

SEP 25 2020

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE COURT OF JUDICIAL DISCIPLINE
OF PENNSYLVANIA

IN RE:

Judge Mark V. Tranquilli :
Court of Common Pleas : 4 JD 2020
5th Judicial District :
Allegheny County :

**MOTION IN LIMINE OF JUDICIAL CONDUCT BOARD AND MEMORANDUM OF
LAW**

AND NOW, this 25th day of September, 2020, comes the Judicial Conduct Board of the Commonwealth of Pennsylvania (Board) by and through undersigned counsel, and files this Motion in Limine seeking to deny admission of evidence of the results of a polygraph examination taken previously by Judge Tranquilli and the testimony of Judge Tranquilli's proffered expert regarding that polygraph examination:

1. On August 12, 2020, the Board filed a six-count Board Complaint alleging that Judge Tranquilli committed judicial misconduct by engaging in the following conduct: (1) mocking and harassing litigants before their lawyers during a custody conciliation conference; (2) referring to a juror in a criminal trial by a racial epithet and stereotyping language; and (3) belittling, demeaning, and threatening criminal defendants appearing before him at sentencing with inappropriate language.
2. To date, Judge Tranquilli has neither filed an Answer nor an Omnibus Motion in response to the Board Complaint.
3. On September 18, 2020, Conference Judge John Foradora conducted a status conference with counsel for the parties and counsel for the Court.

4. At that status conference, counsel for Judge Tranquilli proffered that Judge Tranquilli would seek to admit the testimony of an expert in the field of polygraph examinations who would testify regarding a polygraph examination administered to Judge Tranquilli by the proffered expert during the Board's investigation of his conduct.
5. The results of polygraph examinations and the testimony of experts regarding same are generally inadmissible in criminal and attorney disciplinary proceedings in this Commonwealth due to the inherent unreliability of polygraph examinations. **See, e.g., Commonwealth v. Chester**, 587 A.2d 1367, 1376 (Pa. 1991) (holding co-defendant's refusal to answer polygraph examination question whether he killed victim inadmissible at trial); **see also ODC v. Wittmaack**, 522 A.2d 522, 530 (Pa. 1987) (holding polygraph examination results inadmissible at attorney disciplinary hearing).
6. The exceptions to the aforementioned rule do not apply in the present case, and the Board will provide argument regarding this conclusion in its attached Memorandum of Law.

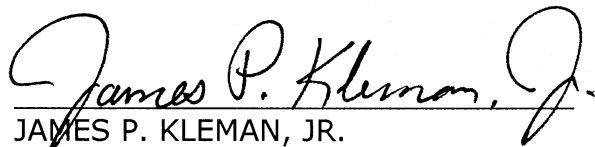
WHEREFORE, based upon the averments set forth above and the arguments in the Board's supporting Memorandum, incorporated herein by reference as though set forth in full, the Board respectfully requests that this Honorable Court DENY the admission of the testimony of Judge Tranquilli's proffered expert witness and the report to which the expert would testify and to order the redaction of any reference to a polygraph examination from any other documents to be entered into evidence at trial.

Respectfully submitted,

RICHARD W. LONG
Chief Counsel

September 25, 2020

By:



JAMES P. KLEMAN, JR.
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**COMMONWEALTH OF PENNSYLVANIA
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IN RE:

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**MEMORANDUM OF JUDICIAL CONDUCT BOARD REGARDING MOTION IN
LIMINE**

I. ARGUMENT

Since 1956, the Supreme Court of Pennsylvania has recognized that polygraph examinations are inherently unreliable. **See Commonwealth v. Saunders**, 125 A.2d 442, 445-46 (Pa. 1956) (“Since it is uniformly held that such a test is not judicially acceptable...it is obvious that neither a professed willingness nor a refusal to submit to such a test should be admitted.”). Thus, it has long been the rule that the results of a polygraph examination are not admissible in Pennsylvania courts at the guilt phase of a criminal trial, **see Commonwealth v. Brooks**, 309 A.2d 732, 733-34 (Pa. 1975); at sentencing, **see Commonwealth v. Puchalski**, 456 A.2d 569, 573 (Pa. Super. 1983); or to establish the violation of a rule of conduct by an attorney, **see ODC v. Wittmaack**, 522 A.2d at 530. Thus, Judge Tranquilli’s proffered expert and the report to which he would testify regarding Judge Tranquilli’s polygraph examination are presumptively inadmissible. **Brooks**, 309 A.2d at 733-34; **see also Wittmaack**, 522 A.2d at 530. Indeed, **Wittmaack** is particularly illuminating, as, in that case, the Supreme Court forbade the respondent-attorney from introducing the results of a polygraph examination in his own defense after the Office of Disciplinary Counsel charged the respondent-attorney with violating the then-extant Disciplinary Rules for, *inter alia*, forging a document and then lying about it under oath. **Id.**, 522 A.2d at 529-30. As is the case with proceedings in this Court, attorney discipline cases are proven by the “clear and convincing” evidence standard, **Id.**, 522 A.2d at 527, and thus, **Wittmaack’s** treatment of the polygraph issue provides the most applicable precedent for this Court to follow in this case. Accordingly, based upon **Wittmaack**, this Court should deny admission of the testimony of Judge Tranquilli’s proffered expert and the corresponding polygraph report. **Id.**, 522 A.2d at 529-30.

However, as with most broad rules, there are exceptions to the general rule of the inadmissibility of polygraph evidence, and these are of relatively recent vintage.

In **Commonwealth v. A.R.**, 80 A.3d 1180, 1182-84 (Pa. 2013), the Supreme Court held that, in the context of a violation of probation hearing for a sex offender, the results of a therapeutic polygraph examination could be admitted, not for the truth of proving whether appellant obtained sexual gratification from aberrant behavior (which had already been decided against appellant by the factfinder at trial),

but to help explain the program's actions and treatment procedures and why the appellant was dismissed from treatment.

Additionally, in *In re S.H.*, 96 A.3d 448 (Pa. Commw. 2014), the Commonwealth Court reviewed a father's challenge to the adjudication of the Secretary of Public Welfare that denied his request to expunge an "indicated" report of the sexual abuse of his son from the ChildLine Registry. In that case, the Commonwealth Court concluded that, in addition to other discretionary errors that prejudiced the appellant, it was error for the administrative law judge not to consider as evidence his successful "passing" of a polygraph by the appellant and the failure of a polygraph administered to the child's mother (one of his accusers). *Id.*, 96 A.3d at 461-62. At the administrative hearing level, the administrative law judge was unsure what to do with the proffered polygraph evidence and did not consider it, noting that such evidence is generally inadmissible. *Id.*, at 451. However, the administrative law judge marked the polygraph evidence and entered it into the record for appellate review. *Id.* The Commonwealth Court concluded that the administrative law judge erred in refusing to consider the polygraph evidence for the following reasons: (1) the "rules of evidence are relaxed in administrative proceedings;" and (2) there was no fixed rule regarding the admissibility of polygraph examinations in administrative proceedings. *Id.*, at 461, *citing A.R.*, 80 A.3d at 1180.

Neither *A.R.* nor *In re S.H.* provide sufficient justification for this Court to depart from the well-entrenched rule of the inadmissibility of polygraph evidence in the present case to permit the testimony of Judge Tranquilli's expert witness or the admission of the polygraph examination report. First, and most importantly, unlike the case in *A.R.*, the ultimate issue of fact demonstrating liability, *i.e.*, whether or not Judge Tranquilli said the things the Board attributes to him in the Board Complaint, has **not** been decided adversely either to Judge Tranquilli or to the Board. *See, e.g., A.R.*, 80 A.3d at 1183 (appellant's refusal to admit his sexual motivation for his behavior reflected a lack of candor that was previously established at trial when the court discredited appellant's testimony and found him guilty of the offense charged). Thus, the admission of the testimony of the expert and the corresponding report in this case could serve only to give to the expert (and the report) this Court's fact-finding and credibility-weighting functions, which is improper. *See, e.g., Kozak v. Struth*, 531 A.2d 420, 422 (Pa. 1987) ("[E]xperts have not been permitted to speak generally to the ultimate issue nor to give an opinion based on conflicting evidence without specifying which version they accept. These principles have been designed to permit the expert to enlighten the jury with his special skill and knowledge but leave the determination of the ultimate issue for the jury after it evaluates credibility.").

In re S.H. is inapposite for the simple reason that proceedings in this Court are not mere "administrative proceedings" with "relaxed" adherence to the Rules of Evidence. The Constitution of this Commonwealth is quite clear that this Court is "a court of record," and the decisions of this Court are to be made in accordance with "the principles of due process and **the law of evidence.**" *See* Pa.Const., Art. V, § 18(b)(5) (emphasis added). Obviously, the term "law of evidence" includes both the Rules of Evidence, which, unlike "relaxed" administrative proceedings of the type

in ***In re S.H.***, have been steadily and meticulously applied throughout this Court's jurisprudence, as well as the common law of the Commonwealth regarding evidentiary issues, which, but for the limited exceptions previously explained and inapplicable here, routinely excludes the evidence that Judge Tranquilli now seeks to admit on his behalf. ***Brooks***, 309 A.2d at 733-34; **see also *Wittmaack***, 522 A.2d at 530. Therefore, as the testimony of Judge Tranquilli's expert and the polygraph report about which he would testify are presumptively inadmissible and fall within no recognized exception, this Court should deny their admission into evidence. ***Wittmaack***, 522 A.2d at 530.

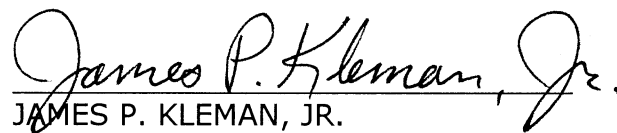
II. CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court forbid the admission of the testimony of Judge Tranquilli's proffered expert witness at trial and the report to which the expert would testify and to order the redaction of any reference to a polygraph examination from any other documents to be entered into evidence at trial.

Respectfully submitted,
RICHARD W. LONG
Chief Counsel

September 25, 2020

By:



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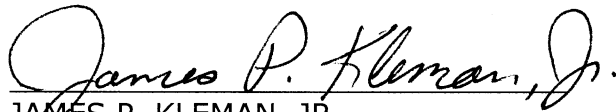
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VERIFICATION

I, James P. Kleman, Jr., Deputy Counsel to the Judicial Conduct Board, verify that the facts set forth in the foregoing Motion and attached Memorandum of Law are true and correct to the best of my knowledge, information, and belief. I understand that the statements made in this Board Complaint are subject to the penalties of 18 Pa.C.S.A. § 4904, regarding unsworn falsification to authorities.

September 25, 2020

By:



JAMES P. KLEMAN, JR.

Deputy Counsel

Pa. Supreme Court ID No. 87637

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Judicial Conduct Board of Pennsylvania

Signature:



Name:

James P. Kleman, Jr.
Deputy Counsel

Attorney No:

87637

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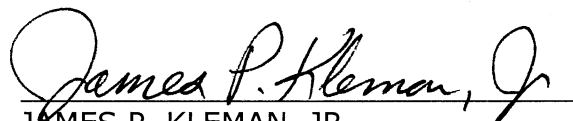
PROOF OF SERVICE

In compliance with Rule 122 of the Court of Judicial Discipline Rules of Procedure, on September 25, 2020, a copy of the Board's Motion and attached Memorandum of Law was sent by UPS Overnight mail to Judge Tranquilli's counsel, John E. Quinn, Esquire, and Matthew Logue, Esquire, at the following address:

John E. Quinn, Esquire
Matthew Logue, Esquire
Quinn Logue LLC
200 First Avenue, 3rd Floor
Pittsburgh, PA 15222-1512

September 25, 2020

By:



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Deputy Counsel

Pa. Supreme Court ID No. 87637

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