

IN THE SUPREME COURT OF PENNSYLVANIA

THOMAS A. JOSEPH, THOMAS J. JOSEPH, :
ACUMARK, INC., AIRPORT LIMOUSINE AND :
TAXI SERVICE, INC., AND AIRPORT TAXI, :
LIMOUSINE AND COURIER SERVICE OF : No. 19 MM 2009
LEHIGH VALLEY, INC. :
 :
 : (Lehigh County
vs. : No. 2009 C 2166)¹
 :
 :
THE SCRANTON TIMES L.P., THE TIMES :
PARTNER, EDWARD J. LYNETT, JR., :
GEORGE V. LYNETT AND CECELIA LYNETT :
HAGGERTY, THE SCRANTON TIMES, INC., :
SHAMROCK COMMUNICATIONS, INC., :
ZYXW, INC., JAMES CONMY AND :
EDWARD LEWIS :
 :
 :
PETITION OF: THE SCRANTON TIMES L.P., :
THE TIMES PARTNER AND EDWARD LEWIS :

TO THE HONORABLE THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

REPORT AND RECOMMENDATION

The undersigned, President Judge of the Court of Common Pleas of Lehigh County, specially appointed by the Pennsylvania Supreme Court to conduct a remand hearing in the above-captioned case hereby submits his Report and Recommendations resulting from that remand hearing.

In an Order dated April 7, 2009, the Supreme Court of Pennsylvania granted the

¹ This Lehigh County case number was generated to facilitate the issuance of hearing subpoenas.

Application of the Scranton Times L.P., The Times Partner and Edward Lewis, for the Exercise of [the Court's] King's Bench Power or Extraordinary Jurisdiction. The Supreme Court assumed plenary jurisdiction and appointed this judge to conduct an evidentiary hearing as soon as practically possible on Petitioners' claim and to submit a report and recommendation, within thirty days of the completion of the proceedings, that specifies "whether relief, including the award of a new trial, is warranted."

In its Order, the Supreme Court noted that its exercise of plenary jurisdiction was based on Petitioners' proffered evidence that raised "... a colorable claim that the irregular assignment and trial in this case were tainted by the involvement of former Judges Michael T. Conahan and [Mark A.] Ciavarella." The Supreme Court Order noted that a further showing of prejudice is not needed when a "... material conflict of interest, bias, or similar judicial irregularity..." has been proved and noted that, "... in terms of the present case, an appearance of impropriety in either the assignment or trial of this case is sufficient to establish prejudice. *See* Pa. Const. art. I, §11; art. V, §10; *In Interest of McFall*, 617 A.2d 707, 712-713 (Pa. 1992)."

I held a two-day hearing on July 1 and 2, 2009. At that hearing, the Petitioners presented the testimony of six witnesses, and the Respondents called four witnesses to testify. Both parties offered numerous exhibits that are listed in the hearing's Notes of Testimony (N.T.). The court submits this Report and Recommendation which consists of findings of facts, a discussion of issues, conclusions, and recommendations.

I. Findings of Fact

A. CASE HISTORY

1. On May 22, 2002, Thomas A. Joseph, Thomas J. Joseph, his son, Acumark, Inc., Airport Limousine and Taxi Service, Inc., and Airport Taxi, Limousine and Courier Service of Lehigh Valley, Inc., corporations Thomas A. Joseph owned and operated, filed in the Office of the Prothonotary of Luzerne County a complaint asserting defamation and false light against The Scranton Times L.P., The Times Partner, either a business sole proprietorship or a general partnership, Edward J. Lynett, Jr. as limited partnership general partner, Edward J. Lynett, Jr., George V. Lynett and Cecelia Lynett Haggerty, individually and as general partners, The Scranton Times, Inc., Shamrock Communications, Inc., ZYXW, Inc., James Conmy, and Edward Lewis. (Joseph case) Petitioners Exhibits 1 and 60; Respondents Exhibit 1.

2. Thomas A. Joseph (Joseph) was identified as owning and operating businesses through the named corporations. The corporate entities and the individuals against whom the action was filed owned, published, edited, and wrote stories that appeared in *The Citizens' Voice*, a Wilkes-Barre newspaper. *Id.*

3. The Joseph case was tried without a jury before former Judge Mark A. Ciavarella (Ciavarella) in May 2006. The non-jury trial lasted eight days. Ciavarella issued a written verdict dated October 27, 2006, issued an Order dated November 8, 2006 denying Defendants' Motions for Post-Trial Relief, and filed, on March 28, 2007, an Opinion in support of the denial of the Post-Trial Motions. Petitioners Exhibits 56-57 and 59; Respondents Exhibits 2 and 4.

4. In the verdict, Ciavarella found in favor of Thomas A. Joseph and Acumark, Inc. in their separate claims of defamation and against The Scranton Times, L.P., The Times Partner, and Edward Lewis in the amounts of two million dollars and one million five hundred thousand

dollars, respectively.² Petitioners Exhibit 56; Respondents Exhibit 4.

5. On November 16, 2006, Thomas A. Joseph and Acumark, Inc. (Respondents) filed a praecipe for the entry of judgment in their favor and against The Scranton Times, L.P., The Times Partner, and Edward Lewis (Petitioners) based on Ciavarella's October 27, 2006 verdict. Petitioners Exhibit 58.

6. Petitioners appealed to the Superior Court which in an opinion affirmed the November 16, 2006 judgment. *Joseph v. The Scranton Times L.P.*, 959 A.2d 322 (Pa.Super. 2008). Petitioners filed a Petition for Allowance of Appeal which, as a result of the Supreme Court's Order dated April 7, 2009, has been held in abeyance, pending further Supreme Court action in connection with the Court's exercise of plenary jurisdiction in the present matter. Respondents Exhibits 3 and 5.

B. CASE EVENTS

7. The bases for the Respondents' asserted claims against the Petitioners in the underlying Luzerne County civil suit were ten articles that appeared in the June 1, 2001, June 2, 2001, June 5, 2001, August 5, 2001 (two articles), August 6, 2001, August 8, 2001, August 12, 2001, August 20, 2001, and October 10, 2001 editions of *The Citizens' Voice*. Petitioners Exhibit 1; Respondents Exhibit 1.

8. The content of the ten articles was summarized by the Superior Court in its opinion on direct appeal. Respondents Exhibit 3. *Joseph v. The Scranton Times L.P.*, 959 A.2d at 328-331. The articles first report the execution of a search warrant by federal law enforcement

² With respect to the other parties and claims, some corporations were removed as party defendants and some claims were dismissed during the trial or were decided in favor of the defendants by the case verdict. Petitioners Exhibits 5, 6, and 56; Respondents Exhibits 3 and 4.

officials at the business office of Acumark, Inc. on May 31, 2001. *Id.* Subsequent articles also report that search warrants were executed, also on May 31, 2001, at the residences of several individuals, including Joseph and William D'Elia (D'Elia), who was identified, according to sources, as being the head of an organized crime family in northeastern Pennsylvania. *Id.*

Among the individuals named in the articles, Acumark, Inc. was discussed or mentioned in two articles (complaint articles 1 and 9); Joseph was discussed or mentioned in one article (complaint article 5); Joseph and Acumark, Inc. were discussed or mentioned in one article (complaint article 2); Joseph and D'Elia were mentioned or discussed in three articles (complaint articles 4, 7, and 8); and Joseph, D'Elia, and Acumark, Inc. were discussed or mentioned in three articles (complaint articles 3, 6, and 10). *Id.*

9. No events requiring significant court involvement occurred in the Joseph case until May 21, 2004, when former President Judge Michael T. Conahan (Conahan), upon consideration of two Joint Motions, issued Orders that established a pre-trial schedule and that amended the case caption. When the Joint Motions were presented, Conahan told Respondents' local counsel, who had presented the motions, to inform Luzerne County Deputy Administrator of Civil Trials Ann Burns (Burns) that Conahan would retain jurisdiction over the Joseph case through the pre-trial process. Petitioners Exhibits 3-7 and 60. Conahan's intention to retain jurisdiction over the pre-trial matters of the Joseph case is noted in the judges civil assignments database entry for the Joseph case. Petitioners Exhibit 85.

10. On August 27, 2004, the First National Community Bank (FNCB) filed a Motion to Quash Petitioners' subpoena for the production of bank records, and a Rule was issued scheduling a hearing on the Motion. Petitioners had requested the bank records based, in part, on

Joseph's claim, made in answer to interrogatory 49, that officers at FNCB, Joseph's major bank, had declared that he and his companies were "... not loanable" Conahan's law clerk advised Petitioners' local counsel that Conahan would preside at the hearing on FNCB's Motion, that Conahan was a member of the FNCB's Board of Directors, and that the law clerk should be informed if a party had a problem with this information. Petitioners' counsel raised an objection with Respondents' local counsel. By letter notice dated September 20, 2004, the Court Administrator informed Petitioners' counsel that the Motion had been reassigned to Ciavarella who issued an Order dated October 7, 2004 that granted the FNCB's Motion to Quash the subpoena. Petitioners Exhibits 10-12, 16-20, 22, and 60.

11 Petitioners filed a Motion for Summary Judgment on August 31, 2004. By letter notice dated October 20, 2004, the Court Administrator informed Petitioners' counsel that the Motion for Summary Judgment had been assigned to Judge Joseph M. Augello. On October 27, 2004, Petitioners filed a Motion to Recuse Judge Augello. By letter notice dated October 28, 2004, the Court Administrator informed Petitioners' counsel that the matter had been reassigned to Ciavarella. Following oral argument on December 1, 2004, Ciavarella issued an Order on January 4, 2005 denying and dismissing Petitioners' Motion for Summary Judgment. Petitioners Exhibits 13, 24-26, and 60; Respondents' Exhibits 6-9.

12. Following the disposition of the Motion for Summary Judgment, counsel for both parties turned to other case-related matters and communicated with one another using methods including letters. One discussion topic was whether Ciavarella had been assigned to serve as trial judge. Examples of letters between counsel include a letter dated January 28, 2005 from Respondents' counsel expressing his understanding that Ciavarella "will handle all future

proceedings and try the case” and a letter dated February 3, 2005 from Petitioners’ counsel stating his belief that “we do not have a trial judge” and that the Court Administrator would randomly assign the case after a certificate of readiness has been filed. This topic was included in subsequent correspondence between counsel for both parties. This dialogue led both counsel to write Ciavarella directly on the topic and resulted in a letter dated March 7, 2005 that Ciavarella wrote Petitioners’ counsel in which Ciavarella stated “... that until a Certificate of Readiness is filed this case is assigned on a rotational basis and depending upon that rotation will determine which Judge actually presides over this matter.” By a letter also dated March 7, 2005, Ciavarella informed Luzerne County Court Administrator William Sharkey (Sharkey) that he had “... no objection to handling any pre-trial matters in this case, but [he] believe[d] it would be most appropriate for the Court Administrator to assign this matter to whatever Judge you deem appropriate.” Petitioners Exhibits 28 and 31-39.

13. On or about March 28, 2005, Respondents filed a Motion for Punitive Damages Discovery. Respondents’ counsel wrote Ciavarella a letter dated March 29, 2005 in which counsel expressed his understanding that, pursuant to Ciavarella’s March 7, 2005 letter, the Court Administrator had assigned Ciavarella to handle the Joseph case pre-trial matters and provided Ciavarella with a copy of the Motion for Punitive Damages Discovery. Ciavarella scheduled a hearing on Respondents’ Motion for May 11, 2005 and issued an Order dated May 24, 2005 granting Respondents’ Motion. Petitioners Exhibits 40-41, 43, and 45.

14. By letter dated October 14, 2005, Petitioners’ counsel wrote Conahan requesting a conference “... to discuss the selection of a trial judge and the possibility of an assignment of an out-of-county judge” An email message of October 18, 2005 written by one of Petitioners’

counsel memorialized a two-party telephone conversation between counsel and Conahan in which Conahan, in an apparent response to the October 14, 2005 letter, stated that he preferred waiting until a certificate of readiness had been filed and a trial judge assigned before discussing any problems Petitioners may have with the assigned trial judge. In this conversation, Conahan identified Ciavarella as one of three full-time civil judges. The same email message indicated that Conahan said that the Court Administrator assigns cases on a rotating basis and that he was not sure how the Court Administrator did the assignment, but did not think that any assignment was done by pulling names out of a hat. An email message of October 25, 2005 written by one of Petitioners' counsel memorialized that day's conference telephone call that involved Conahan and counsel for both parties. The message indicated that Conahan stated that once a certificate of readiness was filed a trial judge would be assigned on a random basis to one of the judges in the civil trial pool and indicated that no party had ever asked for an out-of-county judge in any case, even ones involving the media. By separate letter notices dated December 21, 2005, Burns, Deputy Administrator of Civil Trials, informed counsel for both parties that Ciavarella had been assigned the Joseph case for trial. Petitioners Exhibits 48-49 and 52-54.

15. Luzerne County judges other than Conahan and Ciavarella presided over pre-trial matters in the Joseph case. On June 16, 2004, Judge Mundy issued an Order, based on Petitioners' motion, directing the Prothonotary to issue a commission in order to obtain a subpoena for an out-of-state resident to appear for deposition. On September 13, 2004, Judge Burke denied Petitioners' motion for sanctions against an individual for failing to comply with a subpoena. On December 19, 2005, Judge Olszewski issued an Order granting the Petitioners' motions to compel certain Respondents to produce documents or to provide depositions, or both.

Petitioners Exhibit 60; Respondents Exhibits 16, 18 and 19.

16. Patricia E. Benzi worked as a security guard at the Luzerne County Courthouse. N.T., p. 123. She knew Robert Kulick (Kulick) and met D'Elia through Kulick at a party at Kulick's house in 2003. N.T., pp. 125-126. Benzi knew Conahan first on a professional level and then considered him a friend. N.T., pp. 127-128. D'Elia asked Benzi if she would deliver envelopes to Conahan, and Benzi delivered between ten to twenty envelopes to Conahan from 2003 through 2005. N.T., pp. 128-129 and 131. The first time Benzi delivered an envelope for D'Elia he referred to Conahan as Mike. N.T., p. 130. The last time Benzi delivered an envelope for D'Elia was possibly three weeks before D'Elia was jailed. N.T., p. 130. Another security guard would contact Benzi and tell her that D'Elia was outside the courthouse waiting in the employee parking lot where Benzi would go and receive the envelopes from D'Elia. N.T., p. 133. Benzi described the envelopes she received from D'Elia as being taped shut and having no writing on them. N.T., p. 132. D'Elia never told Benzi what was inside the envelopes, and Benzi did not know what was inside them and never opened any envelopes. N.T., pp. 130-132 and 145. Except for three times when she delivered D'Elia's envelopes to Conahan's tipstaff, Benzi delivered the envelopes directly to Conahan. N.T., pp. 134-135. Conahan only said "thank you" whenever Benzi delivered an envelope and never asked who had given her the envelope to deliver. N.T., pp. 135-136. Benzi also delivered to Conahan envelopes she received from Kulick. N.T., pp. 143-144. Benzi never delivered envelopes to Conahan from anyone other than D'Elia and Kulick during the three year period. N.T., p. 144. Conahan was the only judge to whom Benzi delivered envelopes. N.T., p. 144-145 and 147.

17. Benzi attended several parties at Kulick's house, and one of those parties was a

Christmas party in December 2005. N.T., pp. 139-142 and 150-151. D'Elia, Conahan, and Ciavarella attended that party, and Conahan and Ciavarella were the only judges there. N.T., pp. 142-143. The Christmas party was the only party at Kulick's house that Benzi saw Ciavarella in attendance. N.T., p. 151.

18. Kulick was convicted in 1988 of a federal income tax crime and was incarcerated for ten months. N.T., p. 159. Kulick pleaded guilty to a federal felony crime for firearms possession, is awaiting sentencing, and is hoping that his appearance as a witness in this matter would have a favorable impact on the sentence he receives. N.T., pp. 160 and 219-220.

19. Kulick has known D'Elia for most of his life, and they have had a personal and business relationship during that time. N.T., pp. 161-163. Kulick and his wife operated the Olive's Mediterranean Café, which was located across the street from the Luzerne County Courthouse, between 1999 and 2001, and D'Elia and Samuel Marranta visited the restaurant at least three days each week. N.T., pp. 158-159 and 163. D'Elia was also a frequent visitor to Kulick's house. N.T., pp. 163-164 and 191.

20. Kulick had only a casual social relationship with Conahan before 1999, but Kulick developed a more involved relationship with Conahan after 1999 as a result of Kulick's friendship with D'Elia. N.T., pp. 165-166. For example, Kulick and his wife had dinner with Conahan and his wife numerous times at public restaurants. N.T., p. 167. Conahan and his wife visited Kulick's residence on occasion, and Conahan attended parties at Kulick's home, including the Christmas party in December 2005. N.T., pp. 167-168. Beginning in 1999 or 2000 through 2005 or 2006, Kulick provided Conahan and Ciavarella weekend passes and tickets, each valued at about \$115, to attend the twice annual races at Pocono Racetrack. N.T., pp. 170-172. On

April 15, 2005, Conahan wrote character reference letters on judicial stationary on behalf of Kulick's wife as part of an on-line gaming license application process. N.T., pp. 176-180; Petitioners Exhibits 104 and 105.

21. Kulick discussed with Conahan cases that were pending before Conahan. N.T., p. 190. These discussions took place in person at breakfast and at the courthouse and by telephone. N.T., p. 190. Kulick arranged to meet Conahan either by speaking with him by telephone or by sending him a note in an envelope that Kulick had asked Patricia Benzi to deliver to Conahan. N.T., p.192. Benzi delivered an envelope to Conahan about ten times. N.T., p. 193. The envelope usually contained a note requesting a breakfast meeting, but sometimes contained raceway passes and tickets. N.T., pp. 193-194.

22. When meeting for breakfast, Kulick would meet Conahan at the Perkins restaurant on Route 309 in Wilkes-Barre. N.T., p. 190. The breakfast meetings started in 2001 after Kulick sold Olive's café and ended prior to D'Elia's first arrest in early 2006. N.T., pp. 191 and 195. Kulick met Conahan and D'Elia for breakfast at Perkins restaurant about twice a month. N.T., p. 234. D'Elia attended about eighty percent of the breakfast meetings that Kulick and Conahan had. N.T., pp. 194-195. Kulick, D'Elia, and Conahan usually sat together at the same table in the Perkins restaurant. N.T., pp. 196-197. If either Kulick or D'Elia had something personal to discuss with Conahan, the other person would walk away from the table so that the personal discussion could take place. N.T., p. 199.

23. Conahan stopped meeting D'Elia in public at the restaurant after D'Elia's first arrest, but continued to meet D'Elia in private at a store parking lot located about a mile and a half from the Perkins restaurant. N.T., p. 197. Kulick and Conahan would still meet for

breakfast, and Kulick would inform Conahan where in the parking lot D'Elia would be waiting.

Id. Conahan met D'Elia in the parking lot about three or four times, and Kulick would see them together as he drove from the Perkins restaurant. N.T., p. 198.

24. In private conversations with Conahan, Kulick discussed cases pending before Conahan and sought Conahan's advice or help for individuals with various legal problems or for ways to secure a favorable result for individuals. N.T., pp. 190, 199-205, and 228-229. Kulick did not know whether the discussions he had with Conahan about pending cases actually impacted in any way the outcome of those cases. N.T., pp. 231-232.

25. D'Elia had a close friendship with Conahan. N.T., p. 166. A friend of D'Elia had hired a company owned by Kulick's wife to apply for the on-line gaming license which, if awarded, would be transferred to D'Elia's friend. N.T., p. 180. D'Elia's friendships with Conahan and Ciavarella were independent of Kulick's social relationships with Conahan and Ciavarella. N.T., p. 184.

26. From 2004 through 2006, Conahan and D'Elia would meet for breakfast at the Route 309 Perkins restaurant.³ N.T., pp. 283-284. Their breakfast meetings stopped when D'Elia was imprisoned. N.T., p. 283. They would meet at around 6:30 o'clock A.M. and would sit at a booth in the back corner of the restaurant's front section. N.T., pp. 284-285 and 293-294. No other patrons were usually seated in the area where Conahan and D'Elia had breakfast. N.T., pp.

³ Two waitresses served breakfast to D'Elia and Conahan. Both worked the opening shift which starts on weekdays at 5:30 o'clock A.M. N.T., pp. 280 and 290. One waitress worked the opening shift on three weekdays, and the other waitress worked the opening shift on the remaining two weekdays. N.T., pp. 280 and 290. Both waitresses served D'Elia and Conahan breakfast. N.T., pp. 283 and 293. One waitress said that D'Elia and Conahan had breakfast together twice a month. N.T., p. 283-284. The other waitress said that they had breakfast two or three times a week. N.T., p. 293.

285 and 293. At times, they had envelopes and business papers on the table when they were having breakfast. N.T., pp. 285 and 295. On occasion, Conahan and D'Elia were joined by Kulick. N.T., pp. 295-296. Most of the time, Conahan and D'Elia were the only persons having breakfast. N.T., p. 297. When the three men were together, one might get-up from the table and go to the restaurant's lobby. N.T., pp. 297-298. Usually, Kulick was the person who left the table leaving Conahan and D'Elia alone. N.T., p. 298. On rare occasion, D'Elia left the table so that Conahan and Kulick were alone. *Id.* Conahan was never the person to leave the table. *Id.*

27. Kulick and D'Elia discussed many times the defamation civil action that Joseph had filed against the Scranton Times. N.T., p. 208. The Joseph case was a regular topic of Kulick and D'Elia's everyday conversations as the case was moving through the court system. N.T., pp. 209 and 263-264. D'Elia was upset that Joseph was pursuing the civil action, because D'Elia felt that the legal action resulted in him receiving undue notoriety. N.T., pp. 208-209. D'Elia laughed when he and Kulick talked about the Joseph case, because D'Elia said that Joseph would win the case. N.T., pp. 209-210.

28. D'Elia told Kulick that he had talked with Conahan who told D'Elia that he had talked with Ciavarella about the Joseph case and that the case would result in a positive outcome for Joseph.⁴ N.T., pp. 210-211, 265, and 269. D'Elia told Kulick what Conahan had said when the Joseph case was occurring. N.T., p. 211.

29. Thomas A. Joseph owned and was president of Acumark, Inc. N.T., p. 455. Joseph had a friendship with D'Elia, which included a business relationship. N.T., pp. 205-206

⁴ The statements contained in this sentence are the subject of Respondents' Motion in Limine. The admissibility of these statements is discussed later in this Report and Recommendation.

and 311. Joseph and D'Elia were friends from 1972 until the latter part of the 1990s. N.T., p. 478. The friendship between Joseph and D'Elia was based initially on the close relationship between their families. *Id.* Joseph and D'Elia had a business relationship, which resulted in Joseph paying D'Elia commissions for work that he directed toward Joseph's company. N.T., p. 476-478. In its opinion, the Superior Court characterized Joseph's trial testimony of his relationship with D'Elia as diminishing over time.⁵ *Joseph v. Scranton Times L.P.*, 959 A.2d 322, 342 (Pa.Super. 2008). Respondents Exhibit 3. D'Elia visited Joseph's business twice during the week after the searches were executed on May 31, 2001. N.T., pp. 478-489. Joseph said that he never asked D'Elia to intercede on his behalf in connection with the Joseph case. N.T., p. 459.

30. Conahan and Ciavarella were close friends who lunched together and attended social functions together. N.T., pp. 180-181. Ciavarella was friends with Conahan since 1995 and were next-door neighbors from 2005 or 2006 until 2008. N.T., pp. 409-410. A limited liability corporation that was owned by the wives of Ciavarella and Conahan owned a Florida condominium. N.T., pp. 410-411. Ciavarella and Conahan used the tickets and passes they had received and attended the races held at the Pocono Raceway. N.T., pp. 427-428. Ciavarella and Conahan attended the Christmas party that was held in December 2005 at Kulick's residence.

⁵ The Superior Court outlined Joseph's trial testimony regarding his relationship with D'Elia. Joseph was aware that D'Elia was a reputed leader of an organized crime family in northeastern Pennsylvania; that they had a personal and social relationship that began in the 1970s; that their relationship included their families; that a business relationship developed from the early relationships; that D'Elia referred customers to a Joseph company for which D'Elia was paid a commission; that in the mid 1990s Joseph began to disassociate himself from D'Elia because of D'Elia's relationship with Samuel Marranca; and that although still friends, Joseph and D'Elia only spoke by telephone and only several times a year. *Joseph v. Scranton Times*, 959 A.2d at 340-341. Respondents Exhibit 3. The testimony that Joseph provided at the hearing in this proceeding about his relationship with D'Elia is similar to his trial testimony. N.T., pp. 459-480.

N.T., p. 429.

31. Ciavarella served as a Common Pleas Court Judge from January 1996 until January 2009, when he resigned, because he was indicted by the federal government. N.T., pp. 366-367 and 376. Except for a brief time when another judge filled the position, Ciavarella presided as the county's juvenile court judge from September 1996 until 2008. N.T., p. 412. Ciavarella served as acting President Judge when Conahan was not available to serve in that capacity and was designated to act on behalf of the President Judge during his absence or recusal. N.T., p. 411; and Respondents Exhibits 10-12 and 14.

32. Ciavarella knew, at least from when Conahan had become his next-door neighbor, that Conahan had a relationship with D'Elia that included them meeting for breakfast or lunch at least once or twice a month. N.T., pp. 418-419. Ciavarella did not know what Conahan and D'Elia discussed when they met. N.T., p. 419. Ciavarella knew from reading newspaper articles that D'Elia was a reputed member of organized crime. N.T., p. 420. When asked if Conahan having breakfast or lunch with D'Elia created the appearance of impropriety, Ciavarella said he did not think it was a smart idea for Conahan to do so, because of the number of newspaper articles that concerned D'Elia. N.T., p. 421. Ciavarella told Conahan what he thought, and Conahan replied that he and D'Elia had been having breakfast or lunch for thirty years, that they were friends, and that he saw no reason to stop. N.T., p. 422.

33. In April 2002, a construction company owner visited Ciavarella in his courthouse chambers and offered to pay Ciavarella, as a finder's fee, 10% of whatever the contract price was for his construction company to build the private facility that would house juveniles that were placed at the facility by Luzerne County judges. N.T., p. 414. After speaking with the owner,

Ciavarella went to Conahan's courthouse chambers, told Conahan about the developer's payment proposal, and offered to give Conahan one-half of whatever monies he received from the owner, because "... [Conahan] had put the deal together." N.T., pp. 414-415. Ciavarella received payments of illegal money paid by the construction company or its owner from a company that was owned by Conahan. N.T., pp. 386-387. See footnote 6.

34. Ciavarella knew that D'Elia attended fund raisers that were held for his benefit. N.T., p. 422. In March 2005, an event was held at the Saber Room, a Wilkes-Barre restaurant, to raise funds for Ciavarella's campaign to be retained as judge. N.T., pp. 311, 320, and 424. Kulick and D'Elia attended the fund raising event. N.T., pp. 181-182, 322, and 425-426. During the event, Kulick and D'Elia were talking with one another, when Ciavarella walked by and made a gesture as if he did not want to hear what they were saying. N.T., p. 182. Kulick, D'Elia, and Conahan were together at another retention campaign fund raiser for Ciavarella that was held at the Woodlands Resort. N.T., pp. 182-183. Ciavarella knew D'Elia for fifteen or sixteen years and first met D'Elia when they attended a surprise birthday party for a third party. N.T., p. 420. Ciavarella saw D'Elia at the Christmas party that Kulick had at his home in December 2005. N.T., p. 429. Ciavarella said he had no relationship with D'Elia. N.T., p. 421.

35. Ciavarella was aware that D'Elia played a prominent part in the newspaper articles that formed the basis of Joseph's civil action against the Scranton Times. N.T., p. 430. Ciavarella gave three different answers to the question asking when he first became aware that D'Elia had a central role in the Joseph case and that the newspaper articles were about D'Elia or concerned him: during the trial, N.T., p. 431; after the case was assigned to him to resolve the summary judgment motion, N.T., pp. 431-432; and when he read the articles in the newspaper

when they first appeared, N.T., p. 432-433. Ciavarella said that he and Conahan never discussed D'Elia's involvement in the Joseph case. N.T., p. 434.

36. Ciavarella and Joseph met several times probably when each was dining at the Saber Room restaurant. N.T., pp. 376 and 456. Ciavarella may have hired a Joseph company to print literature during Ciavarella's campaign for judge. N.T., pp. 376

37. According to Ciavarella, he had no role in the process that resulted in his being assigned to the Joseph case for pre-trial matters and for trial. N.T., p. 367 and 372. Except for his clerks and staff, Ciavarella testified that he did not speak with anyone, including Conahan, about the way he handled the pre-trial matters and the trial in the Joseph case. N.T., pp. 368, 372-373, and 375. Finally in this regard, Ciavarella stated that no one attempted to influence in any way his decisions on pre-trial or trial matters. N.T., p. 368 and 373.

38. According to Ciavarella, the Court Administrator assigned him as the trial judge in the Joseph case, and the processes that resulted in his being assigned to handle the pre-trial matters and to serve as trial judge were not any different for the Joseph case than for any other case. N.T., pp. 368 and 372.

39. When asked to explain how cases were assigned and to explain the statement he made in his March 7, 2005 letter, Ciavarella at first said that he did not know how the Court Administrator's Office worked to assign cases from the civil trial list and then said the office "... would assign cases ... on a rotational basis looking at what kind of case load that judge already had, what type of case it was, was it going to be a protracted case, and then the Court Administrator would make the decision as to where that case would go." N.T., pp. 436-437. When asked to explain how that process was rotational, Ciavarella guessed that "... the Court

Administrator would rotate the cases as he saw fit.” N.T., p. 437. Ciavarella added that the process was rotational, because the Court Administrator would not assign all cases to only one judge, but would rotate case assignments among the judges. N.T., p. 438. Ciavarella did note that a judge who handled a pre-trial matter was usually assigned as trial judge. N.T., p. 371.

40. Ciavarella testified that he was not aware of any conflict of interest that affected any decision he made in or of any judicial irregularity that may have occurred in the Joseph case. N.T., p. 374.

41. Ciavarella acknowledged that as judge he had a fiduciary duty to the citizens of the Commonwealth of Pennsylvania, he had a duty to refrain from conduct that constituted a conflict of interest, and he had a duty to recuse himself from matters in which he had a conflict of interest. N.T., p. 380. Ciavarella knew he had a duty to file a true and complete annual financial disclosure form with the Administrative Office of the Pennsylvania Courts which would include the reporting the sources of all income of any kind. N.T., p.381. Ciavarella knew he had a duty as judge to disclose material information relevant to his ability to engage in impartial decision-making. N.T., p. 381.

42. Ciavarella admitted that from 2004 through 2007 he violated his duty to report outside sources of income, that he lied when completing the annual financial disclosure form by not reporting income received, and that he did not report on his income tax return as income the money he received from the owner or his contracting company. N.T., pp. 381-382, 388, and 394-397.

43. Because of his involvement in the unlawful schemes that resulted in his recent plea of guilty to federal crimes, Ciavarella admitted being a corrupt judge at same time he served

as judge in the Joseph case. N.T., pp. 379. Ciavarella did not consider the money he received "... to be illegal mob money."⁶ N.T., p. 387. Ciavarella testified that he believed he was entitled to the money he received from the owner and his construction company that built the privately-owned juvenile detention facility. N.T., pp. 387-388. Ciavarella did not report the money received on his income tax return, because Conahan said that he would pay the taxes on the money and that Ciavarella should consider the money to be a loan. N.T., pp. 388-389.

Ciavarella did not believe that the money paid was a loan, but believed that the money was in fact a direct payment to him. N.T., p. 389. Ciavarella stated that he did not declare the money he received on the annual financial disclosure form, because, based on his reading of the form and without reading the instructions that explained the form, he thought he was not required to do so. N.T., pp. 390-391.

44. Robert Powell, an attorney, a principal in the companies that owned the private detention facility that housed Luzerne county juveniles, and the person who rented the Florida condominium, appeared as an attorney in cases before Ciavarella during the time Ciavarella was receiving money as rental payments. N.T., pp. 398-399. Ciavarella never disclosed to opposing counsel in those cases the receipt of money payments from Powell. *Id.* Ciavarella knew that

⁶ Ciavarella received illegal payments through two schemes. In one scheme, the owner and his construction company (Mericle Development, the company that constructed the private detention facility to house juveniles sent there from Luzerne County after the county's juvenile facility was closed) wired money into an account which forwarded the money into the account of Beverage Marketing which paid Ciavarella about \$440,000. Beverage Marketing was a company owned by Conahan. N.T., pp. 383 and 385-387. In the other scheme, the principal owner of Vision Holdings had an agreement to rent the Florida condominium that was owned by the limited liability company that was owned by the wives of Ciavarella and Conahan. The rent, which was \$10,000 a month for six years, was pre-paid, but was not paid in-full. Ciavarella's share under the rental agreement was about \$520,000 which was received over a six or seven month period. N.T., pp. 391-394.

opposing counsel would have had a problem with the situation, if he had disclosed his receipt of money from Powell. N.T., p. 399. When asked if he should have recused himself from those cases, Ciavarella admitted that he should have disclosed the payments and stated that he would have considered recusal only "... if someone filed a motion and whether or not there truly was a conflict of interest." N.T., pp. 399-400.

45. At a hearing involving pre-trial matters before Ciavarella, Jeffrey McLaren, an attorney for one party, questioned Ciavarella about his social relationship with Powell who represented the other party in the case. N.T., pp. 401-403. Ciavarella responded by explaining his social relationship with Powell and with most of the other persons present in the courtroom at that time. N.T., p. 404. Ciavarella was bothered by McLaren's timing in raising the issue at the conclusion of a two-hour proceeding. N.T., p. 406. Ciavarella felt that if McLaren had a problem with him presiding over the case and if McLaren had information that lead him to think that Ciavarella could not be fair and impartial, then McLaren should have raised the issue before the hearing started. *Id.* Ciavarella admitted that McLaren would have had a problem with Ciavarella presiding over the case had he known that Ciavarella had received about \$500,000 from Powell. *Id.* Ciavarella did not disclose voluntarily the payment arrangement, because McLaren did not ask the question. N.T., p. 406-407. Ciavarella did not disclose the payment arrangement, because he knew that serious problems, like criminal prosecution, imprisonment, removal as judge, and disbarment, would result if the scheme were disclosed. N.T., p. 407. Because of these serious consequences, Ciavarella consciously decided, when questioned by McLaren, not to disclose the payment arrangement with Powell and to continue to preside over the case. N.T., pp. 407-408. Ciavarella stated that he should have recused himself from all cases

in which Powell represented a party and that he never recused himself because no attorney, including McLaren, ever asked the specific question that would have produced the answer needed for Ciavarella to recuse himself. N.T., pp. 408-409. According to Ciavarella, McLaren's questions were vague and not specific, and if McLaren had posed a specific question, Ciavarella would have answered it. N.T., p. 409.

46. Ciavarella accumulated debt of about \$180,000 during his 1995 election campaign for judge. N.T., p. 422. Ciavarella ran for retention as judge in 2005, and his retention campaign was intended to raise sufficient money to retire the debt from his 1995 campaign. N.T., pp. 422-423. The debt from the 1995 campaign was money he owed to himself. *Id.* The retention campaign raised enough money to satisfy the debt in full. *Id.*

47. Ann Burns has served as Deputy Administrator of Civil Trials in Luzerne County's Court Administrator's Office for eighteen years. Petitioners Exhibit 81. She was responsible for sending out the form letter dated December 21, 2005 to inform counsel that the Joseph case had been assigned to Ciavarella for trial. *Id.* See Petitioners Exhibits 53 and 54. Burns identified Petitioners Exhibit 80 as being part of the judges civil assignment database for closed cases and as representing the entries recorded in the database for the Joseph case. Petitioners Exhibit 81. She is responsible for causing information for each case to be entered into the database. *Id.* She wrote in the comments column for the Joseph case that the trial assignment was made by Conahan and Court Administrator Sharkey. *Id.* She normally did not include in the database comment column the kind of information she recorded for the Joseph case. *Id.* Burns included the information in the comments column for the Joseph case that Conahan had informed Sharkey who to assign as trial judge, because she "... wanted to be

protected myself.” *Id.* According to Burns, in December 2005, Judge Lokuta was the judge who was assigned to preside over non-jury trials, although other judges would sometimes also handle non-jury trials. *Id.* Burns did not know why the Joseph case was not given to the judge who was assigned to hear non-jury trials. *Id.* Burns said that the trial assignment in the Joseph case was out of the ordinary and was not done according to any rotational procedures of the Court Administrator’s Office. *Id.* In 2005, Burns was not aware of any system used by the Court Administrator’s Office to make case assignments on a random or rotational system. *Id.* Court Administrator Sharkey made all case assignments and would do so based on his own subjective factors, or as Burns said, the assignment system “... was just whatever was in Mr. Sharkey’s head.” *Id.*

48. The notation “Defamation - Assigned per MTC - WTS” appears in the comments column for the Joseph case which is one of the cases included in the judges civil assignment disposed database prepared by the Court Administrator’s Office. Petitioners Exhibits 80 and 82-84.

49. According to the court calendar for 2004, Judge Augello was assigned to preside over Motion’s Court for the week that began May 17, 2004. Petitioners Exhibit 92. However, on May 21, 2004, Respondents’ local counsel presented a Joint Motion to Set Pre-Trial Schedule and a Joint Motion to Amend Complaint to Conahan who signed the Orders attached to both joint motions. Petitioners Exhibits 3-6. Rules 206.4(c)(1)(ii) and 208.3(1)(ii) of the Luzerne County Rules of Civil Procedure, which identify the procedure for issuance of a rule to show cause and for motions indicates that judicial assignments for these proceedings are “... made on a rotating basis and available at the Office of Court Administrator.” Petitioners Exhibit 87.

50. According to the General Judicial Assignments beginning January 5, 2004, summary judgment motions in civil cases were assigned to Judge Augello, the trial judge, or an assigned judge. Respondents Exhibit 10. Rule 1035.2(a)(3) of the Luzerne County Rules of Civil Procedure authorizes the Court Administrator to assign to a judge a summary judgment motion after the party opposing the motion filed and served a comprehensive opposition brief. Petitioners Exhibit 87. On October 28, 2004, the Court Administrator reassigned the Petitioners' Motion for Summary Judgment to Ciavarella. Respondents Exhibit 9.

51. According to the Order of General Judicial Assignments for the period beginning September 6, 2005 to December 31, 2005, which was filed on June 21, 2005, and the subsequent Court Order of August 29, 2005, Ciavarella was one of five judges assigned to the civil trial section. Respondents Exhibits 12 and 13. On December 21, 2005, the Deputy Administrator of Civil Trials assigned the Joseph case to Ciavarella for trial. Petitioners Exhibits 53 and 54.

52. On January 26, 2009, Conahan and Ciavarella both pleaded guilty to the federal crimes of using the wires to defraud the citizens of Pennsylvania of the right to honest services by an elected public official and of conspiring with one another to defraud the United States. Petitioners Exhibits 65-69. The schemes that resulted in the federal crimes to which Ciavarella and Conahan tendered guilty pleas included causing money to pass through intermediaries and causing false records to be created. Petitioners Exhibit 65. The use of intermediaries included, but was not limited to, transferring of money into and from the bank account of Beverage Marketing of PA, Inc., a company Conahan controlled and into a bank account controlled by Ciavarella. *Id.* The creation of false records included, but was not limited to, Ciavarella's and Conahan's failure to disclose income sources and to disclose financial relationships on the

statements of financial interest for the years 2003, 2004, 2005, and 2006 that Ciavarella and Conahan submitted to the Pennsylvania Administrative Office of Courts. *Id.*

II. Discussion

The Supreme Court assigned this judge to hold a hearing and review the judicial assignments and the trial in the Joseph case. This review was necessary because of the allegations, raised in the Petitioners' Application, that judicial irregularities occurred during these stages of the case. The court held a two-day hearing to give the Petitioners the opportunity to prove their allegations and the Respondents the opportunity to refute them. The proceeding that the court conducted was unlike a traditional legal action which requires a determination of whether one party was injured or harmed by the act or omission of the other party. In this proceeding, the court was required to discover and then evaluate the actions of two former Luzerne County trial judges who were significantly involved in the Joseph case. The Petitioners and Respondents were not parties in the traditional sense in this proceeding. Instead, they and this court focused our attention on the judges whose conduct has been challenged in order to determine if there was impropriety and/or the appearance of impropriety. With this background, the report will discuss the issues involved in this proceeding.

A. RESPONDENTS' MOTION IN LIMINE

The Petitioners attached to their Supplement to Corrected Application for the Exercise of King's Bench Power or Extraordinary Relief a written Declaration of Robert J. Kulick. In paragraph 18 of the Declaration, Kulick alleged the following:

18. During this period of time [between in or about 1999 and in or about 2007], I was aware of the lawsuit that Thomas A. Joseph filed against the Citizens Voice and discussed it frequently with D'Elia, whom I knew to be close

to Joseph. On several occasions, D'Elia told me that he discussed the Joseph case with Judge Conahan, that Judge Conahan had told him he had discussed the case with Judge Ciavarella, and that the outcome of that case was going to be positive for Joseph. These conversations took place before the verdict was ultimately entered in that case.

Respondents Exhibit 22. Prior to the hearing in this case, Respondents filed a Motion in Limine seeking to exclude the testimony of Kulick relating to the statements contained in paragraph 18. Respondents argued that Kulick's testimony would constitute inadmissible triple hearsay. Prior to and at the beginning of the hearing, the court informed counsel for Petitioners and Respondents that the court would permit Kulick to testify to matters relating to the paragraph 18 statements and would decide later whether or not to exclude that testimony as Respondents had requested. N.T., pp. 9-10.

Hearsay statements are inadmissible, unless a statute or rule provides otherwise. Pa.R.E. 802. Hearsay is defined as a statement, other than one made by a declarant while testifying at a trial or hearing, that is offered as evidence to prove the truth of the matter asserted in the statement. Pa.R.E. 801(c). A declarant is a person who made the statement. Pa.R.E. 801(b). Pennsylvania cases have usually used the phrase "out-of-court statement," in place of the phrase "other than one made by the declarant while testifying at the trial or hearing," and the use of the phrase in the Rules was not intended to change Pennsylvania law. *Comment* to Pa.R.E. 801. When an out-of-court statement is offered for a purpose other than to prove the truth of its contents, the statement is not hearsay and is not excluded under the hearsay rule. *Commonwealth v. Cassidy*, 462 A.2d 270, 272 (Pa.Super. 1983). A hearsay statement is admissible if an exception to the hearsay rule applies. Pa.R.E. 803.

Kulick testified at the hearing to matters related to the statements made in the Declaration

paragraph 18. See Findings of Fact, paragraph 28. The court disagrees with Respondents' assertion that Kulick's testimony involved three out-of-court statements. See Respondents' Supplemental Hearing Memorandum, p. 2; and paragraph 95 of Respondents' Proposed Findings of Fact and Conclusions of Law. The court has drawn two conclusions from Kulick's testimony and the statements contained in paragraph 18 of the Declaration. The first conclusion is that Kulick's testimony involved two out-of-court statements. Kulick related what D'Elia had said about what Conahan had said in conversations with D'Elia. In other words, Conahan made statements to D'Elia who repeated them to Kulick who testified about them. The second conclusion is that Conahan's statements served to inform D'Elia that Conahan and Ciavarella had talked about the Joseph case and to assure D'Elia that the outcome of the case would be positive for Joseph. Nothing in Kulick's testimony suggests that Conahan's statements were restatements of what Ciavarella had told him. Conahan's statements to D'Elia about the expected positive outcome represented Conahan's characterization of the results of the discussions he and Ciavarella had about the case.

Petitioners assert that Kulick's testimony is admissible and advance alternative arguments to support their assertion. Either Kulick's testimony is not hearsay, because it was not offered for the truth of the matters contained in his testimony or the testimony satisfies the exception to the hearsay rule found at Pa.R.E. 803(25)(E). Petitioners' Proposed Findings of Fact and Conclusions of Law, paragraphs 12-18, pp. 42-45. The court finds that Kulick's testimony relating to the statements found in paragraph 18 of his Declaration is admissible, because it was

not offered to prove the truth of the matters asserted in the statements.⁷

An out-of-court statement that is not offered as proof for the truth of the matter asserted in the statement is not hearsay. In other words, an out-of-court statement is not hearsay, when it has a purpose other than to convince the factfinder of the truth of the statement. Instances when such non-hearsay statements are admissible include, but are not limited to, the declarant's state of mind, *Commonwealth v. Goldblum*, 447 A.2d 234 (Pa. 1982) (holding that a person's statements that he had business dealings with the defendant were not hearsay, because the statements were offered to show that the declarant knew the defendant); and the hearer's state of mind,

⁷ Pa.R.E. 803(25)(E) serves as an exception to the hearsay rule to admit as evidence a statement that is offered against a party-opponent and is made by a co-conspirator of the party-opponent during the course and in furtherance of the conspiracy. Pa.R.E. 803(25)(E) is consistent with Pennsylvania law. See *Commonwealth v. Mayhue*, 639 A.2d 421 (Pa. 1994); *Commonwealth v. Dreibelbis*, 426 A.2d 1111 (Pa. 1981). This hearsay rule exception is applicable in civil and criminal cases. See *Marshall v. Faddis*, 49 A. 225 (Pa. 1901); *Wagner v. Aulenbach*, 32 A. 1087 (Pa. 1895). The rationale for the exception is that since each co-conspirator represents all co-conspirators by virtue of their agreement with one another, the acts and statements made by one co-conspirator done and said during and in furtherance of the conspiracy are attributable to all members of the conspiracy. For hearsay evidence to be admissible under Pa.R.E. 803(25)(E),

“[t]he prosecution must prove the existence of a conspiracy between the declarant and the defendant against whom the evidence is being offered. Once this requirement is satisfied the Commonwealth must show that the statements were made during the course of the conspiracy, and finally that the statements were made in furtherance of the common design.”

Mayhue, 639 A.2d at 431, citing *Commonwealth v. Zdrate*, 608 A.2d 1037, 1039 (Pa. 1992).

In this case, Petitioners failed to establish the existence of a conspiracy between the declarants, Conahan and D'Elia, and the party-opponent and failed to identify the party-opponent and to explain how the party-opponent was part of the conspiratorial arrangement. Petitioners claim that “[t]he party against whom Kulick's testimony is offered, therefore, is not Joseph, but rather the Luzerne County court system as operated under Conahan.” Petitioners' Proposed Findings of Fact and Conclusions of Law, paragraph 15, p. 44. This claim is not supported by any evidence and is not sufficient to satisfy the proof requirements for a conspiracy that would be needed for Pa.R.E. 803(25)(E) to apply to admit the testimony. The party opponents in the Joseph case were the Petitioners and the Respondents. As noted earlier, this court does not view this proceedings as a traditional case involving two opposing sides.

Commonwealth v. Fisher, 681 A.2d 130 (Pa. 1996) (holding that the victim’s statements about the defendant that were communicated to the defendant were not hearsay, when the statements were offered to prove the defendant’s motive for killing the victim).

In this case, Kulick’s testimony about matters related to the statements in paragraph 18 of the Declaration has a purpose that is distinct from serving to prove the truth of the facts Conahan communicated in his statements to D’Elia. Kulick’s testimony served as circumstantial evidence of the appearance of impropriety of Conahan and of the relationships that existed between Ciavarella, Conahan, D’Elia, and Kulick. Conahan’s statements which were made before the Joseph case was completed, which were made to someone not connected to or affiliated with the court system, and which were expressions of his belief about the outcome of a pending case serve to establish circumstantially that judicial impropriety was present. Kulick’s testimony regarding Conahan’s statements also helps circumstantially to define the extent and character of the relationships between and among those four individuals. Evidence of a judge’s statements about a pending case is relevant to the issue of an appearance of impropriety. In *Commonwealth v. Stevenson*, 829 A.2d 701 (Pa.Super. 2003), the Superior Court held that recusal was warranted, because the judge’s statements, made at arraignment in a criminal case, raised doubts about the judge’s ability to preside impartially in the case and about the appearance of impropriety. In reaching its decision, the Superior Court noted that the inquiry into whether a judge should be recused “... is not whether the jurist was in fact biased against a party, but whether, even if actual bias or prejudice is lacking, the conduct or statement of the court raises ‘an appearance of impropriety.’” *In the Interest of McFall*, 533 Pa. 24, 34, 617 A.2d 707, 712 (1992).” *Stevenson*, 829 A.2d at 705. The nature of these extra-judicial relationships also has a direct bearing on the

judicial activities of Conahan and Ciavarella in connection with the Joseph case.

The nature of Conahan's statements does not diminish or detract from the authenticity of those statements as presented in Kulick's testimony. The personal nature of the relationships involving Conahan, D'Elia, and Kulick assures that statements were repeated accurately. Kulick's pending sentencing assures an incentive to testify truthfully. What Conahan stated and the circumstances under which he made the statements serve as circumstantial evidence to be considered when deciding the issues of this proceeding.⁸

B. INFERENCES FROM INVOKING THE CONSTITUTIONAL PRIVILEGE

Petitioners subpoenaed Conahan, Sharkey, and D'Elia to testify in this proceeding. Petitioners informed counsel for each individual that their clients would be questioned about general court policy and practices for the assignment of cases in Luzerne County, about the assignment of pre-trial and trial matters in the Joseph case, and about any communications about the Joseph case each had with the other individuals. Petitioners Exhibits 72-75. Counsel responded and stated that each client, if called to testify, would invoke his 5th Amendment privilege against self-incrimination. Petitioners Exhibits 76-77.

Petitioners have asked this court to draw adverse inferences from the invocation of the constitutional privilege by these individuals and offered the following in support of their position. "It is well settled that an adverse inference against parties to civil actions is warranted

⁸ This proceeding involves direct and circumstantial evidence. Kulick's testimony about matters related to the statements in paragraph 18 of the Declaration constitutes only a portion of his hearing testimony. This portion of Kulick's testimony represents relevant circumstantial evidence and is part of the total circumstantial evidence presented in this proceeding. However, it is not so significant that its absence would result in a different result. The court would have reached the conclusion it did regarding judicial impropriety, even if the court had decided to exclude this portion of Kulick's testimony.

when they invoke the United States Constitution’s Fifth Amendment privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Harmon v. Mifflin County Sch. Dist.*, 713 A.2d 620, 623 (Pa. 1998) (quoting *Baxter*, 425 U.S. at 318).⁹⁹ Petitioners’ Proposed Findings of Fact and Conclusions of Law, paragraph 23, p. 47.

The court declines to draw any adverse inference from the individuals’ invocation of their constitution privilege against self-incrimination. Petitioners do not identify the specific inferences the court should make. The principles from the *Baxter* and *Harmon* cases do not apply to the facts in this case, because none of the individuals who asserted their constitutional privilege are a party to the Joseph case. *Harmon* requires that independent, probative evidence of the misconduct be presented before an adverse inference can be drawn from the invocation of the 5th Amendment privilege. *Harmon*, 713 A.2d at 624-625. Even if *Harmon* applied in this case, no adverse inferences can be drawn, because the failure to specify what inferences to draw prevents identifying what hearing evidence constitutes the required independent, probative evidence of the misconduct.

C. APPEARANCE OF IMPROPRIETY

In this proceeding, the court is guided by the Code of Judicial Conduct.

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

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

⁹ Petitioners also cite federal cases that permit an adverse inference when the privilege is asserted by a non-party witness who is closely associated with a party litigant. Petitioners direct this argument with respect to the privilege assertion by D’Elia only. Petitioners argument is predicated upon the assumption that Conahan is a party to the case. The federal cases are distinguishable from this proceeding because of the factual differences. Conahan is not a party litigant and, although Conahan and D’Elia may have close personal relationship, that relationship is unlike the fiduciary relationships that permitted the inference in those cases.

integrity and impartiality of the judiciary.”

B. Judges should not allow their family, social, or other relationships to influence their judicial conduct or judgment. They should not lend the prestige of their office to advance the private interests of others; nor should they convey or knowingly permit others to convey the impression that they are in a special position to influence the judge. Judges should not testify voluntarily as a character witness.

Canon 3. Judges should perform the duties of their office impartially and diligently.

C(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

(a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

This court also finds relevant in this civil proceeding the principles the Supreme Court applied in a criminal case that involved whether a sentencing judge’s statements to the media warranted recusal.

The sentencing decision is of paramount importance in our criminal justice system, and must be adjudicated by a fair and unbiased judge. *Commonwealth v. Knighton*, 415 A.2d 9, 21 (Pa. 1980). This means, a jurist who assess[es] the case in an impartial manner, free of personal bias or interest in the outcome. *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 89 (Pa. 1998). Because of the tremendous discretion a judge has when sentencing, a defendant is entitled to sentencing by a judge whose impartiality cannot reasonably be questioned. *Commonwealth v. Darush*, 459 A.2d 727, 732 (Pa. 1983). A tribunal is either fair or unfair. There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings. *In Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992). If a party questions the impartiality of a judge, the proper recourse is a motion for recusal, requesting that the judge make an independent, self-analysis of the ability to be impartial. *Commonwealth v. Travaglia*, 661 A.2d 352, 370 (Pa. 1995). If content with that inner examination, the judge must then decide whether his or her continued involvement in the case creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary. *Commonwealth v. Tharp*, 830 A.2d 519, 534 (Pa. 2003) (quoting *Abu-Jamal*, 720 A.2d at 89). This assessment is a personal and unreviewable decision that only the jurist can make. *Id.* Once the decision is made, it is final *Travaglia*, 661 A.2d at 370 (quoting *Reilly v. SEPTA*, 489 A.2d 1291, 1300 (Pa. 1985)).

This Court presumes judges of this Commonwealth are honorable, fair and competent, and, when confronted with a recusal demand, have the ability to determine whether they can rule impartially and without prejudice. *Commonwealth v. White*, 734 A.2d 374, 384 (Pa. 1999). The party who asserts a trial judge must be disqualified bears the burden of producing evidence establishing bias, prejudice, or unfairness necessitating recusal, and the decision by the judge against whom a plea of prejudice is made will not be disturbed except for an abuse of discretion. *Darush*, 459 A.2d at 731.

Commonwealth v. Whitmore, 912 A.2d 827, 833-834 (Pa. 2006) (quoting *Commonwealth v. Druce*, 848 A.2d 104, 108 (Pa. 2004)) (alteration in original) (citations modified).

1. Court Administration

The Joseph case was dormant for about two years, until May 2004 when a series of judicial actions culminated in a non-jury trial in May 2006. Those judicial actions are the subject of this proceeding. Several of those actions raise an appearance of impropriety.

In May 2004, Petitioners' local counsel presented two joint motions to Conahan for his signature. Another judge had been assigned to serve as motion judge during the week the motions were presented. No explanation was offered to explain why the assigned judge was bypassed. Another unusual circumstance regarding the presentation of the two joint motions was Conahan's statement that he would preside over the Joseph case through the pre-trial stage. This action conflicted with local court rules that provided for the rotational assignment of pre-trial matters among the designated judges.

In September 2004, counsel for FNCB filed a motion to quash a subpoena that Petitioners had issued for bank records. The motion was to be heard by Conahan, and the bank's counsel relayed to Petitioners information that Conahan was a member of the bank's Board of Directors

and that Conahan should be so advised if that presented a problem.¹⁰ Petitioners thought it would be inappropriate, and thereafter the court administrator sent a letter notice informing counsel that the matter had been reassigned to Ciavarella who granted the bank's motion to quash. This reassignment was the first of several matters, requiring significant judicial decision-making, being assigned or reassigned to Ciavarella.

In October 2004, the court administrator sent a letter notice informing counsel that Petitioners' summary judgment motion had been assigned to Judge Augello. Petitioners filed a Motion to Recuse Judge Augello, based on Joseph's deposition answers which made reference to Judge Augello. The motion was granted. The court administrator then sent a letter notice informing counsel that the summary judgment motion had been reassigned to Ciavarella. Following argument, Ciavarella denied and dismissed the motion. This represented the second time a matter of significance in the Joseph case was assigned to Ciavarella.

At this point in the case, Petitioners and Respondents disagreed over whether Ciavarella had been assigned to hear all pre-trial matters and even to serve as trial judge in the Joseph case. The dispute included both counsel sending letters to Ciavarella outlining their positions on the matter. In response, Ciavarella sent a letter in March 2005 indicating that the matters in the Joseph case would be assigned on a rotational basis, that a trial judge would not be assigned until a certificate of readiness is filed, and that the actual trial judge would be determined by the rotational assignment process provided in the local court rules. At the same time, Ciavarella sent a letter informing the court administrator that he had no objection to handling any pre-trial

¹⁰ The Information that charged Ciavarella and Conahan with federal crimes details several schemes that were used as methods for making illegal payments. One scheme involved transferring money into and from the bank account of Beverage Marketing of PA, Inc., a business entity controlled by Conahan. The Information does not identify the bank having that account.

matters in the Joseph case and that the court administrator should assign future matters in the Joseph case to an appropriate judge.

Later in March 2005, Respondents counsel informed Ciavarella that pursuant to Ciavarella's March letter the court administrator had assigned him to handle the Respondents Motion for Punitive Damages Discovery. In May, Ciavarella granted Respondents motion. The court administrator sent no letter notice informing counsel that the Respondents' motion had been assigned to Ciavarella. This the third matter of legal import in the Joseph case that Ciavarella handled.

In October 2005, Petitioners counsel sent Conahan a letter requesting a conference to discuss the assignment of the trial judge in the Joseph case and the possibility of having an out-of-county judge preside. This was followed by two telephone conference calls, the first one of which was *ex-parte* with Petitioners' counsel, in which Conahan discussed several topics and said that the Petitioners should delay raising any questions about the trial judge until after the certificate of readiness had been filed and a judge actually assigned, that several judges were assigned to civil cases, and that once the certificate was filed a trial judge would be assigned using the regular, random rotational process.

Two months later, on December 21, 2005, Deputy Administrator for Civil Trials Burns sent a letter notice informing counsel that Ciavarella had been assigned as trial judge. This was the fourth matter in the Joseph case that was assigned or reassigned to Ciavarella.

Several features about these events raise questions and create the appearance of impropriety about the way the Joseph case progressed through the Luzerne County court system.

Despite Conahan's statements that several judges were assigned to handle civil cases,

Ciavarella was the only judge assigned to handle matters that involved significant judicial decision-making in the Joseph case. Other Luzerne County judges presided over some pre-trial matters in the Joseph case, but those matters did not involve serious outcome determinative issues. See Finding of Facts 15. A reasonable conclusion is that other judges were available to preside over pre-trial and trial matters in the Joseph case. However, Ciavarella was the only judge assigned to proceedings that involved any significant issues.

The practice of the court administrator notifying counsel of a judicial assignment or reassignment was not uniform in this case. No notice was sent to inform counsel that the Respondents Motion for Punitive Damages Discovery had been assigned to Ciavarella.

In their written and oral statements, both Ciavarella and Conahan indicated to counsel that the process of judicial assignment and reassignment would be done in accordance with the local court rules which normally involved randomly assigning a judge from the list of judges assigned to handle civil cases using a rotating basis for the assignment. The implication from their descriptions of the process is that cases were assigned autonomously and rotationally among the judges assigned to handle civil cases. There was a distinct variance between how assignments were required to be made and how they were actually made in the Joseph case. Ciavarella testified at the hearing that the process for judicial assignments in the Joseph case was no different from the process used in other civil cases. Finding of Fact 38. Ciavarella indicated that he understood the local court rule that required assignment on a rotational basis to mean that the court administrator would assign cases as he saw fit. Finding of Fact 39. According to Conahan, judicial assignments were made on a rotating basis. He was unsure how the court administrator actually made assignments, but was sure that assignments were not made by

pulling a judge's name out of a hat. Finding of Fact 14. It would not be unreasonable for a President Judge to be familiar with the process the county's court administrator employed to make judicial assignments or to talk with the court administrator about the process as questions arose.

The evidence indicates that Ciavarella and Conahan portrayed a judicial administration process that involved a neutral and detached assignment of case among listed judges, but understood that the process really entailed a subjective decision by the court administrator, with possible President Judge input, to assign a case to a judge. This view was confirmed by Deputy Administrator for Civil Trials Burns who, having eighteen years experience in that position, had no knowledge of any system that the court administrator used to assign cases on a random or rotational basis and who understood the court administrator's system for case assignments as being based on his own subjective factors. Finding of Fact 47. Civil cases in Luzerne County were not assigned randomly as required by the local court rules, but selectively according to factors known only to the court administrator.

The event that placed the previously described events in perspective and that most exemplified the questionable practices employed in the assignment/reassignment process was the way the Joseph case was assigned for trial. The trial assignment was not made pursuant to the local court rules or according to the way Ciavarella and Conahan described the assignment would take place. Instead, Conahan directed the court administrator to assign the Joseph case trial to Ciavarella. No impartial method was used. The method by which the Joseph case was assigned for trial was unusual according to Deputy Administrator for Civil Trials Burns. Finding of Fact 47. She was so concerned about the way the trial assignment was made that she included a

notation of how the assignment was made in the Court Administrator Office's database. Making this notation was something that she normally did not do. She made the notation in this particular case, because she wanted to protect herself. She did not explain why or from whom she needed protection. A reasonable inference is that Burns had some unspecified concerns about the practices or the persons involved to cause her to take the unusual step of recording who made the trial assignment in the Joseph case. The questionable acts in the trial assignment were Conahan's personal role in making the assignment and Ciavarella being assigned as the trial judge.

The way the Joseph case was assigned or reassigned creates the appearance of impropriety. As President Judge, Conahan was responsible for the administration of cases through the Luzerne County's court system. This duty included oversight of the court administrator charged with carrying-out this responsibility. A party litigant is entitled to a fair and unbiased assignment of the case. The county local court rules specified the procedure for case assignments. The rules were not followed, and assignments were made according to the subjective discretion of the court administrator acting upon direction from the President Judge. The reasonable inference from all the evidence in this proceeding is that the subjective assignment process the court administrator employed determined the assignments in the Joseph case. In fact, the direct evidence is that Conahan, as President Judge, directed the court administrator to assign Ciavarella as the trial judge. It would also be reasonable to infer that since Conahan specially designated Ciavarella to serve as trial judge, Conahan also had directed that Ciavarella be assigned to the pre-trial matters as well. The practice of saying that case assignments are made using a random, rotating assignment method identified in the local court

rules and then actually making assignments on a selective, discretionary basis does not promote public confidence in the integrity and impartiality of the judiciary under Conahan's leadership. All assignments or reassignments of matters involving outcome determinative issues were only given to Ciavarella, even though other civil court judges were apparently available for assignment. This court finds sufficient evidence to establish the appearance of impropriety in the assignment and reassignment of matters in the Joseph case.¹¹

2. Relationships and Improper Appearances

The Joseph case involved a tangled web of interconnected relationships that created the appearance of impropriety in the way Ciavarella and Conahan conducted themselves throughout the case. These relationships involved Ciavarella, Conahan, D'Elia, Kulick, and Joseph. They may not directly link all parties, and they may not have been readily apparent. They were real, however, and help explain the actions of Ciavarella and Conahan.

A central figure in this proceeding is D'Elia. The Joseph case was predicated on ten newspaper articles that discussed or mentioned Joseph and D'Elia, and others, in connection with a federal criminal investigation. The articles reported that D'Elia was a reported member of an organized crime family in northeastern Pennsylvania. The hearing evidence established that D'Elia had relationships with Ciavarella, Conahan, Kulick, and Joseph that varied in nature and

¹¹ Petitioners proposed that this court revisit the evidentiary rulings and legal interpretation and analysis that Ciavarella made during the trial. This court declines to do so, because of the sufficient evidence of appearance of impropriety in the way the Joseph case progressed through the county court system. The Superior Court conducted this review and affirmed the judgment based on the record before it. Based on the discussion in the next section, sufficient questions can be raised about the way Ciavarella carried out his several functions in the Joseph case. A new judge with a fresh eye and perspective reasonably might not evaluate witness credibility or might not assign the same weight and emphasis to the testimony in the same way Ciavarella did when deciding the summary judgment motion, serving as factfinder, and awarding damages.

degree. The other individuals had relationships with one another, but the common denominator involves the relationship each had with D'Elia.

Conahan had a thirty year friendship with D'Elia. D'Elia called Conahan by his first name and sent Conahan envelopes without Conahan asking the delivery person who sent the envelopes. Conahan and D'Elia attended public functions together and would have breakfast or lunch meetings frequently. The bond between Conahan and D'Elia was apparently so strong that, when Ciavarella told Conahan that he thought it was not smart for Conahan to have breakfast or lunch with D'Elia, Conahan responded by saying that he and D'Elia had been eating together for thirty years, that they were friends, and that he saw no reason to stop meeting D'Elia.¹² The relationship between Conahan and D'Elia was so strong that they continued to meet in private after D'Elia's first arrest in 2006.

Conahan and Ciavarella knew one another since 1995. They were close friends who lunched together and attended social functions together and were next door neighbors for about three years. Ciavarella served as temporary President Judge whenever Conahan was unavailable for those duties. Ciavarella knew that Conahan had a personal friendship with D'Elia and thought that Conahan was not smart to do so, because of what was reported in the newspaper articles. Conahan and Ciavarella also engaged in a criminal scheme that resulted in both men being charged with and pleading guilty to federal crimes.

Ciavarella had known D'Elia for fifteen or sixteen years. D'Elia, Kulick, and Conahan

¹² This response is especially significant in several ways. It demonstrates the intensity of the personal relationship between Conahan and D'Elia; it demonstrates that the relationship between Ciavarella and Conahan was sufficiently discrete that they were able to have this personal conversation; and it indicates that Conahan and Ciavarella discussed significant topics, including the Joseph case as D'Elia had told Kulick.

attended Ciavarella's fundraisers and attended social events, like parties, that Ciavarella also attended. Ciavarella claimed he had no relationship with D'Elia.

Joseph had a relationship with D'Elia beginning in 1972 and ending sometime in the 1990s. The relationship decreased over time. Joseph claimed to have only minimal contact with D'Elia in recent years and claimed he never asked D'Elia to intercede on his behalf in the Joseph case.¹³

Conahan's long-standing and public relationship with D'Elia by itself created the appearance of impropriety. D'Elia's reputation may not be factual, but Conahan's association with a person with that kind of reputation and with the perception that D'Elia had special access to Conahan created the appearance that does not promote public confidence in the integrity of the court.

Conahan was involved in the process that assigned the Joseph case to Ciavarella for pre-trial matters and for the non-jury trial. Conahan should have refrained from involvement in any way in the Joseph case, because of the central part D'Elia played in the newspaper articles that were the basis for the case. Conahan's impartiality might reasonably have been questioned and created the appearance of impropriety, when making the judicial assignments, based on the strength of his personal friendship with D'Elia.

Ciavarella denied absolutely that he ever discussed the Joseph case with Conahan. The

¹³ In conversations with Kulick, D'Elia expressed displeasure when Joseph filed the civil action, because D'Elia felt it brought him undue notoriety. Respondents argued that this negated any inference that D'Elia had an interest in helping Joseph. Petitioners Supplemental Hearing Memorandum, p. 5, note 4. Given the personal nature of their relationship, it is reasonable to conclude that D'Elia expressed these feelings to Conahan. It is also reasonable to conclude that D'Elia had an interest in the case and would have gained a measure of satisfaction by a verdict in favor of Joseph knowing that the verdict could be interpreted as retribution against the newspapers for the articles or as vindication that the articles' contents were not true.

court finds it difficult to reconcile this denial given their close friendship, their judicial relationship, and their shared involvement in the criminal scheme that resulted in the federal criminal prosecutions. Ciavarella knew that Conahan and D'Elia had a long, close personal relationship and knew from reading the newspaper articles that formed the basis for the Joseph case that D'Elia played a prominent in the content of those articles.¹⁴ Based upon these facts and considering that Ciavarella's initial response after speaking with the contractor who offered to make illegal payments was to discuss it with Conahan, the court finds it unlikely that Ciavarella never spoke with Conahan about the Joseph case. Ciavarella's ability to speak with Conahan about personal matters raised a reasonable question about Ciavarella's impartiality to preside over a case that depended upon a review, analysis, and interpretation of newspaper articles that involved Conahan's close friend.

Ciavarella and Conahan had a personal and professional relationship which ordinarily would not raise any concerns. However, their relationship assumed a different character when they engaged in the illegal schemes that resulted in the federal criminal charges. This new relationship influenced their conduct and judgments in other Luzerne County cases and could reasonably have influenced their conduct in the Joseph case. Ciavarella would not want to reach a decision that would upset the individuals involved directly or indirectly. A verdict against Joseph would deny him a monetary award and would suggest reasonably that the information reported in the articles was true. This different dimensioned relationship between Ciavarella and Conahan could reasonably have influenced their judicial conduct or judgment in the Joseph case

¹⁴ One factor that undermines Ciavarella's denial is that he offered three answers to explain when he first became aware of the central position that D'Elia played in the content of the newspaper articles. See Finding of Fact 35.

and created the appearance of impropriety.

Although Petitioners never filed a motion to recuse Ciavarella, the hearing facts suggest that Ciavarella lacked the ability to undertake the critical self-examination needed to determine his ability to impartially preside over the Joseph case. See Findings of Fact 44 and 45. In those cases, Ciavarella failed to disclose facts which would have assisted a party litigant to evaluate whether a recusal motion was appropriate. Ciavarella never volunteered that information, because he knew that if he did serious consequences would result. Ciavarella's claim that he was unaware of any conflict of interest in any decision he made in the Joseph case is self-serving and, from prior case examples, is based on a myopic or flawed, or both, perception of what was expected for a critical self-examination.

Ciavarella's admissions that he was a corrupt judge while presiding over the Joseph case, that he did not report outside income on the annual financial disclosure form for judges, that he lied when completing the form, and that he failed to properly report income on his tax returns are sufficient basis to conclude that he violated his fiduciary duty to the citizens of the Commonwealth of Pennsylvania, that he violated his duty to refrain from conduct that constituted a conflict of interest, and that he failed in his obligation to recuse himself in cases in which he had a conflict of interest. These conclusions alone are sufficient to create the appearance of impropriety to serve as judge for any matter in the Joseph case. Tellingly, former judge Ciavarella, a witness called by the Respondent, was, because of his demeanor and lack of remorse, one of Petitioners' best witnesses. His testimony was one of the factors that persuaded me there was and is an appearance of impropriety and a need for a new trial in this case.

The evidence indicates that the multiple, layered relationships (between Ciavarella,

Conahan, D'Elia, and Kulick) influenced Ciavarella and Conahan in their judgement and actions in the Joseph case. Each individually is sufficient to establish the appearance of impropriety, and, when combined, the appearance becomes stronger, brighter and more compelling of the conclusions suggested hereinafter.

III. Conclusions

1. That the portion of Kulick's testimony that related to his statements in paragraph 18 of his Declaration was not hearsay and is admissible at the hearing, because its evidentiary purpose was to establish the appearance of impropriety and the relationships that existed among certain individuals.

2. No adverse inferences of misconduct against Conahan, Sharkey, and D'Elia should be drawn as a result of their assertion of their 5th Amendment privilege against self-incrimination, because no legal authority would allow for the inferences to be made under the circumstances of this case and applicable law.

3. The conduct and judgment of Ciavarella and Conahan in the assignment process of the Joseph case created the appearance of impropriety and the relationships each had with individuals connected directly and indirectly with the Joseph case affected their conduct and judgment in the Joseph case and created appearances of impropriety. Based upon these findings, a new trial is required in the Joseph case.

IV. Recommendation

Petitioners have requested three remedies and have urged this hearing judge to recommend that the judgment and all orders of Conahan and Ciavarella in the Joseph case be

vacated, that an out-of-county judge be appointed to preside over the Joseph case, and that the Petitioners be permitted, at their option, to request a jury trial.

Based on the Supreme Court's Order of April 7, 2009, the testimonial and documentary evidence presented, and the arguments made and authority cited during the hearing and in the parties' briefs and other submitted documents, and in view of the findings of fact and discussion set forth in the previous sections of the Report and Recommendation, I make the following recommendations.

1. In the interests of fair and impartial justice, the judgment entered in the Joseph case as well as all substantive orders of former judges Conahan and Ciavarella in the case should be vacated by the Pennsylvania Supreme Court.

2. The Joseph case should be returned to Luzerne County for disposition consistent with these recommendations, including a new trial. No evidence was presented in this proceeding to indicate that there are not current members of the Luzerne County Court of Common Pleas who could not serve fairly and impartially as judges to dispose of the Joseph case.

3. The Petitioners should not be permitted the opportunity to request a jury trial. No evidence was presented to establish that Petitioners' failure to request a jury trial was in any way influenced or affected by the conduct of Ciavarella or Conahan.

Respectfully submitted,

/s/ William H. Platt

William H. Platt, President Judge
Court of Common Pleas of Lehigh County

Dated: August 3, 2009