

COMMONWEALTH OF PENNSYLVANIA  
COURT OF JUDICIAL DISCIPLINE

IN RE: JUDGE MARISSA J. :  
BRUMBACH :  
MUNICIPAL COURT JUDGE : 2 JD 2022  
1ST JUDICIAL DISTRICT :  
PHILADELPHIA COUNTY :

**RESPONDENT JUDGE MARISSA J. BRUMBACH'S OMNIBUS MOTION**

Respondent, Marissa Brumbach, by and through her undersigned counsel, files this Omnibus Motion pursuant to Pennsylvania Court of Judicial Discipline Rule of Procedure 411 and avers as follows:

**I. Procedural and Factual Background**

1. Since January 1, 2018, Judge Brumbach has served as a judge of the Philadelphia Municipal Court.
2. On June 22, 2022, the Judicial Conduct Board issued Judge Brumbach a Notice of Full Investigation relating to alleged judicial misconduct that purportedly occurred on or about January 6, 2021.
3. On December 14, 2022, the Board filed a Complaint against Judge Brumbach alleging nine counts of judicial misconduct.
4. On that same date, the Board filed a Petition for Relief for Interim Suspension Without Pay.
5. On December 20, 2022, the Court of Judicial Discipline scheduled a hearing on the Board's Petition for January 6, 2023.

6. On December 29, 2022, Judge Brumbach filed an Answer to the Board's Petition

7. On January 5, 2023, Judge Brumbach filed a Memorandum in Opposition to the Board's Petition.

8. On January 12, 2023, following a hearing on January 6, the Court denied the Board's Petition.

9. On January 9, 2023, Judge Brumbach filed a Motion for an Extension of Time to file her Omnibus Motion.

10. On January 11, 2023, the Court granted Judge Brumbach's Motion and ordered her Omnibus Motion be filed by January 30, 2023.

**A. Traffic Court, B Court.**

11. At the time of the alleged conduct, Judge Brumbach was assigned to the Traffic Division B Court ("B Court"). *See* Complaint at ¶ 5.

12. Philadelphia Municipal Court's judges preside over matters in Traffic Division B Court.

13. The judges resolve moving violations, commonly referred to as traffic tickets or citations, occurring within Philadelphia, issued by the Philadelphia Police Department and the Pennsylvania State Police and other police entities.

14. Once issued by Police, the citations are transmitted to Traffic Court where an electronic docket is generated.

15. The electronic docket in Traffic Court is known as ETIMS. *See* N.T., 142-44.
16. Before a case is heard, court staff creates a file folder which includes prints outs of each citation from the electronic docket.
17. Notably, each paper citation is stamped by court staff with the date that the citation is scheduled to be heard approximately two weeks in advance. *See* N.T., at 131; 157.
18. There are times when multiple dates will appear on a citation because a case was, for whatever reason, relisted. *See* N.T. at 161-162.
19. The paper citations are used by the judges to make notations regarding the intended ruling. *See* N.T., at 143-44; 151.
20. The paper citations are not the official docket—the official docket is the Court's ETIMS system. *See* N.T., at 142-144.
21. Cases in Traffic Court are listed in three time slots: 9:00 a.m.; 1:00 p.m.; and 2:30 p.m. *See* Complaint at ¶ 7.
22. As relevant here, there are a number of possible outcomes for any given ticket: for example, guilty plea, not guilty *in absentia*; guilty *in absentia*; prosecutorial withdrawal—where the prosecution decides, for whatever reason to withdraw the ticket; re-listment—where a matter is not ripe for adjudication; and, for the relatively few ticketholders who appear for their hearing, a contested finding of guilty or not guilty.

23. Ticketholders who fail to appear, by operation of law, consent to an *absentia* finding. See Pa.R.Crim.P. 1031; *see also* N.T., 152-53.

24. In these cases, the judge reads the citation to determine whether the probable cause is sufficient to support a finding that the ticketholder is guilty or not guilty of the Vehicle Code sections that were charged. See N.T., 112-13; 127; 129.

25. Under such circumstances, prosecutors do not call any witnesses, nor do they present any testimony from the issuing officer from the Philadelphia Police Department, State Trooper, or another law enforcement officer. See N.T., at 113-114.

26. For all intents and purposes, therefore, for those matters resolved *in absentia*, the determination is made solely upon the judge's review and analysis of the citations. See N.T., at 113-14; 127; 129; *accord Commonwealth v. Koch*, 431 A.2d 1052, 1054 (Pa. Super. 1981).

27. In a contested matter, the ticketholder appears to contest his or her guilt.<sup>1</sup>

28. Notably, not one of the citations at issue was marked straight guilty or not guilty, so as to indicate that the determination was made based upon consideration of the parties' competing positions. See Complaint at ¶ 19; N.T., 112-113.

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<sup>1</sup> The number of individuals who appear to contest tickets is very low—especially after the COVID 19 pandemic.

29. At each time slot, the judge first resolves any citations where the ticketholder appears to contest their guilt so as to not make them wait.

30. For non-contested matters, the District Attorney will notify the Judge of any withdrawals and the Judge then reviews remaining tickets to make the appropriate designations: not guilty *in abstention* or guilty *in abstention*.

31. Judges use the paper citations to make notations consistent with each finding. See N.T., at 143-44; 151.

32. The paper citations are then given to court staff referred to as the “dispositioner” to be formally entered into the docket.

33. Every entry made by a dispositioner into the docket is copied from some form of written instruction, *i.e.* notations on paper citations.

34. The entry by the dispositioner into the docket is the first step required for an adjudication to occur.

35. Following entry, the ETIMS system generates a conviction, a sentence and a judgment as reflected in the docket report. Then—and only then—a Notice of Conviction containing the determination on the citation, the cost and fines imposed constituting the sentence as well as ticketholders appellate rights is generated, docketed and a copy is produced from the docket and mailed to the ticketholder.

36. In short, therefore, without electronic docket entry of court action, a resulting adjudication simply does not and cannot occur.

37. Indeed, without an electronic docket entry, there is no sentence and no appealable final order.<sup>2</sup>

38. Importantly, if the paper citations are never released to the dispositioner, the markings on the paper citations are irrelevant as evidenced by the Board's admission that citations get placed back into "circulation" and can be re-marked and crossed out. *See N.T.*, 37-38.

39. Indeed, that is exactly what happened to the paper citations at issue here. *See N.T.*, 37-38; 161-62; Complaint, Exhibit 75.

40. None of the paper notations referenced by the Board's Complaint were provided to the dispositioner by Judge Brumbach—either directly or indirectly--for entry on January 6, 2022 or January 7, 2022.

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<sup>2</sup> In this regard, Pennsylvania Rule of Criminal Procedure 1037, which specifically relates to appeals from summary convictions in Philadelphia Traffic Court, is instructive, as it provides:

When a defendant appeals after the entry of a guilty plea or a conviction in any Traffic Division summary proceeding, upon the filing of the transcript and other papers by the Traffic Division, the Court of Common Pleas may schedule a status or settlement conference prior to the *de novo* summary trial.

Pa.R.Crim.P. 1037(A). Further underscoring the significance of this rule to the present matter, the Official Comment accompanying that rule explains: This rule was adopted in 2009 to provide the procedures for appeals from the Traffic Division to the Court of Common Pleas of the First Judicial District. Except as provided in this rule, the procedures of Rules 460, 461 and 462, governing appeals for a trial *de novo* in summary cases, shall apply to summary case appeals in the Traffic Division. ***For purposes of this rule, "judgment" means the determination of guilty and any sentence imposed on the defendant.***

Pa.R.Crim.P. 1037, *cmt.*

**B. January 7, 2022**

41. On November 10, 2021, Judge Brumbach informed the President Judge of the Philadelphia Municipal Court, Patrick Dugan, that she would “be attending an event in Florida on January 7, 2022, and unable to preside that day.” *See* N.T., at 21-22; Complaint at ¶ 3.

42. At this time, Judge Brumbach was not yet assigned to *any* courtroom for the month of January. *See* N.T. at 141.

43. In the intervening months, President Judge Dugan did not respond to, or even acknowledge, Judge Brumbach’s email. *See* N.T. at 55; 68.

44. In those same months, Judge Brumbach was assigned to sit in Traffic Court, B Court on January 7, 2022. *See* N.T., at 141.

45. On January 3 and January 4, 2022, President Judge Dugan sent an email to the entire complement of Municipal Court judges indicating that he was experiencing coverage issues that week. *See* N.T., at 62-63; 145.

46. Given these emails, and President Judge Dugan’s lack of response to her own email, Judge Brumbach wanted to ensure that her judicial leave would not burden the administration of the Municipal Court. *See* N.T., at 146.

47. To that end, Judge Brumbach communicated with Donna Sofronski, chief of courtroom operations, and arranged for the District Attorney to review the paper files for all of the cases scheduled on January 7 so that he could determine which cases, if any, he would withdraw. *See* N.T., at 147-48; Complaint at ¶¶ 8-10.

48. After the District Attorney reviewed the file, Judge Brumbach reviewed the papers files and conducted a *preliminary* assessment of the appropriate resolution of each matter, assuming none of the ticketholders showed up to contest their tickets. *See* N.T., at 149; Complaint ¶¶ 11-12.

49. After annotating the relevant papers to reflect her initial inclination, Judge Brumbach then returned the files to Ms. Sofronski on January 6, where they were to remain until the listed cases were called on January 7. *See* N.T., at 176.

50. But January 7 was a snow day and every case scheduled to be heard that day was administratively re-listed. *See* N.T., at 115-16.

51. On January 7, had there not been a snow day, Judge Brumbach *intended* to call court staff at the start of each list time to ascertain whether anybody had appeared to contest their ticket and, in the event one of the individuals contesting their citation had appeared,<sup>3</sup> she *intended* to instruct court staff to re-list those cases to a later date, so as to ensure that their due process rights would be preserved. *See* N.T., at 177-182; Complaint at ¶¶ 23-25.

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<sup>3</sup> In all, 3 ticketholders appeared to contest their citations from those matters on the B Court list from January 7, 2022; but, given that courts were closed that day, their matters were administratively continued to March 2022..



52. The Board Complaint confirms Judge Brumbach's intention that if any person presented in B Court (for a hearing) those individuals' matters were to be rescheduled or continued to another date to be heard before Judge Brumbach, per Judge Brumbach's instruction. *See* Complaint at ¶ 25.

53. For those individuals who did not appear—and for those individuals *only*—Judge Brumbach then *intended* to instruct staff to retrieve the corresponding paper citations she had already marked and give them to the dispositioner for entry into the ETIMS. *See* N.T., at 177-182; Complaint at ¶¶ 23-25.

54. On January 6 at 9:31 a.m. Judge Brumbach emailed President Judge Dugan to inform him of her plan:

Since I have not heard from you regarding coverage and I am aware you are experiencing coverage issues across the Municipal Court with other judges, I have prepared the files for tomorrow after the Assistant District Attorney reviewed them. As such, a least 95% of the files will have been completed by me without the necessity of coverage. If court remains open tomorrow with the impending snow forecast and anyone shows up, my staff and the court staff know what to do. *If you have an alternate plan, let me know and I will set the proper expectations.*

N.T., at 20-21; Complaint at ¶ 13 (emphasized portion omitted from Board's Complaint).

55. That same day, President Judge Dugan then asked Administrative Judge Pittman to talk with Judge Brumbach about the content of that email. *See* N.T., at 23.

56. Judge Brumbach informed Judge Pittman of her plan. *See* N.T., at 123; 170-73.

57. At that time, Judge Pittman did not express any concern, and relayed that coverage would be provided if Judge Brumbach would not be there. *See* N.T., at 123; Deposition Transcript Judge Pittman pp. 17 and 22.

58. Importantly, at this time, Judge Brumbach also informed two senior judges of her plan, and neither expressed any concern. *See* N.T., at 170.

59. Despite his intention to send coverage into B Court, Judge Dugan also arranged to have the January 7 files retrieved and photocopied. *See* N.T., at 123; Deposition Transcript Judge Pittman pp. 17 and 22.

60. But critically, at this time, Judge Brumbach had not adjudicated these matters because she had not instructed the dispositioner to enter her notations on the paper files into the electronic docket representing the first step toward adjudication. *See* N.T., at 115-116.

61. In fact, the paper files were never in the custody or control of the dispositioner.

62. Ultimately, the paper citations remain entirely meaningless unless and until Judge Brumbach instructed the dispositioner otherwise.

63. President Judge Dugan apparently did not appreciate this salient distinction and instead informed—via text message on January 10—Judge Brumbach that she was effectively suspended, having been placed on administrative duties, where she has remained since that date.

**II. Motion to Dismiss Counts 1-9 pursuant to Rule 411(D)(1) because the facts alleged do not constitute misconduct.**

64. The averments set forth above are incorporated by reference as if set forth herein.

65. The facts alleged by the Board are legally insufficient to establish that Judge Brumbach committed any misconduct.

66. Each of the Board's nine allegations of misconduct hinge on its ability to prove, as a matter of law, that Judge Brumbach adjudicated any of the 95 citations before their January 7 list date.

67. Because the Board cannot prove Judge Brumbach adjudicated any of the 95 citations, the Board's Complaint should be dismissed with prejudice.

68. The Board's Complaint erroneously alleges that Judge Brumbach's notations on the Exhibits are "adjudications as written." Complaint at ¶ 22.

69. Notwithstanding the Board's freewheeling use of the term, "adjudication" is a legal term that "has a technical meaning." *J.C. v. Dep't of Public Welfare*, 980 A.2d 743, 747 (Pa. Cmwlth. 2009).

70. Specifically, an "adjudication" is "a final, appealable judgment[.]" *Id.*; see Black's Law Dictionary (11th ed.) ("adjudicate" means "[t]o rule on judicially").<sup>4</sup>

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<sup>4</sup> The term has been defined similarly in the administrative context. See, e.g., 45 Pa.C.S. § 501 (defining "adjudication" as "[a]ny order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made"); 2 Pa.C.S. § 101 (defining "adjudication" as "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made"); accord 77 P.S. § 29.

71. In traffic court, an adjudication cannot occur unless and until the court staff—known as the “dispositioner”—enters whatever is marked on the paper files into the electronic docket. *See* N.T., at 106; 159-60.

72. Pennsylvania Rule of Criminal Procedure 460 confirms this point. Pa. R. Crim. P. 460(a).

73. Rule 460 allows for an appeal from a summary proceeding by “filing a notice of appeal within 30 days after *entry* of the guilty plea, the conviction, or other final order from which the appeal is taken. Pa. R. Crim. P. 460(a) (emphasis added).

74. The term “entry” as used in Rule 460 is defined as “the date on which the issuing authority enters or records the guilty plea, the conviction, or other order in the magisterial district judge computer system.” *Id.*, cmt; *see also* Pa. R. Crim. P. 471 (a certified copy of the disposition report is generated when a matter is adjudicated); Pa. R. Crim. P. 1037 (appeals from Philadelphia Traffic Court take place “after the entry of a guilty plea or conviction”).

75. This same rule holds true in other criminal cases, *see* Pa. R. Crim. P. 720, and in civil cases, *see* Pa. R. Civ. P. 236.

76. This established understanding is also consistent with the appellate rules. *See, e.g.*, Pa.R.A.P. 108(a)(1) (“[T]he day of entry shall be the day the clerk of the court or the office of the government unit mails or delivers copies of the order to the parties, or if such delivery is not otherwise required by law, the day the clerk or office of the government unit makes such copies public.”); *see also* Pa.R.A.P. 301(a)

("[N]o order of a court shall be appealable until it has been entered upon the appropriate docket in the trial court.").<sup>5</sup>

77. The common thread running through these rules is finality. That is, to constitute an "adjudication," the judicial act must be a final pronouncement or decree settling the rights of the parties in the particular dispute.

78. Accordingly, what emerges from this constellation of authorities—particularly Rule 460, which is directly on-point—is that a Philadelphia Municipal Court Judge's initial assessment of a traffic citation is not an adjudication.

79. Indeed, Rule 460 serves two important functions.

80. First, Rule 460 provides a defendant with adequate notice.

81. For instance, a defendant who does not appear in traffic court has no way of knowing the outcome of the case until the matter is adjudicated via the electronic docket, which, in turn, triggers instantaneous electronically generated notice consistent with the criminal rules pertaining to appellate rights.

82. Second, the rule accounts for administrative backlogs.

83. The Board claims that Judge Brumbach's signature on each citation is what transforms the paper citations into an adjudication, but this too is wrong.

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<sup>5</sup> Both rules apply except in a criminal case where no post-sentence motion has been filed. Post-sentence motions are not required for summary offenses. This exception therefore cannot apply in the summary context. Appellate rights relating to summary offenses are as prescribed in Rule 460, which is consistent with Rule 301(a).

84. The paper citations—even being signed—had no legal significance or effect and until the notations including the signor’s name were electronically docketed.

85. Indeed, the incoherence in the Board’s construct is laid bare not only by the multitude of authorities interpreting the term “adjudication,” but also by the practical realities of this very case and the Philadelphia Traffic Court itself.

86. To begin, *every* case scheduled for January 7 was administratively re-listed to another date and adjudicated by some other judge.

87. If the Board’s contention is correct, then the Municipal Court engaged in a mass double jeopardy violation because, under its theory, multiple defendants who had been “adjudicated” as “not guilty,” were *retried* for the same offense.

88. That is, if an adjudication occurred on January 6, 2022, then each of the 95 citation-holders’ double jeopardy rights were violated when they were later retried for the same offense. *See e.g., Commonwealth v. Johnson*, 231 A.3d 807, 297 (Pa. 2020) (The Double Jeopardy Clause “protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.”).

89. The Board’s theory also clashes with the fact that each of the Municipal Court Judges sit in equal jurisdiction with one another.

90. Accordingly, under the coordinate jurisdiction rule, a decision of a Philadelphia Municipal Court Judge generally cannot be reversed, revised, or otherwise reviewed by another judge of that Court.

91. Thus, if an adjudication had, in fact, occurred on January 6, 2022, any other municipal court judge would have been legally prohibited from reversing or overruling the decision of a judge in coordinate jurisdiction. *See Commonwealth v. Williams*, 125 A.3d 425, 431 (Pa. Super. 2015); *Commonwealth v. Turner*, 73 A.3d 1283, 1286 (Pa. Super. 2013).

92. Finally, the Court did not notify any of the individuals about their appellate rights on January 6—that is because those rights did not attach until their cases were adjudicated by a different judge.

93. Compounding the deficiencies in the Board’s theory—is the fact that the paper citations on which Traffic Court Judge make their annotations are not a certified record and, thus, would not be admissible in court to establish a conviction. *See Rawson v. Com., Dept. of Transp., Bureau of Driver Licensing*, 99 A.3d 143, 150-51 (Pa. Cmwlth. 2014) (“The Department meets its burden by submitting into evidence its certified record of conviction demonstrating the offense underlying the conviction.”) (internal citations omitted).

94. In this connection, the *Rawson* Court explained “what constitutes a duly certified record sufficient to establish the fact of actual conviction is governed by” 42 Pa.C.S. § 6103 and that a “duly certified court record is the best evidence of conviction.” *Id.* at 151 (internal citations omitted); *See* 42 Pa.C.S. § 6103 (relating to proof of official records); *see also* 75 Pa.C.S. § 6501 (“certified record of conviction” required under the vehicle code).

95. As such, just as the Commonwealth is required to prove a conviction with a certified record of conviction, the Board here is required to prove the occurrence of adjudication using the certified record—which, in this case, would have been reflected on the electronic docket.

96. Not only is it impossible to characterize the *effect* of Judge Brumbach's actions as "adjudications," but it is also impossible to conclude that she marked the citations with the *intent* of rendering "adjudications."

97. At no point after conducting her review of the matters scheduled for January 7, did Judge Brumbach give the paper files to the dispositioner for disposition.

98. To the contrary, she specifically, explained that the staff should wait and see if coverage was sent, and if not, then wait for her direction on the morning of January 7. *See* N.T., at 180-81.

99. Judge Brumbach's intent is also gleaned from the facts that she discussed this plan with court staff and the ADA, and advised two senior judges of her plan.

100. In short, what the Board characterizes as "adjudications" were nothing more than notations reflecting Judge Brumbach's preliminary assessment, which were subject to change and—not being final determinations—by definition, were not adjudications.



101. Moreover, the lack of merit in the Board's position is brought into full focus by the fact that the Board—despite alleging a deprivation of “due process”—is unable to identify a single defendant whose due process rights were implicated.<sup>6</sup>

102. The Board's use of the term “adjudicate” is legally baseless and factually misleading.

103. As noted above, in Traffic Court B, the necessary first step for an adjudication to occur is when the notations on the paper citations are entered into the electronic docket by the dispositioner.

104. Judicial misconduct requires a showing that the jurist has committed specific acts in violation of the prescriptions governing the judiciary. *In re Sullivan*, 135 A.3d 1164, 1173 (Pa. Ct. Jud. Disc. 2016) (citing *In re Cicchetti*, 697 A.2d 297 (Pa. Ct. Jud. Disc. 1997)); *see also In re Smith*, 687 A.2d 1229 (Pa. Ct. Jud. Disc. 1996).

105. Accordingly, applied to the present matter, if an adjudication cannot be established as having taken place on January 6, 2022, the Board's allegation of misconduct cannot be sustained because, absent an adjudication, no ticketholder was denied the right to be heard.

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<sup>6</sup> At the January 6, 2023 Hearing, the Board's attorney made—for the first time—an argument that the Commonwealth's due process rights were deprived by Judge Brumbach's actions. Because this argument was not alleged in the Complaint, it should not be considered. This claim is especially specious because (a) the Commonwealth reviewed every file before Judge Brumbach; (b) in any event, no adjudication ever occurred; and (c) court was closed on January 7 and each of these cases was administratively re-listed and heard at a later date.

106. On January 6, 2022, Judge Brumbach did not—and indeed, could not—act to bring any matter to final resolution resulting in an adjudication and therefore did not commit any acts that would constitute a violation of a ticketholder’s due process right to be heard. This is so for at least two reasons.

107. First, the Philadelphia Municipal Court was closed on January 7, 2022 due to a winter storm and, as a result, every case scheduled for that day was administratively re-listed.

108. Second, if courts were open, Judge Dugan intended to assign another judge to provide coverage for B Court; in turn, that judge would have handled all matters ripe for judicial determination and (presumably) the dispositioner would have entered into the docket that judges intended findings, resulting adjudication when appropriate. *See* N.T., at 123; Deposition Transcript Judge Pittman, pp. 17 and 22.

109. In fact, the Board’s Complaint avers no material facts in support of adjudication.

110. Instead, the Exhibits as averred only purport conclusions of law.

111. Stated differently, the conduct that the Board alleges simply never occurred.

112. The Board’s failure to plead any facts showing *completed* acts in support of each element of each charge of alleged judicial misconduct furnishes additional grounds for dismissal.

113. Thus, as set forth more fully above, each of the Board's allegations must fail:

- a. Count 1: the Board's complaint fails to establish that Canon 1, Rule 1.1 was violated because Judge Brumbach has complied with the law and the Code of Judicial Conduct.
- b. Count 2: the Board's complaint fails to establish that Canon 1, Rule 1.2 was violated because Judge Brumbach has at all times acted in a manner that "promotes public confidence in the independence, integrity, and impartiality of the judiciary" and has avoided "impropriety and the appearance of impropriety." Not one of the allegations challenges Judge Brumbach's impartiality or integrity. Nor did any of the alleged conduct implicate public confidence. Judge Brumbach presented an idea to Judge Dugan—which, again, was never executed—that, if implemented, would have maximized judicial resources and fairly administer justice. Indeed, to the extent there is any negative publicity associated with Judge Brumbach's alleged conduct, it is the direct result of the unfounded Complaint by the Board.
- c. Count 3: the facts do not establish a violation of Canon 2, Rule 2.1 because at all times Judge Brumbach gave her judicial office precedence over her personal activities. Judge Brumbach gave two months' notice that she would take a day of judicial leave—as

permitted by Pa.R.J.A. 704. In fact, Judge Brumbach's sole reason for even developing the plan in question was borne out of her concern that Judge Dugan would not provide coverage in her courtroom on January 7 because he had failed to communicate with her.

- d. Counts 4 and 5: the facts alleged do not establish a violation of Canon 2, Rule 2.5(A)-(B) because Judge Brumbach has performed her duties competently and diligently, and has cooperated with other judges in the administration of justice. To put a fine point on it, not *one* fact alleged by the Board implicates this Rule. To the contrary, if anything, the allegations confirm Judge Brumbach's steadfast compliance with these Rules, as they show that Judge Brumbach communicated with court staff, ADAs, and other Judges and worked to administer justice by advancing a plan that would alleviate any coverage issues the Court was experiencing.
- e. Count 6: the facts alleged do not establish a violation of Canon 2, Rule 2.6(A) because not one person was denied the right to be heard as the Court was closed on January 7 and each person had their citations administratively relisted to a different date; moreover, any suggestion that such a denial *would* have occurred is speculative to the extreme and not a proper basis for finding misconduct.

- f. Count 7: the facts alleged do not establish a violation of Article V, Section 17(b) because, as described above, Judge Brumbach has not violated any law or any canon of judicial ethics.
- g. Counts 8 and 9: the facts alleged do not establish a violation of Article V, Section 18(d)(1) for all of the reasons stated in (a) through (g).

WHEREFORE, the facts alleged are insufficient to prove the Board's claims in counts 1 through 9. As such, Counts 1 through 9 should be dismissed with prejudice.

**III. Motion to Dismiss Pursuant to Rule 411(D)(3) Because The Board Violated Its Own Procedures and Rules By Filing This Baseless Claim.**

114. The allegations set forth above are incorporated by reference here as if fully set forth herein.

115. The utter lack of legal or factual basis for the Complaint against Judge Brumbach also requires dismissal pursuant to Rule 411(d)(3) of the procedural rules governing matters before this Court. *See* Pa. Ct. Jud. Disc. R..P. 411(d)(3); *accord see In re Hasay*, 686 A.2d 809, 816-817 (Pa. 1996) (“We emphatically reject the assertion that the board's compliance with its rules of procedure is absolutely beyond judicial review. The rules exist in part to insure that due process is accorded judicial officers subject to investigation and prosecution by the board....”).

116. Specifically, Rule 411(d)(3) allows a Judicial Officer to “challenge the validity of the charges on any legal ground including [] that the Board violated the procedures governing it.” Pa. Ct. Jud. Disc. R.P. 411(d)(3).

117. Here, the Board plainly did not fulfill its duty to adequately investigate this matter, as evidenced by fact that the allegations in its Complaint have no factual or legal predicate. *See* J.C.B.R.P. 26; J.C.B. I.O.P. 2.13; J.C.B. I.O.P. 2.12; J.C.B. I.O.P. 2.22; J.C.B. I.O.P. 3.03; J.C.B. I.O.P. 3.04.

118. A more thorough investigation and better understanding of the particularities of Traffic Court, B Court, as well as the Criminal Rules of Procedure would have made crystal that Judge Brumbach did not violate any rule or law, as developed in the discussion of the pertinent legal authorities set forth above

119. Along those lines, the Board also violated Rule 27 by recommending to the Board that this matter proceed—even without any factual or legal support. *See* J.C.B.R.P. 27.

WHEREFORE, the completely baseless nature of these allegations compels a conclusion that the Board abdicated its duties under one or more of its own rules to promptly and properly investigate these allegations and therefore Counts 1 through 9 should be dismissed with prejudice.

**IV. Motion to Preclude Admission of Exhibits 1-95 As Evidence That An Adjudication Occurred.**

120. The allegations set forth above are incorporated by reference here as if fully set forth herein.

121. The threshold inquiry as to whether evidence should be admitted is whether the evidence is relevant.<sup>7</sup>

122. “Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact. Evidence, even if relevant, may be excluded if its probative value is outweighed by the potential prejudice.” *Smith v. Morrison*, 47 A.3d 131,137 (Pa. Super. 2012); see Pa.R.E. 403.

123. Here, the Board attached to its Complaint photocopies of 95 citations (“Exhibits 1-95”), which it claims establishes that Judge Brumbach adjudicated each of the citations.

124. The citations were apparently taken from Donna Sofronski’s possession by Marge Fenerty on January 6, 2022. See N.T., at 85.

125. Fenerty then directed somebody to make photocopies of each citation. See N.T., at 91.

126. Thus, Exhibits 1-95 are photocopies of each citation as they existed on January 6, 2022, and “an original writing, recording, or photograph is required in order to prove its content unless these rules, other rules prescribed by the Supreme Court, or a statute provides otherwise.” See *Comment: Pa.R.E. 1002* (“best evidence

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<sup>7</sup> The admission of the documents referred to as Exhibit 1 through Exhibit 95 (hereinafter “Exhibits”) attached to the Board’s Complaint must be excluded on the following grounds, individually and/or collectively, under the Rules of Evidence: best evidence, hearsay, confrontation, chain of custody, relevance, authentication, staleness and absence of certification or an official certified record, transcript or docket report in proper form. See *In re A.J.R.-H*, 188 A.3d 1157, 1162 (Pa. 2018) (recognizing the interplay between these various evidentiary rules).

rule.”) *See Hera v. McCormick*, 425 Pa. Super. 432, 625 A.2d 682 (1993); and *See* Pa.R.E. 1002.

127. Because no adjudication occurred on January 6—as explained above—the Exhibits are not probative of whether or not an adjudication occurred.

128. Indeed, as the *Rawson* Court makes plain, a certified record of conviction is required for the Commonwealth to prove a conviction in criminal matters. *See Rawson*, 99 A.3d at 151; *see also* 75 Pa.C.S. § 6501 (“A certified record of conviction includes a certified record of conviction from any Federal or state court and a certified record of administrative adjudication from any state. These records or copies of these records shall be admissible in any court of law without any need for further documentation.”)

129. Here, if the Board wants to prove an adjudication occurred, the only competent evidence to support that allegation is the certified record—which in this case exists on the electronic docket.

130. As such, given that Exhibits 1-95 are not probative of an “adjudication,” pursuant to Pennsylvania Rule of Evidence 401, the Board should be precluded from offering Exhibits 1-95 for the discrete purpose of proving that an adjudication occurred.

131. Furthermore, even assuming *arguendo* Exhibits 1-95 can pass muster under the relevancy examination of Rule 401, whatever minimal probative value these copied documents could conceivably be is outweighed by the countervailing considerations set forth in Rule 403.



132. Specifically, allowing the Board to introduce these exhibits to argue that an adjudication occurred would be unduly prejudicial, confuse the issue, and result in unnecessary delay and waste of time because, as a matter of law, those documents cannot show occurrence of an adjudication.<sup>8</sup>

133. As such, Rule 403 provides an independent and alternative basis for prohibiting the Board from presenting Exhibits 1-95 for purposes of demonstrating that an adjudication has occurred.

WHEREFORE, Judge Brumbach respectfully requests that the Board be precluded from admitting Exhibits 1-95 for the purpose of proving an adjudication occurred.

**V. Motion to Preclude Exhibits 1-95 Pursuant to Pa.R.E. 1002.**

134. The allegations set forth above are incorporated by reference here as if fully set forth herein.

135. “An original writing. . . is required in order to prove its contents unless” provided otherwise by rule or statute. Pa.R.E. 1002.

136. As the comment to Rule 1002 explains, this Rule is predicated on the common law “best evidence rule” and is critical because:

(1) The exact words of many documents, especially operative or dispositive documents, such as deeds, wills or contracts, are so

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<sup>8</sup> Notably, these risks are further exacerbated by the evidentiary issues discussed in Sections V and VI *infra*.

important in determining a party's rights accruing under those documents.

(2) Secondary evidence of the contents of documents, whether copies or testimony, is susceptible to inaccuracy.

(3) The rule inhibits fraud because it allows the parties to examine the original documents to detect alterations and erroneous testimony about the contents of the document.

(4) The appearance of the original may furnish information as to its authenticity.

Pa.R.E. 1002, cmt. (citation omitted).

137. The comment further explains “writings that are viewed as operative or dispositive have usually been considered to be subject to the operation of the rule.” *Id.*

138. Here, inasmuch as the paper citations are the lynchpin of the Board’s allegations, Exhibits 1-95 should be precluded, as those exhibits are not the original copies of the citations, as they exist today.

139. This is critical because the original copies, as they exist today are—by the Board’s own admission—materially different. *See N.T.*, at 37.

140. As Attorney Norton explained:

[S]ome of the originals are no longer in existence. What happened was, they were put back into circulation . . . so that the individuals could have their day in court. And that at that point, things were scratched off that—that were on them on January 6, were then scratched off so another Judge could write on them. The—the matters that were circled indicating guilty in absentia or not guilty in absentia on January 6 would have been scratched off[.]

*N.T.*, at 37-38.

141. According to the Board's theory, the original copies are probative of an adjudication; in that case, the Board must be required introduce the original copies.<sup>9</sup>

142. In short, therefore, Exhibits 1-95 are incomplete records and, if admitted, will cause severe unfair prejudice, confuse the issue and mislead this Court by obfuscating the additional markings on each citation that are relevant to proving when an adjudication occurred.

WHEREFORE, because admission of Exhibits 1-95 into evidence would violate Pennsylvania Rule of Evidence 1002, Judge Brumbach respectfully requests that the Board be precluded from admitting them into evidence.

**VI. Motion to Preclude Original Copies of Exhibits 1-95 Because Board Failed to Preserve The Original Copies.**

143. The allegations set forth above are incorporated by reference here as if fully set forth herein.

144. To the extent the original records are deemed admissible despite the arguments above, they should nevertheless be precluded for an additional reason: spoliation.

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1. <sup>9</sup> Of Course, had Judge Brumbach actually adjudicated these citations—as the Board alleges—the Board would not rely on these paper citations to prove that adjudication, but rather rely on the certified record. *See supra*.

145. “Spoliation is the nonpreservation or significant alteration of evidence for pending or future litigation, that authorizes trial courts to exercise their discretion to impose a range of sanctions against the spoliator.” *Commonwealth v. Underwood*, 2020 WL 4746004 (Pa. Super. Aug, 20, 2020) (internal quotations and brackets omitted).

146. According to the Board, the markings on the original documents as they existed on January 6 were proof of an adjudication.

147. Yet, despite this claim, the Board took no steps to prevent the original copies of the citations from being placed back into circulation and subsequently being marked and altered.

148. This is striking considering that the Board considers these documents to be fundamental to their Complaint.

149. The Board had the authority and duty to preserve the original copies, but failed to do so.

150. As a result, Judge Brumbach is greatly prejudiced because she is unable to adequately defend her claim absent the original unaltered citations as they existed on January 6, 2022.

WHEREFORE, Judge Brumbach respectfully requests that the Board be precluded from admitting the original copies because the Board has caused them to be irreparably spoiled.

Dated: January 30, 2023

/s/ Matthew H. Haverstick

Matthew H. Haverstick (No. 85072)  
Shohin H. Vance (No. 323551)  
Francis G. Notarianni (No. 327461)  
KLEINBARD LLC  
Three Logan Square  
1717 Arch Street, 5th Floor  
Philadelphia, PA 19103  
Ph: (215) 568-2000  
Fax: (215) 568-0140  
Eml: mhaverstick@kleinbard.com  
svance@kleinbard.com  
fnotarianni@kleinbard.com

**VERIFICATION**

I hereby verify that I have read the foregoing Omnibus Motion and that it is true and correct to the best of my knowledge, information and belief subject to penalties set forth in 18 Pa.C.S. § 4904.

Dated: January 30, 2023

A handwritten signature in black ink, appearing to be 'MJB', written over a horizontal line.

Hon. Marissa J. Brumbach

## CERTIFICATE OF SERVICE

I, Matthew H. Haverstick, hereby certify that on January 30, 2023, I caused a true and correct copy of the attached Omnibus Motion to be served on the following via email:

Melissa L. Norton  
Interim Chief Counsel  
Commonwealth of Pennsylvania Judicial Conduct Board  
601 Commonwealth Ave., Suite 3500  
Harrisburg, PA 17106  
Eml: Melissa.Norton@jcbpa.org

/s/ Matthew H. Haverstick  
Matthew H. Haverstick (No. 85072)  
KLEINBARD LLC  
Three Logan Square  
1717 Arch Street, 5th Floor  
Philadelphia, PA 19103  
Ph: (215) 568-2000  
Fax: (215) 568-0140  
Eml: mhaverstick@kleinbard.com

## CERTIFICATE OF COMPLIANCE

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

Submitted by:	Kleinbard LLC
Signature:	<u>/s/ Matthew H. Haverstick</u>
Name:	Matthew H. Haverstick
Attorney No.:	85072