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COMMISSION ON  
JUDICIAL QUALIFICATIONS

STATE OF KANSAS

BEFORE A HEARING PANEL FOR FORMAL JUDICIAL COMPLAINTS

Inquiry Concerning a Judge )  
Christopher M. Magana )

Docket No. 1330

**FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND DISPOSITION**

On March 27, 2018, Panel A of the Commission on Judicial Qualifications (Commission) issued a Notice of Formal Proceedings, pursuant to Rule 611(b) (2017 Kan. S. Ct. R. 475), against Christopher M. Magana, District Judge of the 18<sup>th</sup> Judicial District. The Notice of Formal Proceedings alleged that Respondent engaged in certain conduct which violated the provisions of Canon 1 and Canon 2 of the Rules of the Supreme Court of the State of Kansas Relating to Judicial Conduct, specifically Rules 1.1, 1.2, 2.2, 2.5, 2.6, and 2.8.

On May 17, 2018, the parties came before Hearing Panel B of the Commission (hereafter referred to as The Panel) for a prehearing conference. Respondent appeared in person and through counsel, Marty Snyder and Dennis Depew of the Office of the Attorney General. Sarah E. Warner appeared in person for the Examiner for the Commission and Todd N. Thompson, Examiner, appeared via telephone. The Panel was represented by Hon. Nicholas M. St. Peter, Chair of The Panel, and by Hon. Larry D. Hendricks. Judge St. Peter entered pretrial orders and also ordered the Examiner to provide a more definite statement to clarify the facts associated with each alleged violation of the rules.

On June 1, 2018, the Examiner filed a Supplement to Formal Complaint providing a more detailed statement of Respondent's conduct aligned with the alleged violations of the Rules of the Supreme Court of the State of Kansas Relating to Judicial Conduct. The Supplement provided as follows:

## CANON 1

**A JUDGE SHALL UPHOLD AND PROMOTE THE *INDEPENDENCE, INTEGRITY, AND IMPARTIALITY* OF THE JUDICIARY, AND SHALL AVOID *IMPROPRIETY* AND THE APPEARANCE OF IMPROPRIETY.**

### **RULE 1.1 Compliance with the *Law***

"A judge shall comply with the *law* and the Kansas Code of Judicial Conduct."

Respondent acknowledges he did not comply with K.S.A. 43-165. The statute contemplates that "reasonable cause for such non attendance" by a juror can be shown, and thus should be considered. Respondent alleges it was a "good-faith error," which Comment [3] of Rule 2.2. states would not be a violation. The panel will consider whether the error was in good faith, and whether Respondent should have done research into the law regarding the appropriate means to punish a juror for failure to appear. There will be evidence that if Respondent had performed a digital search of the Kansas statutes (e.g. Westlaw) by entering "penalty for juror failure to appear" or something similar, K.S.A. 43-165 would have been the first hit, along with *State v. Lewis*, 161 P.3d 807, 38 Kan.App.2d 91 (2007), which quotes and discusses K.S.A. 43-165, and is a case originating in Sedgwick County.

K.S.A. 43-165 states:

Each judicial district of the district court may direct from time to time, the number of jurors to be summoned for said court, and how long they shall be summoned before their attendance shall be required, and may make such rules and orders as it may deem proper, touching the jury service of the court, not inconsistent with the provisions hereof, and may enforce the same by attachment and fine not exceeding one hundred dollars (\$100). Unexcused, nonattendance of a person summoned unless reasonable cause for such nonattendance be shown to the satisfaction of the court shall be punished by the imposition of a fine not exceeding one hundred dollars (\$100) for each day of unexcused absence.

Respondent instructed McDaniel to be in the same seat at 8:45 the next morning (Day 2), and McDaniel failed to do so. Respondent contends no good or possible reason exists for her absence. The statute contemplates that "reasonable cause" may exist. McDaniel has stated that on the night of Day 1 her father had to go to the hospital, that her mother had taken him there, and her mother was not, therefore, available to care for McDaniel's son on the morning of Day 2. McDaniel also said she told the Jury Clerk she would appear the morning of Day 2 if she could bring her son, and she told Respondent she was "hoping you guys could give me another chance to be on jury duty." The panel will consider whether Respondent is correct that no good or possible reason exists to excuse McDaniel's absence, and whether Respondent's failure to follow the law was in good faith.

Respondent's conviction of McDaniel was overturned by the Kansas Court of Appeals in *In re McDaniel*, Case No. 115,614, June 9, 2017. The Court of Appeals concluded that reference to an attached transcript does not meet the requirements of K.S.A. 20-1203, and that "failure to comply with this statute is jurisdictional." The Court of Appeals determined that "direct contempt orders that do not meet the requirement set forth

in the statute are void." The panel will consider whether Respondent's failure to comply with the Court of Appeals panel's interpretation of the statute was in good faith, or otherwise justified under the circumstances.

**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."

Comments [1], [3], and [5] of Rule 1.2 provide:

- [1] "Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge."
- [3] "Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms."
- [5] "Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 601B defines "Impropriety" as follows:

**"Impropriety"** includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality.

Rule 601B defines "Integrity" as follows:

**"Integrity"** means probity, fairness, honesty, uprightness, and soundness of character.

Two subpoenaed witnesses in the underlying case "disappeared" over the noon hour of Day 2 and material witness arrest warrants had to be issued for them. They were arrested that night and brought before the court the next morning to purge their failure to obey the subpoenas. They were not found to be in criminal contempt of court and were not sentenced to a six months controlling jail sentence or ordered to serve 30 days in jail beginning immediately, as was McDaniel. Nor were the witnesses required to spend nearly four days in jail. The panel will consider whether Respondent's disparate treatment of the witnesses compared to McDaniel demonstrates appropriate impartiality, temperament, and fairness.

McDaniel's failure to show on Day 2 reduced the pool of prospects, and as a result, six additional juror prospects were brought in. During the delay, the two prosecution witnesses failed to return after the lunch break, which resulted in an early overnight recess on Day 2 without a sworn jury. Respondent contends the delay was "all due to McDaniel's absence," and that his imposition of the criminal contempt sentence was, therefore, warranted. The panel will consider whether the delay was fully attributable to McDaniel, and whether the penalty imposed demonstrated appropriate impartiality, temperament, and fairness.

Respondent convicted McDaniel of direct criminal contempt and sentenced her to a "six month controlling jail sentence" and ordered that she "serve 30 days in jail beginning today." McDaniel was immediately taken into custody after the contempt hearing, and she remained in jail for the remainder of Friday, full days of Saturday, Sunday, and Monday,

and most of Tuesday morning. The panel will consider whether that incarceration was fair and impartial under the circumstances, and whether it demonstrated appropriate temperament.

Attorney Hoeme says he was not in the courtroom during the release hearing, and that the first time he spoke to McDaniel was after she had been released from custody. Respondent says Hoeme was in the courtroom, and that Hoeme spoke to McDaniel as McDaniel was being escorted out of the courtroom. These two versions of the release hearing are incompatible; either Hoeme or Respondent is not accurately describing what occurred. The panel will consider the probity of each person's description of the release hearing.

See also supplemental comments under Rule 1.1, above, regarding compliance with the law.

## **CANON 2**

### **A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.**

#### **RULE 2.2**

#### ***Impartiality and Fairness***

"A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*."

Respondent never intended to leave McDaniel in jail for 30 days; he intended to release McDaniel on Monday the 21st, but that Monday was a "blow up day" during which he was very busy, so the release hearing didn't happen until Tuesday, December 22. The

panel will consider whether Respondent performed his duties competently and diligently as regards the timing of the release.

Respondent does not know what McDaniel was told or not told by others, or what she thought was the purpose of the contempt hearing. McDaniel's version of her conversations with the Jury Clerks differs from the Jury Clerks' versions, and Respondent says McDaniel was individually told of possible punitive measures for failure to appear by the Jury Clerk on the morning of December 8. Respondent also denies McDaniel told the Jury Clerk that she could attend if she could bring her son, or that bringing her son was even discussed with the Jury Clerk. The panel will consider what McDaniel was told by the Jury Clerk, and what she told to the Jury Clerk, and whether and how that information reached Respondent, and if such information was properly received by Respondent and lawfully and fairly applied.

See also supplemental comments under Rule 1.2, above, regarding sentencing of missing witnesses, and the consideration of impartiality and fairness.

**Rule 2.5**  
**Competence, Diligence, and Cooperation**

"(A) A judge shall perform judicial and administrative duties, competently and diligently."

Comment [1] to Rule 2.5 provides:

"[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office."

The McDaniel case file was unavailable because the case designation "MR" had been assigned. "MR" is a "miscellaneous record," and those files are not open for examination. Respondent did not know how files come to be marked "MR" or the impact of a file being marked "MR." The panel will consider whether Respondent should have known, or should have determined, (i) the significance of the "MR" designation, and (ii) whether having the file closed impaired McDaniel's rights.

Respondent made efforts to ascertain the proper procedure for a situation involving criminal contempt. The panel will consider whether his efforts were appropriate, competent, and diligent, and whether he should have first determined the appropriate penalty, rather than focusing his efforts on determining how to impose a criminal contempt sanction.

See also comments under Rule 1.1 regarding compliance with the law, and under Rule 2.2 regarding the timing of the release hearing and the receipt and use of information from the Jury Clerks.

**RULE 2.6**  
**Ensuring the Right to Be Heard**

"(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to *law*."

Comment [1] to Rule 2.6 provides:

"[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."



Respondent instructed his staff to tell McDaniel she was in direct criminal contempt of court and would be scheduled for a hearing on December 18. Respondent opened that hearing as "a proceeding for direct criminal contempt." Respondent made no reference to any right of McDaniel to have an attorney appointed to assist her, and there was no testimony under oath given at the contempt hearing. The Jury Clerks were not called to testify at the contempt hearing; the Jury Clerks did not present statements while under oath; and the Jury Clerks were never cross-examined. Respondent has noted that the Court of Appeals "panel expressly acknowledged it had no sworn factual record before it upon which to base its assumptions," but it is also true that Respondent took no sworn testimony at the contempt hearing. The panel will consider whether Respondent's actions and procedures properly accorded McDaniel the right to be heard according to law.

See also comments under Rule 1.1 regarding compliance with the law; Rule 1.2 regarding the contempt hearing and the immediacy of the imposition of McDaniel's sentence; Rule 2.2 regarding the delay in releasing McDaniel; and Rule 2.5 regarding the closed "MR" file.

#### **RULE 2.8**

##### **Decorum, Demeanor, and Communication with Jurors**

"(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity ..."

Comment [1] of Rule 2.8 provides:

"[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate."

Attorney Bach Hang claims he told Respondent he was there to ask about the McDaniel matter, and that Respondent stated: "Bach, I don't want to hear it. You are the 10<sup>th</sup> lawyer today on that." Respondent says he had already been approached by McDaniel's mother, by McDaniel's mother's preacher, and by an attorney named Steve Johnson who, while in the hallway, had been asked by the preacher if he could intercede on McDaniel's behalf. Hang said Respondent seemed "really angry" with McDaniel, but left him with the impression Respondent might release McDaniel from the jail soon, and that getting an attorney involved was unnecessary. Hang says Respondent did not say explicitly that release was imminent, but that was the impression that Hang had after talking to Respondent. Respondent says he told Hang that "it's going to be taken care of" and to not worry about it.

Respondent said that as soon as Bach Hang told him that it was attorney Hoeme who had sent Hang over to get information on McDaniel, Respondent terminated the discussion.

The panel will consider what was stated in the conversation with Hang, and whether Respondent's decorum and demeanor were appropriate for the circumstances. The panel will also consider whether the conversation with Hang was properly terminated based upon disclosure of the identity of one of the attorneys involved. The panel will also consider Respondent's demeanor with McDaniel at the contempt hearing.

McDaniel claims she was not advised that she could be incarcerated as a result of the contempt hearing, but thought the purpose of the hearing was, as the clerk's notes indicate, "to explain why she did not report back to court this morning." The panel will consider Respondent's communications with McDaniel via letter and at the contempt hearing.

### STIPULATIONS

In the pretrial order filed on August 17, 2018, the parties entered a joint stipulation of the following facts:

1. McDaniel was summoned for jury duty in August of 2015 to serve the week of September 14. She requested and received a continuance to the week of December 7.

2. On November 30, McDaniel called the jury office seeking to be excused from the December 7 jury service.

3. The call note from Mary Ellen Comer states:

Called states that she has a sick uncle to take care of and there is no one else to care for them. ADV that she can get a doc note stating his conditions and it needs to state what the needs are and if he can be left alone. Also stated she is a single mother and can't find daycare. ADV we cannot EXC. Asked to speak to supervisor. Transferred to KS. DC

4. Comer transferred McDaniel's call to Karen Spence, the supervisor. The call note of Spence states:

Called and wanted to speak to supervisor / states she has 2 young children and can't afford to take off work / advised cannot EX / DF 12-07-15 / KS

5. McDaniel appeared for jury service on December 7, 2015, and received the standard group training (orientation). She was sent to Judge Goering's Division, not selected, and sent back to the jury coordinator.

6. McDaniel was then sent to Respondent's Division where she remained the rest of the day during jury selection in *State v. Tran*.

7. Jury selection was not completed that day, and the prospective jurors in the pool were instructed by Respondent to report the following morning at 8:45, and to sit in the same seats.

8. On Tuesday morning Respondent was advised by his staff that McDaniel was not present. At 8:45 the *Tran* trial was called to order and Respondent observed for himself that McDaniel was not present. He consulted with the *Tran* trial counsel as to how many additional jurors would be needed to complete jury selection.

9. After additional jurors arrived, jury selection resumed.

10. McDaniel had called the jury coordinator on Tuesday morning.

11. The call note of Mary Ellen Comer states:

Called stating that she has no daycare and can't come in. ADV that is not EXC and that is why we DEF her was to allow her time to work out the issues. Asked for another week that she can come in and she started yelling at me and said her situation is not going to change, what are we going to do put her in jail. Asked her twice to stop yelling and she would not ADV I could let her speak to a supervisor, she would not leave her # but I wrote it down from caller ID and gave to KS. DC

12. The first December 8 call note of supervisor Karen Spencer states:

Left v-mail / states she has no daycare today / states her mom is sick / states she is single mom / returned call today / advised Judge Magana will decide if she can be EX or DF to another week to complete selection / 804-0531 / advised will call back with Judge decision / KS

13. Respondent inquired of Judge Kaufman about the proper process for pursuing a contempt citation. The initial email to Judge Kaufman, on December 8 at 10:52 a.m., inquired about a process or order for a "show cause" hearing. Judge Kaufman responded at 11:00 a.m. by indicating that Kaufman's previous contempt situation involved a seated juror failing to show for a day of trial, and that he considered that to be direct contempt. Judge Kaufman stated that "show cause is for indirect contempt." Judge Kaufman suggested that if it was indirect contempt, Respondent should follow K.S.A. 20-1204a, which Kaufman described as a "quite burdensome" procedure.

14. Jury selection was completed Tuesday afternoon, but two subpoenaed material witnesses failed to return after the noon hour. The unsworn jurors were dismissed early while material witness arrest warrants were issued.

15. At approximately 2:15 on Tuesday afternoon, McDaniel and her mother appeared at the jury coordinator's office.

16. McDaniel was verbally told that a contempt hearing would be held on December 18.

17. Clerk Karen Spencer's notes state:

Came in today at 2:15pm to get work cert / I went to Judge Magana to find out if she should be DF or if she would be EX due to not reporting this morning / Judge Magana states to DF 12-18-15 at 3:00 pm to his courtroom on 5<sup>th</sup> floor for contempt hearing / she was with her mother and states she will come with her and wanted to know what a contempt hearing is / advised to explain why she did not report back to court this morning after order from the Judge / Judge Magana will follow up with a letter / KS

18. Respondent ordered a hearing on direct contempt be scheduled in ten days, on December 18, and that letters be sent to McDaniel advising her of the contempt hearing.

19. Respondent "instructed ... staff to tell McDaniel she was in direct criminal contempt of court and would be scheduled for a hearing on December 18."

20. The absent trial witnesses were apprehended and jailed overnight. Early Wednesday, counsel were appointed for the witnesses, a hearing was held, and they remained in custody through the completion of their testimony.

21. The panel was sworn Wednesday morning and the *Tran* jury trial resumed.

22. On Thursday, Judge Kaufman indicated in a follow-up email that "if in the future this happens to me, my letter will be, in substance, a show cause document"—but still for direct contempt.

23. McDaniel appeared as directed on December 18, and Respondent opened the hearing as "a proceeding for direct criminal contempt."

24. The transcript of the contempt hearing is a complete record of the statements made on December 18<sup>th</sup>.

25. Respondent stated on the record the facts as he understood them.
26. The clerks were not called to testify at the contempt hearing; the clerks did not present statements while under oath; and the clerks were never cross-examined.
27. Respondent referred to McDaniel's juror questionnaire form, which indicated McDaniel's desire to avoid jury service, and that in addition to requesting to be excused because she is a single parent with work responsibilities, she also stated that "the judicial system is against my religious beliefs."
28. Respondent mentioned at the contempt hearing a couple of Protection From Abuse ("PFA") orders with which McDaniel had been involved. Respondent mentioned those to illustrate that McDaniel had familiarity with the judicial system, and that she used the system for her benefit, so she should not shirk her duty to serve as a juror. One of the PFAs was against McDaniel.
29. Respondent also made mention of municipal court matters involving domestic violence charges against McDaniel that had occurred several years earlier.
30. Respondent advised McDaniel that many other juror candidates had more compelling excuses than did she, and he convicted McDaniel of direct criminal contempt and sentenced her to a "six month controlling jail sentence" and ordered that she "serve 30 days in jail beginning today."
31. The Sheriff was contacted and McDaniel was taken into custody, where she remained for the remainder of Friday, full days of Saturday, Sunday, and Monday, and most of Tuesday morning.
32. Respondent "never intended" to leave McDaniel in jail for 30 days. Respondent says he intended to release McDaniel on Monday the 21st, but that Monday was a "blow up day" during which he was very busy, and the release hearing didn't happen until Tuesday, December 22.
33. On Friday, December 18, Respondent inquired of work release jail staff whether there were any female beds available. He did not receive a response until Monday morning, December 21, at 10:37 a.m. He replied "But I think I'm releasing her tomorrow or Wednesday so not sure it's worth it for you to get her over there or not."
34. The case file was unavailable because the case designation "MR" had been assigned. "MR" is a "miscellaneous record."

35. Bach Hang, who was the attorney with the Joseph Hollander & Craft firm, emailed Respondent's administrative aide at 2:28 p.m. on Monday, December 21. The email describes McDaniel as a "potential" client. The subject of the email was "Terra McDaniel 15MR1061" and the email stated:

Beranda, Good afternoon. Potential client. She is considering hiring us. She is currently in custody. Her mother tells us that Judge Magana ordered she be put in jail on 12-18-15. I am not sure what the "MR" destination in the case number really means exactly. Can you tell me why Judge Magana put her in jail?

36. Hang's inquiry was made at the request of Jess Hoeme, another attorney at the Joseph, Hollander & Craft firm.

37. At some juncture, Hang went to the courthouse and met with Respondent in the courtroom.

38. Hang and Respondent conversed about the McDaniel matter.

39. Respondent told Hang he had already been approached by McDaniel's mother, by McDaniel's mother's preacher, and by an attorney named Steve Johnson who, while in the hallway, had been asked by the preacher if he could intercede on McDaniel's behalf.

40. There was further discussion between Respondent and Hang.

41. Respondent says he intended at that point in time to release McDaniel at the earliest opportunity.

42. As soon as Hang told Respondent that it was Hoeme who had sent Hang over to get information on McDaniel, Respondent terminated the discussion.

43. At a release hearing on December 22, Respondent commuted McDaniel's sentence and ordered she be released.

44. The transcript of the release hearing indicates that no one present told the judge that he or she represented McDaniel or intended to enter an appearance as counsel of record for her. There is no mention of Hoeme or his firm in the transcript of the release hearing.

45. At no point prior to a December 29 email from Jess Hoeme to Respondent did any attorney advise Respondent that he or she represented Terra McDaniel.

46. Respondent believed McDaniel and other jurors deserved "a lesson" about the critical importance of juror participation in the criminal justice system.

47. The Journal Entry of Judgment re Direct Criminal Contempt filed by Respondent did not specify in the Journal Entry the conduct constituting contempt, but instead incorporated by reference the transcript of the contempt hearing.

48. The conviction was appealed, and was overturned by the Kansas Court of Appeals. *In re McDaniel*, Case No. 115,614, June 9, 2017.

49. The Court of Appeals concluded that reference to an attached transcript does not meet the requirements of K.S.A. 20-1203, and that "failure to comply with this statute is jurisdictional."

50. The Court of Appeals determined that "direct contempt orders that do not meet the requirement set forth in the statute are void."

### **SUMMARY JUDGMENT**

On September 10, 2018, Respondent filed a motion for summary judgment and requested dismissal of the disciplinary action in its entirety. The Examiner filed a response in opposition to summary judgment on September 27, 2018.

On November 2, 2018, The Panel met for consideration of the motion for summary judgment and also the request for subpoena for Letter of Support filed by Respondent. The Panel reviewed Respondent's motion, the Examiner's response and the Respondent's reply, and made the following findings:

1. A legal question exists concerning the power of The Panel to consider and determine this matter based upon the process of summary judgment.
2. The Panel sits as both the finder of fact and law with respect to a formal hearing.
3. There is no historical precedent for a hearing panel to adjudicate a pending matter by summary judgment.



4. There is historical precedent for a pending matter to be submitted to a hearing panel for formal hearing based upon a stipulation of facts with the parties filing proposed findings of fact and conclusions of law and submitting a proposed discipline.
5. The Panel in conducting formal proceedings has all powers necessary to conduct and dispose of proceedings.
6. In this matter, the parties have submitted a substantial number of stipulated facts, with only a few factual matters subject to dispute. In light of the current posture of this matter, The Panel believes that the most efficient manner to adjudicate this Inquiry would be by formal hearing instead of by summary judgment.
7. The Panel makes no findings concerning the power of a future hearing panel to consider and rule upon a motion for summary judgment.
8. The Panel declined to rule on the pending motion for summary judgment, but will consider all legal arguments raised in the motion as part of the formal hearing in this matter.
9. The Panel concluded the request for issuance of a subpoena for letter of support was moot.

### **FORMAL HEARING**

On January 3-4, 2019, a public hearing was held in Topeka, Kansas, before The Panel of the Commission on Judicial Qualifications, at which hearing The Panel accepted stipulations and heard evidence. Members of The Panel present for this hearing were: Hon. Nicholas M. St. Peter, Chair; Diane H. Sorensen, Vice-Chair; Hon. Bradley E. Ambrosier; Allen G. Glendenning; Hon. Larry D. Hendricks; Sister Rosemary Kolich; and Susan Lynn. Todd N. Thompson, Examiner, appeared in person. Respondent appeared in person and through counsel, Marty Snyder and Dennis Depew of the Office of the Attorney General.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### **RULE 1.1 Compliance with the *Law***

"A judge shall comply with the *law* and the Kansas Code of Judicial Conduct."

Judicial discipline standards differ across the country for discipline involving a judge's legal error. In the Texas judicial disciplinary case of *In re Inquiry Concerning Honorable Carl Ginsberg*, CJC No. 17-0739, June 11, 2018, a Special Court of Review selected by the Texas Supreme Court Chief Justice considered whether a district court judge violated the Texas Code of Judicial Conduct by refusing to enforce recent amendments to a Texas statute concerning the appointment of guardians ad litem, attorneys ad litem, and mediators. The district court judge believed the statute violated the separation-of-powers clause of the Texas Constitution and he had taken an oath to uphold the constitution. In the *Ginsberg* opinion, the Special Court of Review concluded the judge's failure to comply with the recent amendments did not rise to the level of sanctionable judicial misconduct under the Code.

For legal errors in a judicial misconduct proceeding, the *Ginsberg* Special Court of Review explained:

"When determining whether legal error rises to the level of judicial misconduct, the test cannot be whether the judge intended to engage in the conduct. Absent scrivener's error other such inadvertence, a judge's every ruling is intentional, and thus willful, so under this standard, every legal error would constitute judicial misconduct. But, it has long been established that 'charges involving no more than mistakes of judgment honestly arrived at or the mere erroneous exercise of discretionary power entrusted by law to a district judge' do not constitute judicial misconduct. . ."

The Panel, in the Respondent's case, adopts the following standard in *Ginsberg*:

"For legal error to rise to the level of judicial misconduct, a legal ruling or action must be 'made contrary to clear and determined law about which there is no confusion or question as to interpretation,' and the complained-of legal error additionally must be (1) egregious, (2) made as part of a pattern or practice of legal error, or (3) made in bad faith."

The Panel applies this standard to the legal errors alleged against the Respondent.

The Panel concludes there was no malicious, purposeful, or intentional conduct on the Respondent's action. The Panel recognizes that the subject of contempt is a difficult area of law and that the Court of Appeals' examination and application of K.S.A. 43-165 in *In Re Terra L. McDaniel*, 54 Kan. App. 2d 197, 399 P.2d 222 (2017), was an issue of first impression and application. The Panel also finds that the "hybrid contempt approach" discussed in *State v. Jenkins*, 263 Kan. 351, 363, 950 P.2d 1338 (1997), does not clearly alleviate the confusion between direct and indirect contempt.

The Panel discussed at great length the applicability of K.S.A. 43-165 to the facts of this case and its provisions of a maximum penalty for enforcement of jury service in the district courts. Under K.S.A. 43-165, the failure of a juror to report for jury duty is punishable by a maximum fine of \$100 for each day of unexcused absence. Respondent's failure to comply with K.S.A. 43-165 is undisputed. Respondent acknowledged his error.

Respondent performed legal research. He researched the law on McDaniel's case as being criminal or civil contempt, and also direct or indirect contempt. A review of the Kansas statutes will quickly reveal that the statutes addressing contempt are located in a completely different section of the Kansas statutes than the sections addressing jury

service. See K.S.A. 20-1201 *et seq.* (Contempt); K.S.A. 43-165 (Jury Service Enforcement). Respondent researched the contempt statutes. The Examiner alleged in the Supplemental Notice of Formal Hearing that “if Respondent had performed a digital search of the Kansas statutes (e.g. Westlaw) by entering “penalty for juror failure to appear” or something similar, K.S.A. 43-165 would have been the first hit, along with State v. Lewis, 161 P.3d 807, 38 Kan.App.2d 91 (2007), which quotes and discusses K.S.A. 43-165, and is a case originating in Sedgwick County.” The Panel finds that the Examiner presented no evidence at the formal hearing to support this allegation.

Respondent also did more than just legal research. He discussed the situation with his colleagues on the district court bench and he actually followed the advice of one of his judicial colleagues. The Panel concludes that even if Respondent would have discovered K.S.A. 43-165, there was still a question of whether it applied to McDaniel's situation and there is no case law in either the Court of Appeals or the Supreme Court stating that K.S.A. 43-165 applied to the facts of this case.

The Panel unanimously concludes Respondent's conduct does not rise to the level of a violation of Rule 1.1 of Rules of the Supreme Court Relating to Judicial Conduct. The Panel finds Respondent's erroneous application of the law on contempt was not made contrary to clear and determined law about which there is no confusion or question as to interpretation and the complained-of legal error was not made in bad faith.

## **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...."

## **RULE 2.2**

### ***Impartiality and Fairness***

"A judge shall uphold and apply the *law*, and shall perform all duties of judicial office fairly and *impartially*."

## **RULE 2.6**

### **Ensuring the Right to Be Heard**

"(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to *law*."

The Panel considered the alleged violations of Rule 1.2, 2.2, and 2.6 together.

Respondent researched McDaniel's criminal history and presented the evidence at the contempt hearing without any meaningful opportunity for McDaniel to be heard or to challenge the court's findings. The evidence discovered in Respondent's emails showed that he had already decided that McDaniel was in contempt and that he was just researching the possible punishment. Respondent gathered all the evidence against McDaniel without taking any testimony at the contempt hearing and relied on hearsay evidence from the district court clerks.

The Panel reviewed the transcript of McDaniel's direct contempt hearing held on December 18, 2015. There was no reference by Respondent to any right McDaniel had regarding representation by an attorney or appointment of an attorney.

The Panel finds no disparate treatment of McDaniel compared to the witnesses subjected to the material witness arrest warrants in the *State v. Tran* trial. The arrest warrants instigated by the district attorney for witnesses are a completely different situation from the contempt of court by a juror proceedings against McDaniel.

The Panel specifically finds that the Examiner did not present any evidence at the formal hearing that McDaniel's actions did not delay the trial. Rather, The Panel concludes that the statements and allegations by the Examiner in the Notice of Formal Hearing and Supplement regarding a lack of delay of the proceedings were not supported by the evidence at the formal hearing. On the contrary, Respondent presented evidence by his own testimony and sworn evidence of witnesses that McDaniel's actions did in fact delay the trial in *State v. Tran*. However, the evidence does not support Respondent's argument that the delay in the trial was *fully* attributable to McDaniel. The evidence presented at the formal hearing clearly established that Respondent had a difficult jury pool and panel. The timetable for the events causing delays, requests for additional people from the jury pool, and material witness arrest warrants all support a finding that the delay should not be fully attributable to McDaniel.

The Panel is disturbed that even if all of the delay was attributable to McDaniel, her punishment did not fit her crime. Respondent sentenced McDaniel to 6 months in the county jail and imposed a sentence of 30 days in jail with work release authorized. The Panel finds the sentence imposed against McDaniel was unduly harsh. In addition to a disproportionate punishment, The Panel states that it was not just the fact that McDaniel spent 4 days in jail, but that she *understood* she was going to spend 30 days (including Christmas Day) in jail, being unaware that Respondent never intended for her to serve the full sentence. Respondent testified that he determined that a weekend in jail would be an appropriate sentence. He sent an e-mail to the court reporter advising the court reporter that he intended to release McDaniel "next week." Respondent also sent an e-mail to Casanova at the Sheriff's office, stating that he would be releasing McDaniel "Tuesday or Wednesday." However, Respondent advised McDaniel that he was imposing a 30-day sentence. Respondent testified that when he told McDaniel he was imposing a 30-day sentence, he was cognizant of the fact that the thirty days would include Christmas.

The Panel finds there was no evidence to contradict the Examiner's evidence that McDaniel had no idea when she showed up for the contempt hearing that she would end up in jail. McDaniel was immediately taken into custody after the contempt hearing, and she remained in jail for the remainder of Friday, and full days of Saturday, Sunday, and Monday.

The Panel unanimously concludes that Respondent's imposition of a 30-day sentence for McDaniel's actions in the *State v. Tran* trial was abusive. Respondent's actions violate Rule 1.2 as not promoting confidence in the judiciary, Rule 2.2 as an unfair sentence in the level of punishment imposed and the manner in which it was given, and Rule 2.6 as denying McDaniel the right to be heard.

**RULE 2.5**  
**Competence, Diligence, and Cooperation**

"(A) A judge shall perform judicial and administrative duties, competently and diligently."

The Panel finds no facts to support a violation of Rule 2.5 concerning the Respondent's performance of his administrative duties overseeing the operations of the district court clerk's office. The Panel concludes the designation of the McDaniel case as a miscellaneous record, with the assigned "MR" abbreviation, was a product of the clerk's office. The Panel is cognizant that it is impossible for a judge to know all the systems and administrative procedures of the clerk's office.

**RULE 2.8**  
**Decorum, Demeanor, and Communication with Jurors**

"(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity ..."



The Panel finds no violation of Rule 2.8 regarding the conduct with attorney Bach Hang. The Panel finds Respondent's decorum and demeanor with Hang, and also with McDaniel at the contempt hearing, were appropriate for the circumstances.

### **DISPOSITION**

Pursuant to Supreme Court Rule 620 (2018 Kan. Ct. R. Annot. 487), based on the foregoing Findings of Fact and Conclusions of Law, and based on a unanimous vote of the members, the Panel issues an admonishment to Respondent as his actions in this case have violated Rules 1.2, 2.2, and 2.6 of the Rules of the Supreme Court of the State of Kansas Relating to Judicial Conduct.

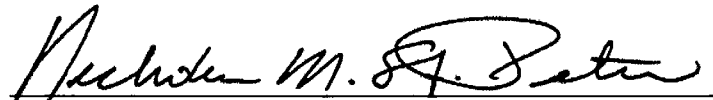
Even if The Panel accepts Respondent's characterization of his conduct as a legal error in his application of the law on contempt, Respondent's conduct falls below the high standards required by the Code of Judicial Conduct and diminishes public confidence in the integrity of the judiciary in violation of Canon 1, and undercuts the fairness and opportunity to be heard protected in Canon 2.

The Panel is mindful of Respondent's successful career as an attorney and district court judge. Many individuals testified, by letter and personally, to his dedication and character, including fellow members on the district court bench, his wife, and a board member of a charitable board. This proceeding does not call into question Respondent's past accomplishments, his reputation, or his integrity. The object of the proceeding is not to punish the Respondent. The object of a judicial proceeding such as this one is to uphold

the Canons of Judicial Conduct and hereby, protect the integrity of court proceedings and the public. The admonishment here accomplishes that goal.

DATED this 15<sup>th</sup> day of February, 2019

FOR THE COMMISSION ON  
JUDICIAL QUALIFICATIONS

A handwritten signature in cursive script, reading "Nicholas M. St. Peter", written over a horizontal line.

NICHOLAS M. ST. PETER, CHAIR