2 JD 96, 697 A.2d 297, 303 (Pa. Ct. Jud. Disc. 1997). The Court's decision in *Cicchetti* was affirmed by the Pennsylvania Supreme Court, which held that, as to the complainant probation officer who worked in his courtroom, the respondent judge's "actions toward her were not only in his capacity as a judicial officer, but also as her direct supervisor"; "he attempted to use his position as the President Judge to pressure her into acquiescing to a sexual relationship" because his conduct was "so persistent, so coercive, and so extreme." 743 A.2d 431, 444 (Pa. 2000).

72. *In re Singletary*, No. 3 JD 12, slip op. at 14-17 (Oct. 9, 2012).

73. *In re Stoltzfus*, No. 4 JD 11, 29 A.3d 151, 153, 156 (Pa. Ct. Jud. Disc. 2011).

74. See *In re Hasay*, No. 2 JD 95, 666 A.2d 795 (Pa. Ct. Jud. Disc. 1995).

75. Canon 7B(1)(a); Rule 15D(1).

76. See Canon 7B(1)(c), (2); Rule 15D(3), (4).

The Court's application of these requirements has been quite straightforward.⁷⁷ Improper campaign conduct may also violate Article V, §18(d)(1)'s "disrepute" provision, as in *In re Singletary*.⁷⁸ Not surprisingly, court employees are prohibited from doing indirectly what a judge is prohibited from doing directly.⁷⁹

Conduct While In Office

Judges' political conduct in office is also limited. Rule 15B prohibits judges from engaging in "partisan political activity."⁸⁰ Relatedly, Rule 3B provides that "[m]agisterial district judges shall not use or permit the use of the premises established for the disposition of their magisterial business for any other occupation, business, profession or gainful pursuit." In a strikingly vague catch-all Canon, Canon 7 provides that "[j]udges should refrain from political activity inappropriate to their judicial office."

In two decisions, the Court has found improper political activity by magisterial district judges while in office. In *In re Berkhimer*, the Court found the respondent judge's practice of sending "Quickie Notes" from the judge's court office to constituents whose achievements were mentioned in the local newspaper, for purpose of improving prospects for reelection, violated Rule 3B.⁸¹ And in *In re Hartman*, the Court found the respondent judge's endeavoring to secure the election of his wife to the district judge office from which he was retiring by approaching party officials and attending a party committee meeting violated Rule 15B(1) and (2).⁸²

Charitable And Community Organizations

While judges' conduct in political and business activities is quite circumscribed, judges are not so limited from participating in charitable and community activities and organizations.⁸³ Judges, however, are prohibited from soliciting funds for such

77. Compare *In re Singletary*, No. 1 JD 08, 967 A.2d 1094 (Pa. Ct. Jud. Disc. 2008) (indicated in a campaign speech that those who contributed could expect favorable treatment in his court), with *In re Miller*, No. 3 JD 99, 759 A.2d 455 (Pa. Ct. Jud. Disc. 2000) (no violation where magistrate district judge's campaign materials for common pleas judge seat did not misrepresent his position or qualifications by referring to himself as "judge").

78. See *In re Singletary*, 967 A.2d 1094; *In re Murphy*, No. 1 JD 10, 10 A.3d 932 (Pa. Ct. Jud. Disc. 2010) (forged signatures on nomination petitions).

79. See Canon 7B(1)(b), Rule 15D(2); *In re Cicchetti*, 743 A.2d 431, 441-42 (Pa. 2000) (affirming Court of Judicial Discipline's conclusion that court-appointed employees may assist a judge's retention election because assisting with a retention campaign is not "partisan political activity," but recognizing that "permitting court-appointed employees to participate in the retention election campaigns of judicial officers may create the appearance of impropriety" and so prohibiting that conduct in the future).

80. Rule 15B(1) defines "partisan political activity" to include the following non-exclusive list of activities: "serving as a committee-person, working at a polling place on Election Day, performing volunteer work in a political campaign, making political speeches, making or soliciting contributions for a political campaign, political action committee or organization, attending political gatherings, dinners or other functions." It does *not* include "involvement in non-partisan or public community organizations or professional groups." 15B(2) prohibits magisterial district judges and candidates for the office from:

(a) hold[ing] office in a political party or political organization or publicly endorse candidates for political office.

(b) engag[ing] in partisan political activity, except as authorized in subdivision C of this rule. Nothing herein shall prevent magisterial district judges or candidates for such offices from making political contributions to a campaign of a member of their immediate family.

81. 877 A.2d at 584.

82. 873 A.2d 875.

83. See Canon 5B ("Judges may participate in civic and charitable activities that do not reflect adversely upon their impartiality or interfere with the performance of their judicial duties."); Canon 5A note ("Complete separation of judges from extra-judicial activities is neither possible nor wise; they should not become isolated from the society in which they live."); see also Raymond J. McKoski, *Charitable Fund-*

organizations. For example, Rule 11 provides “[m]agisterial district judges shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of their office for that purpose, but they may be listed as an officer, director or trustee of such an organization. They shall not be a speaker or the guest of honor at such an organization’s public fund raising events, but they may attend such events.”⁸⁴

The Court’s cases in this area track quite closely these prohibitions. In *In re Hartman*, the Court found that a judge violated Rule 11 for having collected money in his office for local charitable activities and events, permitted the use of his office for organizational meetings, and permitted advertisements for charitable and community activities in his office’s waiting area.⁸⁵ The Court dismissed charges in two other cases. In one, *In re Carney*, the Court found that the respondent judge, who led a local anti-graffiti task force, had not solicited funds, despite an editorial’s mention of his idea of setting up a reward fund and that readers should call his office to make a contribution.⁸⁶ In the other, *In re Crahalla*, an evenly divided Court dismissed a complaint alleging a violation resulting from the respondent judge having sent a letter seeking contributions benefitting the Boy Scouts.⁸⁷

Impartiality, Disqualification And Recusal

The Court reviews judges’ failure to disqualify themselves in cases in which their impartiality has been questioned. Suppose that a recusal motion is presented to a trial court, the judge reviews it, the judge decides not to recuse herself, and she then presides over the merits of the case. According to the Court’s explanation of the Pennsylvania law relating to recusal, if the appellate court finds that the litigants received a fair trial, the appellate court would not have authority to review the trial judge’s recusal decision because “disqualifying factors of the trial judge become moot” when an appellate court determines that a fair and impartial trial was had.⁸⁸

Instead, according to the Court, in these cases, a challenge to a judge’s decision not to recuse is appropriately reviewed by the Court of Judicial Discipline upon a formal complaint by the Board charging the judge with having breached Canon 3C or Rule 8, governing judges and magisterial justices, respectively.⁸⁹ Canon 3C, which is largely identical to the Rule, provides in part as follows:

Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct, 2008 Mich. St. L. Rev. 769, 774-76 (explaining that “a judge’s participation in civic, educational, religious, fraternal, and other charitable activities can enhance [the public] trust in many ways,” including by fulfilling the expectation that judges be active members of their communities, by providing opportunities to teach about the administration of justice, by personalizing judges within the community, by integrating judges into the community and thereby fostering better judicial decision-making, and by improving judges’ well-being).

84. Canon 5B governs judges’ involvement in community and charitable activities, and Canon 5B(2) contains a similar limitation on their involvement.

85. 873 A.2d 875.

86. 28 A.3d 253.

87. No. 2 JD 99, 747 A.2d 980 (Pa. Ct. Jud. Disc. 2000).

88. See *In re Zupsic*, 1 JD 05, 893 A.2d 875, 891 (Pa. Ct. Jud. Disc. 2005) (quoting *Reilly ex rel. Reilly v. SEPTA*, 489 A.2d 1291, 1300 (Pa. 1985)).

89. The distinction drawn by the Pennsylvania courts appears to be between, on the one hand, litigating the question of whether a judge violated the Canons or Rules in failing to recuse herself (a disciplinary matter) and, on the other hand, litigating the question of whether the parties received a fair trial (a matter for the appeals court). See, e.g., *Tindal v. Workers’ Compensation Appeal Bd.*, 799 A.2d 219, 223 (Pa. Cmwlth. Ct. 2002) (“Given the Supreme Court’s clear direction that this Court is not the proper forum in which to adjudicate violations of the Code, we will not address Claimant’s argument that, pursuant to the Code, WCJ Bachman should have recused herself. We may, however, address Claimant’s argument that WCJ Bachman was not capable of presiding over this matter impartially.”); cf. *Commonwealth v. Druce*, 848 A.2d 104, 111 (Pa. 2004) (affirming denial of recusal motion, and refusing to implement a *per se* rule that

- (1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:
- (a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (b) they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (c) they know that they, individually or as a fiduciary, or their spouse or minor child residing in their household, have a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (d) they or their spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) is acting as a lawyer in the proceeding;
 - (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
 - (iv) is to the judge's knowledge likely to be a material witness in the proceeding;

The Court has applied these standards, as well as other Rules and Canons,⁹⁰ and Article V, §18(d)(1)'s "disrepute" and "prejudicial to the administration of justice" provisions, to cases in which the charged judge failed to recuse himself from hearing cases involving friends or family members, in most cases finding a violation. For example, in *In re DeLeon*, the Court found a violation where the respondent judge had, on behalf of a social acquaintance, issued an *ex parte* "Stay Away Order" without following the proper procedure.⁹¹ And in *In re Zupsic*, the Court found a violation where the respondent judge held a preliminary hearing and dismissed the case

a judge who violates Canon 3A(6) (regarding public statements) must recuse herself because, among other things, the Canons do not have the force of substantive law).

The Supreme Court has explained that an appellate court will grant a new proceeding if the trial judge suffered from even an appearance of impropriety:

[A]n "appearance of impropriety is sufficient justification for the grant of new proceedings before another judge. . . . A jurist's impartiality is called into question whenever there are factors or circumstances that may reasonably question the jurist's impartiality in the matter." *Joseph*, [987 A.2d] at 634 (quoting *In Interest of McFall*, 533 Pa. 24, 617 A.2d 707, 713 (1992)). "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings." *Id.* (quoting *In Interest of McFall*, at 714).

In re Lokuta, 11 A.3d 427, 435-36 (Pa. 2011) (finding no abuse of discretion in Court of Judicial Discipline judge's failure to recuse).

The Pennsylvania Supreme Court will also review judges' failures to recuse themselves "as an exercise of [the Pennsylvania Supreme Court's] inherent constitutional powers governing judicial administration." See *Joseph v. Scranton Times L.P.*, 987 A.2d 633, 635 (Pa. 2009) (citing Pa. Const. art. V, §10(a); *In re McFall*, 617 A.2d 707 (Pa. 1992)).

90. Canon 2 states that "[j]udges should avoid impropriety and the appearance of impropriety in all their activities." It provides as follows:

- A. Judges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- B. Judges should not allow their family, social, or other relationships to influence their judicial conduct or judgment. They should not lend the prestige of their office to advance the private interests of others; nor should they convey or knowingly permit others to convey the impression that they are in a special position to influence the judge. Judges should not testify voluntarily as a character witness.

Rule 13 provides, in part, that "magisterial district judges and all employees assigned to or appointed by magisterial district judges shall not engage, directly or indirectly, in any activity or act incompatible with the expeditious, proper and impartial discharge of their duties."

91. No. 2 JD 08, 967 A.2d 460 (Pa. Ct. Jud. Disc. 2008).

of the son of a personal and business acquaintance to whom judge might have been beholden, and also attempted to influence police officers and complaining witnesses, on behalf of friends, in cases pending before him.⁹²

Notably, in reviewing whether recusal is required, the Court does not require a judge to recuse himself if his alleged bias is not tied to the particular matter before him. For example, in *In re Carney*, the Court found no violation where the respondent judge, who led an anti-graffiti task force and had made public comments about the task force, had not presided over any cases in which the task force or a member of the task force was a party or where graffiti had been involved.⁹³ The Court explained that “if [the judge] was never called upon to exercise his judicial conduct or judgment in a graffiti case, he never had an opportunity to ‘allow’ that conduct or judgment to be influenced,” and, furthermore, that its holding “should not be seen to imply that a mere showing that graffiti cases did come before [the judge] would be enough to establish a violation of 2A.”⁹⁴

Influence

Judges are prohibited from using their positions to influence prosecutorial or judicial decision-makers. Rule 2A provides “[m]agisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Magisterial district judges . . . shall not lend the prestige of their office to advance the private interest of others, nor shall they convey or permit others to convey the impression that they are in a special position to influence the judge.”⁹⁵

The Court has repeatedly found violations of Rule 2A, as well as Article V, §18(d) (1)’s “disrepute” and “prejudicial to the administration of justice” provisions, when a judge contacts another judge or arresting officer to influence the outcome of a case pending before another judge. For example, in nearly identical opinions in *In re Joyce & Terrick*⁹⁶ and *In re Trkula*,⁹⁷ the Court found violations resulting from the respondent judges’ attempts to influence the outcome of appeals from their courts by contacting the Statutory Appeals Unit. Relatedly, *In re Kelly*, the Court found a violation where the respondent judge attempted to influence the outcome of a case by contacting another district justice for a friend of his in connection with a traffic violation which was scheduled for disposition before the other district justice.⁹⁸

92. 893 A.2d 875; also compare *In re Arnold*, 51 A.3d 931 (violation where judge had failed to docket citation filed in her court against one of her sons), with *In re McCutcheon*, 846 A.2d 801 (no violation where judge presided over hearing of a friend of her grandson); *In re Dagher*, No. 1 JD 95, 657 A.2d 1032 (Pa. Ct. Jud. Disc. 1995) (violation of Article V, §17(c)’s prohibition against accepting any fee or emolument for performance of any judicial service where judge accepted football tickets from litigant in matter pending before him).

93. 28 A.3d 253, 269-70.

94. *Id.* at 269 & n.20.

95. Canon 2A and B contain essentially identical prohibitions.

96. Nos. 2 JD 97, 3 JD 97, 712 A.2d 834 (Pa. Ct. Jud. Disc. 1998).

97. No. 7 JD 96, 699 A.2d 3 (Pa. Ct. Jud. Disc. 1997).

98. No. 1 JD 00, 757 A.2d 456 (Pa. Ct. Jud. Disc. 2000); see also *In re Zupsic*, 893 A.2d 875 (judge asked state trooper to reduce charges in the case of the relative or friend of the judge’s previous employer); *In re Berkheimer*, No. 1 JD 03, 828 A.2d 19 (Pa. Ct. Jud. Disc. 2003) (judge contacted arresting police officer with the intent that the charges against the arrestee, pending before another magisterial district judge, be downgraded); *In re Timbers*, 674 A.2d 1217 (judge asked police officer to withdraw speeding ticket issued to judge’s friend, after having recused himself from hearing the matter).

Financial And Business Activities

The Court is often involved in cases in which judges' financial and business activities, related to both the conduct of their judicial offices and the conduct of their affairs outside of their judicial activities, are the subject of complaints.

Misuse Of Office Staff For Personal Financial Gain

When judges have used their judicial staff as personal employees or as employees of another business, the Court has found that they have violated Article V, §18(d) (1)'s "disrepute" provision. Two notable examples are *In re Berry* and *In re Lokuta*, in which the Court found violations. In *In re Berry*, the respondent judge improperly actively operated his real estate business out of his judicial office and used his judicial secretary to manage the day-to-day operations of his business and, as a result, incurred no overhead in his business.⁹⁹ In *In re Lokuta*, the respondent judge improperly used court employees for "personal business and chores," including yard work and cleaning, at the judge's residence.¹⁰⁰

Other Financial Dealings

Canon 5 governs judges' "financial activities" and their "fiduciary activities." Canon 5C governs financial activities, providing as follows:

- (1) Judges should refrain from financial and business dealings that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, exploit their judicial position, or involve them in frequent transactions with lawyers or persons likely to come before the court on which they serve.
- (2) Subject to the requirement of subsection (1), judges may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a family business.
- (3) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as they can do so without serious financial detriment, they should divest themselves of investments and other financial interests that might require frequent disqualification.
- (4) Information acquired by judges in their judicial capacity should not be used or disclosed by them in financial dealings or for any other purpose not related to their judicial duties.

Canon 5D, governing their fiduciary activities, provides as follows:

Judges should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of their family, and then only if such service will not interfere with the proper performance of their judicial duties. "Member of their family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary judges are subject to the following restrictions:

- (1) They should not serve if it is likely that as a fiduciary they will be engaged in proceedings that would ordinarily come before them, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which they serve or one under its appellate jurisdiction.

99. No. 1 JD 09, 979 A.2d 991 (Pa. Ct. Jud. Disc. 2009).

100. 964 A.2d 988; see also *In re Orié Melvin*, No. 5 JD 12, 2012 WL 3775764 (Pa. Ct. Jud. Disc. Aug. 30, 2012) (suspending respondent judge without pay after she was indicted for theft of services and related crimes for allegedly diverting the services of her judicial staff to her political campaign for the Supreme Court).

- (2) While acting as a fiduciary judges are subject to the same restrictions on financial activities that apply to them in their personal capacity.

Rule 15A provides that “[m]agisterial district judges shall not hold another office or position of profit in the government of the United States, the Commonwealth or any political subdivision thereof, except in the armed services of the United States or the Commonwealth.”

While the Court has addressed these standards, it has not yet found violations of them. For example, in *In re Whittaker*, the respondent judge’s employment by a township fire department while also serving as magisterial district judge was not a violation because he reported his earnings on his yearly financial disclosure statements and received no indication in response to his disclosure that his employment might be a violation. In adopting the reasoning set forth in the opinion in support of dismissal of *In re Crahalla*, the Court concluded that the respondent judge had acted without requisite *mens rea*; when he was “notified that his employment with the Fire Department might be a violation of a Rule . . . , [he] immediately resigned from the job” and “[s]ince then he has served as an unpaid volunteer,” a position about which the Court had no qualms.¹⁰¹

Criminal Convictions And Other Illegal Activity

Most of the Court’s opinions have dealt with perhaps the easiest issue—whether a judge who has engaged in or been convicted of criminal conduct has also violated a governing ethical prohibition. In eleven of twelve cases, the Court found that judges previously criminally convicted of crimes were found in violation of Article V, §18(d)(1)’s disrepute provision or §17(b)’s “activity prohibited by law” provision¹⁰²; in eight others, the Court found violations because the Court heard the underlying facts and found that they constituted a violation of the law.

Felony Convictions

Each of the cases in which a judge has been convicted of a felony has resulted in essentially identical opinions applying Article V, §18(d)(1), which provides, in relevant part, that “[a] justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony.” In these cases, the Court has held, upon stipulated facts, that the “conviction, of itself, provides the grounds for the imposition of discipline” pursuant to Article V, §18(d)(1).¹⁰³

101. 948 A.2d 279, 296-302; cf. *In re Horgos*, No. 4 JD 95, 682 A.2d 447 (Pa. Ct. Jud. Disc. 1996) (judge served as executor of the estate of a very close family friend and, in that role, issued to himself a check in the amount of \$150,000, representing the executor’s commission and a bequest to him, which he did not report on his statement of financial interest, which violated Supreme Court Order No. 47 of 1984).

102. The outlier is *In re Gentile*, No. 5 JD 94, 654 A.2d 676 (Pa. Ct. Jud. Disc. 1994), in which the Board filed a Petition to Implement Automatic Forfeiture of Judicial Office for “misbehavior in office” pursuant to Article V, §18(d)(3). The judge had been convicted of one count of obstructing the administration of law. The Court was presented with the question of whether this conviction constituted a conviction for “misbehavior in office.” The Court split four to four on the question, and the complaint was therefore dismissed.

103. *In re Conahan*, No. 8 JD 11, 51 A.3d 922 (Pa. Ct. Jud. Disc. 2012); *In re Toole*, No. 5 JD 11, 26 A.3d 581 (Pa. Ct. Jud. Disc. 2011); *In re Joyce*, No. 3 JD 11, 26 A.3d 577 (Pa. Ct. Jud. Disc. 2011); see also *In re Amati*, No. 4 JD 03, 849 A.2d 320 (Pa. Ct. Jud. Disc. 2004); *In re Jaffe*, 2 JD 03, 839 A.2d 487 (Pa. Ct. Jud. Disc. 2003); *In re Sullivan*, No. 3 JD 01, 805 A.2d 71 (Pa. Ct. Jud. Disc. 2002); *In re Melograne*, 1 JD 99, 759 A.2d 475 (Pa. Ct. Jud. Disc. 2000); *In re Larsen*, 4 JD 94, 746 A.2d 108 (Pa. Ct. Jud. Disc. 1999).

Misdemeanor Convictions And Illegality Without Conviction

Cases in which judges have been convicted of a misdemeanor, or have otherwise engaged in illegal conduct, also typically result in a violation,¹⁰⁴ although the basis for the violation depends on the type of judge.

Article V, §17(b) provides, in relevant part, that “[j]ustices and judges shall not engage in any activity prohibited by law.” This provision has been used to discipline common pleas judges who have been convicted of misdemeanors.¹⁰⁵ The same section may be used to discipline judges who have not been *convicted* of illegal conduct, although the Court has found that they engaged in illegal activity.¹⁰⁶

Magisterial district judges are treated differently. By its terms, §17(b) does not apply to them.¹⁰⁷ Other rules and standards provide the basis for discipline of magisterial district judges who engage in illegal activity.¹⁰⁸

CONCLUDING THOUGHTS

This article has provided background on the genesis of the Board and Court of Judicial Discipline, an empirical sense of the Board’s and Court’s work, and then collected the corpus of Court of Judicial Discipline cases with an eye to divide it rationally into eight subject areas. We offer three concluding thoughts.

First, the 1993 amendments to the Pennsylvania Constitution and the advent of the Court brought about the much needed separation of judicial ethics prosecution and adjudication in Pennsylvania. Actual fairness to the Commonwealth’s judges and the appearance of fairness to the community at large demanded it. Although the Board and Court are housed in the same building in Harrisburg, they are entirely separate institutions—they hire different employees, are composed of different members, and function independently.

104. *In re Hasay*, No. 2 JD 95 (Aug. 3, 1995), is the outlier. In *Hasay*, the judge had not been criminally convicted and the Board charged him with violations arising out of his alleged possession of 43 grams of marijuana. The Court concluded, however, that the judge “did not have the requisite intent to constructively possess the marijuana.”

105. See *In re Pazuhanich*, No. 3 JD 04, 858 A.2d 231 (Pa. Ct. Jud. Disc. 2004) (summary offense of public drunkenness and first-degree misdemeanors of indecent assault, endangering the welfare of children, and corrupting the morals of a minor); *In re Eagen*, 814 A.2d 304 (second-degree misdemeanor of obstructing administration of law or other governmental function); *In re Cicchetti*, 697 A.2d 297 (making a willfully false statement in a report attesting that the judge’s retention election committee had not violated any provision of the Election Code).

106. See *In re Berry*, 979 A.2d at 1003 (judge’s use his judicial secretary to manage the day-to-day operations of his real estate business constituted “diversion of services” in violation of the Pennsylvania criminal code).

107. See *In re Murphy*, 10 A.3d 932 (finding no violation of §17(b) despite magisterial district judge’s conviction of misdemeanors arising out of his forging of signatures on his nomination petitions), *overruling In re Amati*, 849 A.2d 320; *In re Toczydlowski, Jr.*, No. 1 JD 04, 853 A.2d 24 (Pa. Ct. Jud. Disc. 2004); *In re Walters*, No. 3 JD 96, 697 A.2d 320 (Pa. Ct. Jud. Disc. 1997); *In re Chesna*, No. 6 JD 94, 659 A.2d 1091 (Pa. Ct. Jud. Disc. 1995); see also *In re Harrington*, No. 6 JD 04, 877 A.2d 570 (Pa. Ct. Jud. Disc. 2005) (no violation of §17(b) for magistrate district judge); *In re Strock*, No. 3 JD 98, 727 A.2d 653 (Pa. Ct. Jud. Disc. 1998) (same); *In re Trkula*, 699 A.2d 3 (same).

108. See *In re Cioppa*, 51 A.3d at 925 (violation of §18(d)(1)’s “disrepute” and “prejudices the proper administration of justice” provisions and Rule 2A for illegally attempting to trade exchange favorable rulings for sex); *In re Murphy*, 10 A.3d 932 (violation of §18(d)(1)’s “disrepute” provision for illegally forging signatures on nomination petitions); *In re Trkula*, 699 A.2d 3 (violation of Rule 2A for illegally making false statements to two FBI agents conducting an investigation of the Statutory Appeals Unit of Allegheny County and derivative violation of §17(b)); *In re Strock*, 727 A.2d 653 (violation of §18(d)(1)’s “disrepute” provision and Rule 5A for illegally appropriating the public funds of judge’s office); *In re Harrington*, 877 A.2d 570 (violation of §18(d)(1)’s “disrepute” provision for illegally using parking tickets issued to other cars to avoid her car being ticketed); *In re Chesna*, 659 A.2d 1091 (violation of §18(d)(1)’s “disrepute” provision for illegal gambling operation).

Second, as previously noted, we are concerned about the risks presented by the seemingly overlapping jurisdiction of the Court and the Pennsylvania Supreme Court in judicial ethics matters. Enforcement of judicial ethics matters in the Commonwealth relies upon the Board's review of complaints and, where appropriate, the Board's filing of formal complaints with the Court. The Board and Court each have developed, and should continue to develop, expertise and experience in their respective spheres. Moreover, the Supreme Court has the last word on judicial ethics matters because decisions of the Court are subject to review by the Supreme Court. This structure is appropriate because the Supreme Court is Pennsylvania's highest court and as such reviews the decisions of all trial courts and intermediate appellate courts. Given this structure, it is difficult to understand why the Supreme Court should ever involve itself in judicial ethics matters prior to an appeal from the Court. To do so undermines the delegation of judicial ethics matters to the Court and puts the Supreme Court in the position of having appeared to pre-judge a matter that would otherwise be before it in the ordinary course.

Third, the judicial ethics matter that most rocked the Commonwealth in the last two or more decades—the "Kids for Cash Scandal" involving former common pleas judges Michael Conahan and Mark Ciavarella—only found its way to the Court as a result of former judges' federal criminal convictions. We believe that their conduct was as much an outlier from the conduct of the men and women who are judges in the Commonwealth as it was a judicial evil that perverted the rule of law. The salutary consequences of the scandal, moreover, have included improvements in the Board's procedures for reviewing complaints, as well as a healthy questioning about how the local culture, which included members of the local business, legal and political communities, could have allowed those judges' conduct to persist and how similar conduct can be systematically avoided in the future. To be clear, however, this event is no failing of the Court; rather, a footnote to the controversy is the limitations of a tribunal like the Court, which addresses only controversies presented to it.