
DEL SOLE CAVANAUGH STROYD LLC

REPORT OF SPECIAL COUNSEL REGARDING THE REVIEW OF JUSTICE EAKIN'S PERSONAL EMAIL COMMUNICATIONS

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DEL SOLE CAVANAUGH STROYD LLC
The Waterfront Building
200 First Avenue, Suite 300
Pittsburgh, PA 15222
Tel: (412) 261-2393
Fax: (412) 261-2110

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A. EXECUTIVE SUMMARY

On September 28, 2015, and October 20, 2015, the Pennsylvania Supreme Court received CD-ROMs from the Attorney General of Pennsylvania containing emails that were sent from and received by a personal email account of Justice J. Michael Eakin. The Attorney General's communications to the Court asserted that the emails contained "pornography" and other offensive and insensitive contents which may constitute violations of the Canons and Rules of Judicial Conduct. The Court retained this Firm as Special Counsel to review and to analyze those emails and to advise the Court whether they may give rise to extraordinary circumstances warranting the immediate exercise of this Court's supervisory authority as described in In re Magisterial District Judge Mark A. Bruno, 101 A.3d 635 (Pa. 2014).

A total of 955 emails were submitted by the Attorney General, of which 157 were sent by Justice Eakin. As described in this Report, Justice Eakin sent an email containing a photograph of a topless woman. Also of note, he forwarded an email with a joke about spousal abuse and several other emails with purported jokes and banter that are offensive. Justice Eakin received a number of emails with photographs of topless women and occasionally of completely nude women. Justice Eakin also received a number of emails with purported jokes that are insensitive and would be offensive to women, African-Americans, immigrants and other groups.

We consider some of the materials that Justice Eakin sent and many that he received to be of serious concern. However, having reviewed these emails in light of applicable law and Canons and Rules of Judicial Conduct, we do not believe that they give rise to the type of extraordinary circumstances warranting immediate intervention by the Court. To the contrary, we conclude that such a review of Justice Eakin's conduct is best left to the apparatus set forth in Article V, §18 of the Pennsylvania Constitution. Indeed, the Judicial Conduct Board is well suited to undertake such a comprehensive investigation of Justice Eakin's conduct and to determine whether his conduct violates the Canons and Rules of Judicial Conduct. Furthermore, it is well positioned to develop a body of authority detailing responsibilities and expectations of a jurist concerning personal emails.

Finally, we recognize that this matter can be compared to the invocation of the Court's extraordinary supervisory powers concerning Justice McCaffery. (In re: Mr. Justice Seamus P. McCaffery of the Supreme Court of Pennsylvania, Judicial Administration Docket, No 430 (October 20, 2014)). These two situations are, however, dissimilar. The alleged conduct in the McCaffery matter was far broader

than the transmission of inappropriate emails. Other serious factors implicating Justice McCaffery are not present here. We recommend, therefore, that the Court not exercise its extraordinary powers but allow the investigation of Justice Eakin's conduct to proceed before the Judicial Conduct Board according to the Constitutional processes of Article V, §18.

B. BACKGROUND

1) The Attorney General's September 28, 2015, Letter Forwarding Justice Eakin's Personal Emails to the Judicial Conduct Board and the Supreme Court

On September 28, 2015, the Pennsylvania Attorney General sent a letter to the Honorable Jayne F. Duncan, Chair of the Judicial Conduct Board of Pennsylvania, enclosing a CD-ROM with 943 email files which were sent from and received by a personal email account of Justice J. Michael Eakin. A copy of the letter and enclosed CD-ROM was sent to Chief Justice Thomas G. Saylor.

The Attorney General's letter stated:

[A] review indicates these emails may violate Rule 1.2 of the Code of Judicial Conduct which provides: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

(9/28/2015 Letter, p.1, quoting Code of Judicial Conduct, Rule 1.2). The letter also suggested that the emails may violate Code of Judicial Conduct, Rule 3.1, which provides in relevant part:

Judges shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all provisions of this canon. However, a judge shall not... (c) participate in activities that would reasonably appear to undermine the judge's independence, integrity and impartiality.

(9/28/2015 Letter, p.1; quoting Code of Judicial Conduct, Rule 3.1(c)).

In response to the issues raised by the Attorney General's letter, the Supreme Court retained this Firm as Special Counsel to independently review the CD-ROM

from the Attorney General and to prepare this Report regarding its contents. The following is submitted pursuant to that directive.

2) The Attorney General's October 20, 2015, Letter

On October 20, 2015, Attorney General Kane sent another letter and CD-ROM to the Justices of the Supreme Court. The CD-ROM contains forty-eight (48) emails. The Attorney General's letter represents that she found these 48 emails to be especially offensive and that she intended to release them to the public.

An examination of these materials reveals that they are largely duplicative of the materials that had been submitted by the Attorney General on September 28, 2015. There are, however, twelve (12) emails which were not included in the earlier submission. An additional email was included on the earlier disk but had no working attachment. Three (3) of the emails on the October 20, 2015, disk were sent by Justice Eakin—the remainder were received by him.

3) Prior review of Justice Eakin's emails

Allegations of potentially inappropriate emails involving members of the Supreme Court first arose approximately one year ago when the Attorney General disclosed that emails with pornography and other inappropriate material which were sent by former Justice McCaffery were found on servers maintained by the Office of the Attorney General (OAG). The materials identified by the Attorney General also included emails to and from Justice Eakin. Upon disclosure, the Supreme Court retained Robert L. Byer, Esquire, of Duane Morris LLP to conduct an independent review of those materials and to prepare a report to the Court regarding their content and whether they could constitute violations of the Code of Judicial Conduct.

The OAG gave Special Counsel Byer access to emails through an on-line electronic platform that hosted the documents and allowed him to review them. The OAG did not provide Special Counsel Byer with a CD-ROM or other tangible collection of the emails. Special Counsel Byer represents that he reviewed all of the emails and attachments to which he was given access by the OAG.

Special Counsel Byer was given access to 1,038 emails that were sent from and received by Justice Eakin's personal email address (wap092001@yahoo.com - "John Smith"). Of those 1,038 emails, 133 were sent or forwarded by Justice Eakin. The others were received by him. Special Counsel Byer observed that "nearly all" of the emails that were sent by Justice Eakin "were to a small group of friends

concerning golfing, fishing, fantasy football, travel and similar purely social issues.” (Special Counsel Byer’s Report, p. 4). His Report found that none of the emails contained any discussion of cases. Further, none of the emails sent from Justice Eakin’s account contained material of a pornographic nature.

Special Counsel Byer’s Report observed that almost all of the emails that were received at Justice Eakin’s personal account involved large groups of recipients. Special Counsel Byer found that one email contained “offensive sexual content.”¹ He stated that Justice Eakin did not forward that email to any other recipient.

It is important to note that, although we reviewed the Report of former Special Counsel Byer for purposes of completeness of our investigation, we did not rely on it in rendering our conclusions. Rather, we undertook our own comprehensive, independent review of the materials delivered from the OAG.

C. MATERIALS REVIEWED AND METHODOLOGY OF REVIEW

1) Information Reviewed:

- Emails on the CD-ROM that was submitted to the Supreme Court by the Attorney General on September 28, 2015;
- September 28, 2015, Letter from Attorney General Kathleen G. Kane;
- Emails submitted to the Supreme Court by the Attorney General on October 20, 2015;
- October 20, 2015, Letter of Attorney General Kathleen G. Kane;
- Report of Special Counsel Robert L. Byer;
- Supreme Court of Pennsylvania / Unified Judicial System of Pennsylvania Technology Resources Usage Policy;

¹ Special Counsel Byer described this email to the undersigned Special Counsel. It was a video of two people engaging in sexual conduct. The email was included in the September 28, 2015, group of emails, but without a functioning attachment. The complete email, with working attachment, is contained in the additional material and is subject of this instant review, as discussed on page 13.

- October 16, 2015, press release of the Judicial Conduct Board;
- December 17, 2014, Judicial Conduct Board Letter of Dismissal to Justice Eakin;
- Conversations with Special Counsel Robert L. Byer;
- Various Canons and Rules of Judicial Conduct and interpreting cases.

2) Methodology of Review:

The initial CD-ROM, which was sent on September 28, 2015, containing Justice Eakin’s personal emails is divided into two folders: “2008-2012” and “2012-Present.” Each of those folders in turn is divided into two subfolders: “To wap092001” and “From wap092001.”

Those folders and subfolders contain the following numbers of emails:

	To wap092001	From wap092001	TOTAL
2008-2012	642	120	762
2012-Present ²	144	37	181
TOTAL	786	157	943

Each of these folders was reviewed independently by three attorneys: Joseph A. Del Sole; William S. Stickman IV and Bryan C. Devine. All emails and attachments were reviewed. In each instance, the reviewing attorney determined whether the content suggested violations of state or federal law or whether it could be deemed to constitute a violation of the Canons and Rules of Judicial Conduct sufficient to constitute extraordinary circumstances warranting the Court’s immediate exercise of its supervisory powers.

On October 20, 2015, the Attorney General released a second CD-ROM containing selections from Justice Eakin’s email account that she deemed to be offensive. This CD-ROM contained forty-eight (48) emails. Our review of its contents established that twelve (12) were not contained on the CD-ROM that was previously submitted on September 28, 2015. One (1) additional email on the second CD-ROM was contained on the prior disk, but on the prior disk it lacked its

² The latest email on either disk was dated April 30, 2014.

attachment. These emails were reviewed with the same diligence and scrutiny as our review of those that were submitted on September 28.

In the context of the Attorney General's Letter dated September 28, 2015, and in light of the concerns expressed by the Attorney General and others about the offensive nature of certain emails, we specifically scrutinized the materials for emails possibly containing:

- Pornography;
- Racially insensitive matters;
- Misogynistic Materials;
- Culturally insensitive topics;
- Information concerning cases or the business of the Court.

All emails with content that could arguably fall into these categories were identified, printed, and given additional scrutiny by all counsel.

D. GOVERNING CANONS AND POLICIES

Various media reports involving Justice Eakin's emails have focused on the fact that some may be offensive, crude, or pornographic. What is or is not offensive is necessarily a subjective inquiry and could not serve alone as a basis for legal analysis. Rather, Special Counsel first reviewed objective standards upon which to assess subjective impressions created by the emails. Those standards are set forth below.

1. Code of Judicial Conduct

The Attorney General's September 28, 2015, Letter to the Judicial Conduct Board and Supreme Court suggests that emails at issue may violate two rules of the Code of Judicial Conduct, Rule 1.2 and Rule 3.1(c).

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Rule 3.1 Extrajudicial Activities in General

Judges shall regulate their extrajudicial activities to minimize the risk of conflict with their judicial duties and to comply with all provisions of this Canon. However a judge shall not:

* * *

(c) participate in activities that would reasonably appear to undermine the judge's independence, integrity, or impartiality.

Comment [3] to Rule 3.1 states:

Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination.

2. Canons of Judicial Conduct

It is noteworthy that Rules 1 through 3 of the Code of Judicial Conduct — expounding upon the Canons of Judicial Conduct — were adopted by the Court on January 8, 2014 and effective July 1, 2014. Because the emails currently under review pre-date the effective date of the current Rules of Judicial Conduct, the Canons that were applicable when the emails were exchanged are pertinent. Those Canons are as follows:

Canon 1. Judges should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing, and should themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2. Judges should avoid impropriety and the appearance of impropriety in all their activities.

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

The official note to Canon 2 stated in pertinent part:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. Judges must avoid all impropriety and appearance of impropriety. They must expect to be the subject of constant public scrutiny. They must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Throughout our review of Justice Eakin's emails, the above Canons and Rules have been viewed as guideposts on which to focus the subjective review of their content.

E. FINDINGS OF SPECIAL COUNSEL REGARDING EMAILS

1) The emails that are subject to our review are partially different from those provided to Special Counsel Byer.

A threshold question in our analysis was whether the body of emails submitted by the Attorney General on September 28, 2015, was the same set of emails that were previously reviewed by Special Counsel Byer. We conclude that the emails that we have reviewed differ in part from those previously submitted.

It is not possible to compare both sets of emails because Special Counsel Byer was not given a set of the emails. Rather, he was only permitted to review emails that were located on a distant server at the OAG. Therefore, we are not able to make

a one-to-one comparison of the emails that he reviewed and those that we were given.

We conclude nevertheless that the materials are at least in part different from those which Special Counsel Byer reviewed. First, the number of emails do not match. Special Counsel Byer was given access to 1,038 emails that were sent from or received at Justice Eakin's personal "John Smith" account of which only 133 were sent by Justice Eakin. The materials that are currently under review contains 955 emails, of which 157 were sent by Justice Eakin.

As stated above, the discrepancies in the number and content of the emails do not affect our conclusions because we have undertaken a full and independent review of the materials that were submitted to us and we base our conclusions on those materials and only on those materials.

2) The content of "John Smith" emails

All of the emails under review were sent and received by the same account – "wap092001@yahoo.com." The name that was associated with this account was "John Smith." There is nothing in the email address, identifying name, or any other aspect of the email format which specifically identifies either "wap092001" or "John Smith" as Justice Eakin. Indeed, unless a recipient or sender had independent knowledge that that email account belonged to Justice Eakin, there would be no way for anyone to identify it as belonging to him.

We reviewed the materials in our possession for any content which could potentially give rise to a violation of the Canons and Rules of Judicial Conduct as set forth above — as well as any other Canon or Rule of Conduct or violation of state and/or federal law. In light of the context of the disclosure of these emails and our retention as Special Counsel, we gave special solicitude toward emails which arguably contained the following:

- Pornographic content;
- Discriminatory, disparaging or prejudicial remarks relating to individuals' gender, race, religion, sexual orientation or similar factors;

- Communications involving matters before the court, court business or any information suggesting undue influence on or access to a member of the Court.

It is appropriate to note that all of the emails which we reviewed came into the possession of the Attorney General because they were either sent from or received by an employee of the OAG. For example, Jeffrey Baxter, a Senior Deputy Attorney General at the OAG, is a common recipient of all of the emails sent from Justice Eakin's personal account which we reviewed.

a) Emails sent by Justice Eakin

The CD-ROM of September 28, 2015, contains 157 emails from the "John Smith" account going to approximately twenty seven (27) recipients.³ Most of the emails were sent to a much smaller group of acquaintances. All of the emails were sent to, copied to, or received from Jeffrey Baxter, an employee at the OAG.⁴

The vast majority of the emails that Justice Eakin sent relate to social activities involving a small group. For example, many concern planning, participating in and subsequently talking about an annual golf outing, most containing unremarkable comments discussing their logistics and describing related activities. Other emails among this group involve little more than discussions about fantasy football and fishing trips.

None of the emails sent by Justice Eakin relate, refer to, discuss, or even mention any cases before the Court, any business of the Court or any matters involving the judiciary. Nor does Justice Eakin express personal views about legal or political matters.⁵

Our review determined that none of the emails sent by Justice Eakin contained pornographic materials. Justice Eakin forwarded a joke that featured a photo of a woman changing her bikini top that revealed a view of her breasts. That email would most likely not be characterized as "pornographic" according to contemporary

³ Some recipients of the 157 emails were identified by name, while some were identified only by email address. Therefore, there may be fewer than 27 recipients if some email addresses which did not display a name actually belonged to individuals who were specifically named.

⁴ Indeed, the inclusion of Mr. Baxter on the emails is how they came to be on the OAG server and, therefore, furnished by the Attorney General.

⁵ One email from Jeffrey Baxter sought advice about running for office, to which Justice Eakin gave a general response, made no promises, and did not get involved in the political process.

community standards. It was sent to three (3) members of the small golf group. As described more fully below, Justice Eakin received many emails with nude women. He replied to the sender of some of these emails. On no occasion did we find an email in which Justice Eakin objected to receiving such emails.

Justice Eakin forwarded multiple emails that were insensitive, chauvinistic and offensive to women. An email dated July 6, 2010, was particularly insensitive toward women. That email contained a joke about spousal abuse in which a battered wife reported that her abusive husband “beats me to a pulp” every time he came home drunk. The doctor’s advice was to swish tea in her mouth when the husband arrived home. After the husband stopped beating his wife, the “punch line” was “You see how much keeping your mouth shut helps.”⁶

Justice Eakin sent or forwarded other emails that are offensive to women. For example, on March 29, 2010, he forwarded a joke entitled “Why I failed 4th grade,” consisting of a photograph of a young boy in a classroom with his female teacher, with captions of the teacher saying “So—an abstract noun is something you can think of but not touch...can you give me two examples?” The boy replied “Your tits.”

In addition to such jokes, Justice Eakin sent several emails involving male banter about trips to strip clubs while on the annual golf outings. These conversations included inappropriate and chauvinistic statements. Justice Eakin also engaged in an exchange with Jeffrey Baxter containing inappropriate sexual innuendo about specific women known to both men.

A review of the emails sent from Justice Eakin’s account revealed nothing that can be characterized as racist, homophobic or otherwise discriminatory toward any group (other than the gender-related issues previously discussed).

b) Emails received by Justice Eakin

Among the materials provided on September 28, 2015, 786 emails were received at the “John Smith” email account. An additional 12 were on the October 20, 2015 Disk. As an initial matter, it is impossible to determine whether Justice

⁶ This email was highlighted by the Attorney General in a press conference and was described in media reports.

Eakin read or even opened any of the emails that were received.⁷ For purposes of this Report, however, we have assumed that Justice Eakin was aware of the emails that he received in the “John Smith” account.

Many of those emails involved large groups of “blast” recipients. In such instances Justice Eakin was one recipient among many — often dozens — recipients. Many of the emails received by him were from members of the relatively small social circle which was described above.

A review of the emails sent to Justice Eakin reveals none relating to, referring to, discussing, or even mentioning any matters before the Court, any business of the Court or any aspect of the judiciary. There are no requests for favors, influence or any other communication of a similar nature. Moreover, most of the emails that Justice Eakin received were not individually addressed to him or were not directed to him alone. Rather, they were either “blast” emails forwarding impersonal materials such as jokes or were group emails involving his social circle.

The CD-ROM of September 28, 2015, contains several emails with photographs of topless or less frequently completely nude women. Most of these were included in the context of jokes or other attempts at adult humor. They were forwarded to groups of recipients, rather than being addressed to Justice Eakin alone. None of the emails display any sexual act, graphic depiction of genitals or any contact with genitals. It is questionable as to whether these materials can be classified as “pornographic” under contemporary standards. The definition of pornography is elusive and can vary widely from one person to the next. To use a more commonly understood standard, none of the materials (with the exception of one described below) would warrant above an “R” rating from the Motion Picture Association of America.

There is an email on the CD-ROM of October 20, 2015, containing a video of what appears to be sexual intercourse.⁸ The camera angle and the physiology of the participants make it impossible to tell whether there was any actual penetration. Rather, only the male’s bare buttocks is readily evident in the clip. Although this email was included on the CD-ROM of September 28, 2015, the attachment was unreadable while the later CD-ROM had a functioning attachment. This email was

⁷ Again, the emails submitted by the OAG are only available for review because an OAG employee was either the sender, recipient or co-recipient of emails from or to the “John Smith” account.

⁸ The email was labeled “FW Mission Impossible.”

received by Justice Eakin. There is no indication from the materials that we reviewed that he forwarded it after receipt. The content of this video constitutes pornography under contemporary standards.

Aside from emails containing nudity, Justice Eakin received a substantial number of emails with jokes which are racially insensitive and disparaging of women and other groups. Except as previously noted, there is no indication that these purported jokes were requested, solicited, commented upon or forwarded by Justice Eakin. However, emails of this kind continued to be received throughout the period covered by the emails which are currently under review.⁹

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

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

These illustrations represent the kind of offensive emails that Justice Eakin received. As set forth in our analysis below, the Judicial Conduct Board is well suited to examine these emails along with the ones that he sent—both standing alone as individual examples of his conduct and as a group and how they relate to each other

⁹ It is apt to note that on a proportional basis more of these jokes are contained in the 2008 to 2012 folder than in the 2012 to the present folder.

as a whole. The Judicial Conduct Board is equipped to investigate the context of these emails and to expand an inquiry beyond the emails themselves. The Judicial Conduct Board is, therefore, best suited to assess whether these emails and other conduct that it may discover violate applicable laws, Canons or Rules.

F. ANALYSIS

After thoroughly reviewing the emails submitted with the Attorney General's September 28, 2015, letter and considering the applicable Canons and Rules of Judicial Conduct as well as the AOPC Technology Resources Usage Policy, it is our opinion that there has been no conduct which would constitute the type of extraordinary circumstances to warrant the exercise of the Court's supervisory authority to take immediate independent disciplinary action against Justice Eakin as a result of the emails that we have reviewed. To the contrary, Special Counsel recommends that the Court should permit the investigatory and disciplinary apparatus set forth at Article V, §18 to run its course.

This determination is not an endorsement of the content of the emails that are contained in Justice Eakin's "John Smith" account. To the contrary, many of those emails are offensive, tasteless, insensitive, juvenile and repugnant to reasonable sensibilities. They raise legitimate and substantial questions whether they fall within conduct proscribed by the Canons and Rules of Conduct. That determination, however, should be made pursuant to the process set forth by Article V, §18 of the Pennsylvania Constitution.

It is our opinion that none of the emails reveal conduct by Justice Eakin that would warrant immediate action by the Court. An investigation by the Judicial Conduct Board may, however, determine whether applying the Canons and Rules to these facts warrants a finding of misconduct. The Judicial Conduct Board is well suited to undertake such an investigation and to make such a determination. We recommend, therefore, that the Court permit the Judicial Conduct Board to proceed on this matter pursuant to the ordinary procedures set forth in Article V, §18 of the Constitution.

- 1) Special Counsel reviewed the emails for the purpose of recommending whether they evidence extraordinary circumstances which warrant the exercise of the Court's supervisory authority.**

It was neither the role nor the competence of Special Counsel to opine whether Justice Eakin's emails constitute a violation of the applicable Canons and Rules of Judicial Conduct. Indeed, Special Counsel is not equipped with the tools needed to conduct such an investigation, such as subpoena power. Rather, we limited our consideration to examining materials submitted by the Attorney General to determine whether they reflect conduct which could constitute extraordinary circumstances that would warrant the Court taking immediate action under its supervisory powers.

In In re Magisterial District Judge Mark A. Bruno, 101 A.3d 635 (Pa. 2014), the Court explained that the creation of the Judicial Conduct Board and the Court of Judicial Discipline by Article V, §18 of the Pennsylvania Constitution did not divest the Court of its supervisory authority over the Unified Judicial System pursuant to its King's Bench powers. This authority includes the power to investigate, suspend and sanction a jurist. However, the Court in Bruno explained that just because it possesses that power does not mean that it will or should exercise that power. Such power should not be wielded lightly. Rather, it is only warranted in extraordinary circumstances where immediate action is necessary. In ordinary matters, the Court will defer to the entities that were created under Article V, §18. Accordingly, this is the category of matter that should be reviewed and determined by the Judicial Conduct Board.

2) Nothing in the emails reveals illegal activity or conduct that could undermine the sanctity of the judicial process.

In assessing whether Justice Eakin's emails give rise to a finding of extraordinary circumstances so as to warrant the immediate exercise of the Court's supervisory authority to further investigate, suspend or otherwise sanction him, we first looked to whether any of the materials suggested a crime or other conduct undermining the sanctity of the judicial process.

Our thorough review of the materials revealed nothing that could even remotely be viewed as a violation of any federal or state law. Moreover, none of the materials rose to the level of obscenity, and none indicated any attempts to garner favor with Justice Eakin or otherwise influence his behavior as a Supreme Court Justice.

None of the emails that we reviewed indicated behavior suggesting that the sanctity of the judicial process had been compromised. There was no discussion involving the Court's business. There were no discussions of cases pending before

the Court or of cases that were likely to come before the Court. Indeed, there were no discussions of legal issues at all.

3) The Pre-July 2014 Canons of Judicial Conduct apply to Justice Eakin’s conduct in sending and receiving the emails in question.

In addition to determining whether the emails involved a violation of applicable law, we examined whether there were possible violations of the Canons and Rules of Judicial Conduct that may be deemed to constitute extraordinary circumstances as to warrant the Court’s immediate supervisory review.

We observe that the governing authority for our examination of Justice Eakin’s conduct vis-à-vis these emails are the Canons of Judicial Conduct as they existed at the time of the conduct. The current Rules of Judicial Conduct, which became effective on July 1, 2014, constitute a sufficient departure from prior Canons as to constitute a new regimen of authority, rather than merely interpreting the existing Canons. Further, the absence of reported decisions under the prior Canons cannot support a finding that the earlier Canons were already understood to implicitly encompass the Rules, which were only explicitly adopted in 2014.

The Canons of Judicial Conduct that may be implicated by the “John Smith” emails are Canon 1 and Canon 2, which state in relevant part:

Canon 1. Judges should uphold the integrity and independence of the judiciary.

An independent and honorable judiciary is indispensable to justice in our society. Judges should participate in establishing, maintaining, and enforcing, and should themselves observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2. Judges should avoid impropriety and the appearance of impropriety in all their activities.

* * *

B. 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.

The official note to Canon 2 stated in relevant part:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. Judges must avoid all impropriety and appearance of impropriety. They must expect to be the subject of constant public scrutiny. They must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

These Canons represent the “letter of the law” for Pennsylvania judges during the time frame of the personal emails to and from Justice Eakin that we have reviewed. It is possible that the Judicial Conduct Board, in light of its familiarity with the Canons and Rules as they are interpreted and applied, may conclude that the pre-2014 Canons implicitly incorporated concepts that were later expressly enshrined in the 2014 Rules and comments thereto. That is a matter for the Judicial Conduct Board, and it is our recommendation that the Court permit the Board to exercise its particular expertise in interpreting the Canons and Rules in this regard.

4) Analogous federal disciplinary matters are instructive in analyzing Justice Eakin’s conduct.

There are no reported cases from this Commonwealth applying these Canons to a situation remotely similar to this one. However, two federal disciplinary proceedings from other jurisdictions address analogous conduct under substantially similar canons of conduct.¹⁰ We reviewed these similar proceedings to assess whether Justice Eakin’s conduct could give rise to a finding that extraordinary circumstances exist so as to warrant the Court taking immediate action or whether it should be left to the ordinary constitutional processes under Article V, §18.

In In re: Complaint of Judicial Misconduct (Kozinski), J.C. No. 03-08-90050 (June 5, 2009), the Judicial Council of the Third Circuit¹¹ investigated allegations of misconduct of Ninth Circuit Chief Judge Alex Kozinski regarding pornographic and

¹⁰ The pre-2014 Canons of Judicial Conduct were substantially similar to the ABA Model Canons of Judicial Conduct, which were in turn substantially enacted as the Federal Canons of Judicial Conduct.

¹¹ Because Judge Kozinski was and is a member of the Court of Appeals for the Ninth Circuit, his disciplinary proceeding was transferred to the Judicial Counsel for the Third Circuit.

other offensive files which he posted onto an internet site, "<http://alex.kozinski.com>."

The Judicial Council's opinion offers a brief description of some of the materials that Judge Kozinski posted to the website including "a photo of naked women on all fours painted to look like cows, a video of a half-dressed man cavorting with a sexually aroused farm animal, and a graphic step-by-step pictorial in which a woman is seen shaving her public hair." (Kozinski Opinion, p. 4). Judge Kozinski told investigators that he did not believe that the material was publicly available but rather that he intended only on using the website as a storage area for emails and other materials that he received or found. Judge Kozinski admitted, however, to sharing some materials from the site with friends and that prior to the website becoming public he was aware that it was accessed on at least one occasion.

Judge Kozinski's website came to public light when a California attorney told the *Los Angeles Times* about it. The *Times* ran a story about the website coinciding with Judge Kozinski sitting by designation as a trial judge over an obscenity trial. Judge Kozinski immediately declared a mistrial, recused himself, and self-reported to the Judicial Council.

The Judicial Council's analysis of Judge Kozinski's conduct recognized that "[t]he identified conduct at the core of this Complaint consists of the possession of sexually explicit offensive material combined with its public accessibility." Further, the Council observed that merely because conduct is performed in the judge's "private" sphere of life and is legally defensible does not mean that it is not "judicially imprudent." Specifically, the Council cited Canon 2(A) of the Federal Canons of Judicial Conduct, which provides that "[a] judge...should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."¹² Conversely, the Council recognized that, while it is unquestionable that private, extra-judicial activities may violate canons of conduct, examination of such conduct must be balanced against the "legitimate zone of privacy for judges." (Kozinski p. 29).

In making its determination, the Council found that Judge Kozinski did not intend for the materials on his website to be publically available. (Kozinski p. 30). However, the Council observed:

¹² This provision is substantially the same as Pennsylvania Canon 2(B), which was in effect at the time of emails in question.

But possession of controversial private material such as that at issue here carries with it the peril of unwanted disclosure. As noted, the conduct at issue here extends beyond the purely private possession of controversial material. The Judge became aware over time that, despite his initial intent, members of the public could access material in his [website] because of the Internet accessibility of the [website].

(Kozinski p. 30). The Council concluded:

Imprudent extra-judicial conduct that becomes public may result in gratuitously offending many people and invite public controversy, which in turn may undermine public confidence in the judiciary. The Judge's possession of sexually offensive material combined with his carelessness in failing to safeguard his sphere of privacy was judicially imprudent.

(Kozinski p. 31).

As to the sanction to impose on Judge Kozinski, the Council held:

The Judge explained and admitted his error; apologized for it, recognizing its impact on the judiciary; and committed to changing his conduct to avoid any recurrence of the error. The offending material has been removed and will be destroyed. The Judge's acknowledgement of responsibility combined with the corrective action he has already completed or has committed to pursue and his apology, along with our admonishment, made public in this opinion, properly remedy the problems raised by the complaint. Accordingly, this proceeding is properly concluded. We find that all of the purposes of the judicial misconduct provisions are fully served.

(Kozinski p. 31). Thus, the Council meted out no further punishment or reprimand to Judge Kozinski.

Another federal disciplinary proceeding concerned U.S. District Judge Richard Cebull (of the District of Montana). The Opinion of the Judicial Council of the Ninth Circuit is docketed at C.C.D. No. 13-01 (January 17, 2104). The Cebull

proceeding was premised on that Judge forwarding racist, sexist, homophobic and similarly insensitive emails from his judicial email account.¹³

In February, 2012, Judge Cebull forwarded a racist joke about President Obama to six acquaintances, and the email ended up being forwarded to a newspaper, which published it, attracting wide reporting in local and national media. An investigation of Judge Cebull's account determined that he had sent hundreds of emails consisting of cartoons, articles, video links and jokes "related to race, politics, religion, gender, sexual orientation, and politically sensitive issues." (Cebull p. 5). The Judicial Council described the nature of those emails:

The majority of the emails were political in nature. Whether they were cast as jokes or serious commentary, the emails showed disdain and disrespect for liberal political leaders. A significant number of emails were race related. Whether cast as jokes or serious commentary, the emails showed disdain and disrespect for African Americans, Native Americans and Hispanics, especially those who are not in the United States legally. A similarly significant number of emails related to religion and showed disdain for certain faiths. Approximately the same number of emails concerned women and/or sexual topics and were disparaging of women. A few emails contained inappropriate jokes relating to sexual orientation. Finally a large number of emails related to pending legislation or an issue that could come before the court, such as immigration, gun control, civil rights, health care or environmental matters.

(Cebull, pp. 5-6).

The Judicial Council determined that Judge Cebull's conduct violated Canon 1, Canon 2 and Canon 5 of the Code of Judicial Conduct. Specifically, the Council held that Judge Cebull's conduct "reflects negatively on Judge Cebull and on the judiciary and undermines the public trust and confidence in the Judiciary." (Cebull, p. 13). Further, the Council observed that "[e]ven if Judge Cebull intended his emails to remain private, he was indifferent to their potential negative impact." (Cebull, p. 14).

¹³ Judge Cebull told investigators that his federal judicial email account was the only account that he had.

As sanctions, the Council publicly reprimanded Judge Cebull. Further, it ordered that no new cases be assigned to him for a 180-day period during which the Judge was ordered to “complete training in judicial ethics, racial awareness and elimination of bias, including unconscious or latent bias, before his suspension is terminated.” (Cebull, p. 16). Further, Judge Cebull was ordered to undertake public outreach “to help sensitize the legal community and the community at large in order to avoid repetition of such misconduct in the future.” (Id.). The Council also required Judge Cebull to issue an apology to be approved by the Council. (Id.).

Shortly after this determination of the Council was pronounced, Judge Cebull decided to retire.

These two cases are instructive to our charge. First, they provide real-world applications of analogous Canons of conduct in situations similar to the one here. They provide insight into how two federal disciplinary tribunals have viewed the private conduct of judges that relate to electronic activity and communications. On a procedural level, they show the utility of a full investigation according to customary channels of investigation and judicial discipline. Pennsylvania’s Judicial Conduct Board is similarly well suited to conduct such an inquiry into Justice Eakin’s conduct. Thus, we recommend that the Court permit the Judicial Conduct Board investigation to run its course.

5) Emails that Justice Eakin sent do not evidence extraordinary circumstances warranting immediate review by the Court.

In light of the plain language of the Canons of Judicial Conduct in place at the time that Justice Eakin sent the emails under review and in light of the substantially similar canons to analogous situations, it is our opinion that the emails sent by Justice Eakin did not constitute actions which were so extraordinary as to warrant the exercise of the Court’s extraordinary supervisory powers. We do not, however, opine whether there may be violations of Canons or Rules — only that the Judicial Conduct Board is well equipped to address that question. Accordingly, we recommend that the Court permit the Board to fully investigate that question.

First, to reiterate the description above, it is important to note that Justice Eakin did not send any emails which in any way concerned the business of the Court, the judiciary, issues pending or likely to be before the Courts and did not take public positions on political matters. Nor are there any communications where Justice Eakin offers, indicates or even implies any professional partiality or favoritism.

As the federal Judicial Councils have aptly determined, however, purely private and social communications are not insulated from scrutiny. This is particularly true if disclosure of the materials—advertent or inadvertent—would serve to bring disrepute to the jurist or the judicial system.

As described above, Justice Eakin sent no emails which were pornographic, racist or homophobic or that denigrated any religion. We do recognize, however, that certain jokes that Justice Eakin forwarded are particularly insensitive to women and chauvinistic. Of concern to us are one email forwarding a purported joke making light of spousal abuse and a chain of emails with sexual innuendo about women apparently known to the parties. These emails are troubling.

A key distinction between Justice Eakin’s situation and those of Judge Kozinski and Judge Cebull is the fact that Justice Eakin did not have a website or email account in his own name and did not use a judicial email account. Justice Eakin’s personal emails were sent from a pseudonymous email address. Indeed, neither the pseudonym “John Smith” nor the email address itself “wap092001@yahoo.com” give any indication that Justice Eakin was involved. Thus, a member of the public viewing sent or received emails would be unable to associate the content of the email with a member of the judiciary.

This is a layer of insulation that was not present in the federal Judicial Council matters - a layer of insulation that may be significant. As the Kozinski opinion points out, the scrutiny of a jurist’s personal life must take into account the reasonable zone of privacy to which a jurist is entitled. Conversely, a jurist must balance the right to maintain a reasonable zone of privacy with the “constant public scrutiny” contemplated by the comment to pre-revision Canon 2. In this case, however, we question whether there could be a reasonable expectation of “insulation” from public disclosure and embarrassment of both the Justice and the judiciary because the emails that we reviewed were all sent to or received from a government server which the OAG maintained.

Nevertheless, we believe that Justice Eakin’s decision to conduct personal social communications with friends via a personal email account on a commercial email platform (yahoo.com) which is not attributable to him by name or as a jurist presents a more difficult question than the one presented in the federal cases as to whether and to what extent that any Canon or Rule may have been violated. The Judicial Conduct Board is well situated to review this issue in the light of the Pennsylvania Canons and Rules and to make an appropriate determination.

Ultimately, we do not believe that the emails sent by Justice Eakin give rise to the type of extraordinary circumstances which would warrant the Court's exercise of its supervisory authority. However, the conduct is well suited for review by the Judicial Conduct Board as to whether it violated the applicable Canons and Rules of Judicial Conduct. We further recommend that the Court permit the Judicial Conduct Board to undertake a full review of Justice Eakin's conduct under the process set forth by our Constitution.

In reviewing Justice Eakin's conduct, the Judicial Conduct Board will be able to examine each email and determine whether it constitutes conduct which violated the Canons and Rules of Judicial Conduct. The Judicial Conduct Board is best equipped to address ethical and practical questions that are beyond the scope of our analysis. For example, a question may arise whether a jurist's participation in a network of email exchanges — both sending and receiving — that regularly contain inappropriate material among the same group of individuals that includes attorneys, other judges and other public officials may demonstrate relationships that are unduly close, unseemly or otherwise inappropriate. This is the type of an examination that the Judicial Conduct Board is well suited to undertake.

Finally, the instant situation is not comparable to the Court's exercise of its supervisory powers when it immediately suspended former Justice McCaffery. A review of the *Per Curiam* Order that was issued in that matter reveals that the Court acted as a result of allegations that were far more troubling than those that we encountered in reviewing Justice Eakin's emails. There were five reasons for the immediate suspension of former Justice McCaffery: 1) allegations that the former Justice improperly contacted a traffic-court official regarding a citation issued to his wife; 2) authorizing his wife to accept hundreds of thousands of dollars in referral fees while serving as the former Justice's administrative assistant; 3) allegations that the former Justice attempted to influence judicial assignments in the Court of Common Pleas of Philadelphia outside of the scope of his official duties; 4) exchanging "hundreds of sexually explicit" emails with members of the OAG; and 5) allegedly attempting to "importune[d]" a member of the Court. *See In re: Mr. Justice Seamus P. McCaffery of the Supreme Court of Pennsylvania*, Judicial Administration Docket, No 430 (October 20, 2014). The issues involving Justice McCaffery were different in magnitude than those relating to the instant inquiry into Justice Eakin's emails. Indeed, in other circumstance where the Court has suspended a jurist it was either after criminal proceedings were initiated or the jurist refused to comply with administrative orders.

Special Counsel does not believe that this case presents the same kind of extraordinary circumstance that warrant immediate action. Rather, the processes set forth at Article V, §18 of the Pennsylvania Constitution are well-suited to examining and addressing Justice Eakin’s conduct.¹⁴

6) The issue whether Justice Eakin violated the Canons of Judicial Conduct regarding emails that he received raises questions that are best left to the Judicial Conduct Board.

The emails that Justice Eakin received in his personal “John Smith” account pose more difficult questions - both as to the content of those emails and whether there should be culpability for receiving those emails. We believe that these issues are best suited to development according to the apparatus for such a review under Article V, §18 of the Constitution.

Many of the emails that Justice Eakin received contained material that are readily described as sexist, racist, homophobic, and otherwise offensive—indeed repugnant – in the eyes of most people of the Commonwealth. Were these emails sent by Justice Eakin, they could be precariously close to the Cebull case.¹⁵ In addition, there could be no question that in such a scenario they could constitute a violation of the currently applicable Rules of Judicial Conduct. The scenario that this Report analyzes is, however, different in two primary aspects.

First, the emails in question were received by, rather than sent by, Justice Eakin. Also, the so-called jokes appear to be unsolicited by Justice Eakin. We are unable to find any analogous cases that involve the culpability of a jurist for *receiving* inappropriate materials. Many of the inappropriate emails were forwarded to Justice Eakin as one recipient of many on a “blast” email. Even for those that were limited to a smaller group of social friends, there does not currently exist a framework by which to assess whether materials received *by* a jurist may impute culpability *to* the jurist. On a related note, we find no authority placing an affirmative obligation upon a jurist who receives inappropriate material 1) to request

¹⁴ It should be noted that Justice Todd dissented from the Court’s immediate exercise of supervisory authority stating that “[t]his is precisely the type of conflict — perhaps the prototypical conflict — for which the citizens of our Commonwealth, in response to a similar controversy over two decades ago, constitutionally created the independent Judicial Conduct Board and the Court of Judicial Discipline.” (*In re: McCaffery*, (Todd; dissenting), p. 1).

¹⁵ We are aware that, unlike Judge Cebull, Justice Eakin used a pseudonymous account that did not reveal him as a recipient of offensive emails. The Judicial Conduct Board is the proper entity to judge how such an action should be viewed.

to be removed from the distribution list or 2) to undertake other action vis-à-vis the sender.¹⁶

Our opinion that Justice Eakin's conduct *vis-à-vis* the emails that he received is factually distinguishable from the analogous federal cases, which were previously addressed, should not be viewed as a suggestion that such conduct is acceptable or that it does not run afoul of applicable Rules and Canons of Judicial Conduct. These emails involve somber questions that warrant a full and thorough investigation. Indeed, the Judicial Conduct Board is best suited to view each email and place it in its proper context in order to determine whether Justice Eakin engaged in conduct which violated applicable Canons and Rules.

Further, the emails that he received should be examined not only individually but also as part of a larger pattern of conduct. Indeed, the fact that the emails were not received sporadically but were received on a regular basis over a period of years merits further analysis. The Judicial Conduct Board is best able to determine whether Justice Eakin opened and read these materials and whether he made any effort to be removed from the distribution list of offensive materials. As a fundamental matter, the Judicial Conduct Board can determine the ethical responsibility of a jurist who regularly receives emails with contents that, if sent by the jurist, would likely constitute a violation of applicable Canons and Rules of Conduct. At the very least, submission of this issue to the Judicial Conduct Board should serve as an admonition that jurists should not send or be part of networks that regularly exchange insensitive emails or similar materials because such conduct could cast both the jurist and the judiciary into disrepute or could cause a reasonable person to question the impartiality of a judge and the judicial system.

G. CONCLUSION

The Attorney General has forwarded the CD-ROM of September 28, 2015, containing the emails in question to the Judicial Conduct Board. The CD-ROM of October 20, 2015, was also sent to the Board. It is our understanding that the Judicial Conduct Board is currently investigating Justice Eakin's conduct in sending and receiving the emails in question.

As the Court recognized in In re Magisterial District Judge Mark A. Bruno, 101A.3d 635 (Pa. 2014), the Judicial Conduct Board has primary, but not exclusive,

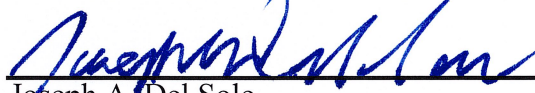
¹⁶ This does not apply to situations where for example the material is illegal or an email makes an unethical request of a jurist. It is limited to the materials under review.

responsibility to investigate allegations of misconduct against a Pennsylvania jurist pursuant to Article V, §18 of the Constitution. As stated in Bruno, it is the Judicial Conduct Board, not the Court, which is charged with conducting such investigations in ordinary circumstances and charged with determining whether further proceedings may be warranted. Also, the Judicial Conduct Board has special expertise in applying the Canons and Rules of Judicial Conduct and is authorized to undertake a broader investigation and to create a factual record beyond the emails themselves. To the extent that it does so, a more extensive record could provide the Board with greater insight than can be determined from the review of the emails alone.

In light of our finding that the materials that we reviewed do not constitute evidence of extraordinary circumstances warranting the immediate exercise of the Court's extraordinary supervisory powers, this situation should be referred to the Judicial Conduct Board for further proceedings independent of the Court. It is our recommendation, therefore, that the Court should refrain from invoking its immediate supervisory powers at this time but rather should allow the investigation of Justice Eakin's conduct to proceed pursuant to the provisions of Article V, §18 of the Pennsylvania Constitution.

Respectfully submitted,

DEL SOLE CAVANAUGH STROYD LLC



Joseph A. Del Sole
PA ID No. 10679
The Waterfront Building
200 First Avenue, Suite 300
Pittsburgh, PA 15222
Tel: (412) 261-2393
Fax: (412) 261-2110