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February 22, 2016

717-234-7911

Honorable Jack A. Panella
Conference Judge
Court of Judicial Discipline
601 Commonwealth Avenue, Ste. 5500
Harrisburg, PA 17106-2595

Re: ***In re Eakin***, 13 JD 2015

Dear Judge Panella:

Thank you for the opportunity to respond to the questions that this Court posed at the January 21, 2016 pre-trial conference in the ***Eakin*** matter. This letter brief serves as the Board's response to these questions. The Board understands that it has the discretion, consistent with the statement that you made at the close of the pre-trial conference and with its constitutional mandate of confidentiality in its proceedings, to decline to answer some or part of the factual questions posed by the Court that relate to the Board's proceedings. The Board, however, can provide sufficient guidance to the Court in these matters without disturbing areas guarded by the confidentiality mandate of the Pennsylvania Constitution.

The questions and issues posed by this Court and the Board's responses are as follows:

QUESTION/ISSUE 1:

"The admissibility of Sam Stretton's testimony and the possible calling of two other witnesses who will testify as to whether the facts as alleged to [this Court] constitute violations of the [C]anons." N.T., Pre-trial conference, 1/21/2016, at 36.

BOARD'S RESPONSE:

Justice Eakin called Attorney Stretton as at the suspension hearing an expert to opine to a "reasonable judicial and legal certainty that [Justice Eakin's] emails do not violate the [c]harge[d] Rules of Judicial Conduct 2(a), 5, and the constitutional section 17(b) and 18[(d)](1) of Article V." N.T., Suspension Hearing, 12/21/2015, at 51. Following the Board's objection, Justice Eakin, through counsel, explained that Attorney Stretton was being called at the suspension hearing to attack the "strength and merits" of the Complaint and that, if, through Attorney Stretton's testimony, it was established that Justice Eakin did not violate the Code of Judicial Conduct or the Constitution, the suspension issue would become moot. ***Id.***

It is clearly the intent of Justice Eakin to admit Attorney Stretton's opinion testimony and the opinion testimony of two other experts in the field of judicial discipline (one of them named as Robert Davis, Esquire) at trial to establish that Justice Eakin did not commit a violation of the Code or the Constitution. Expert testimony is governed by Pennsylvania Rules of Evidence 702-706. Of these rules, Pa.R.E. 704 is particularly relevant for this Court's consideration. Rule 704 states "An opinion is not objectionable just because it embraces an ultimate issue."

Thus stated, the ambit of Rule 704 is exceptionally broad and would, at first blush, appear to permit Attorney Stretton's opinion testimony regarding whether or not Justice Eakin violated the charged violations of the Code and Constitution. However, the Board asserts that the reach of Rule 704 is not as broad as its language would suggest and does not provide for the admission of Attorney Stretton's testimony or the testimony of other witnesses who would testify as to whether or not Justice Eakin's emailing conduct amounts to a violation of the Code or the Constitution.

The substance of Attorney Stretton's opinion testimony undoubtedly states his opinion whether Justice Eakin violated the Code and Constitution as charged in the Board complaint. Attorney Stretton's testimony, then, constitutes a legal conclusion regarding the applicability of the Code and Constitutional provisions to Justice Eakin's emailing conduct. Legal conclusions upon questions of law are the province of courts, not witnesses. ***See, e.g., Gilbert v. Synargro Cent., LLC*, ___ A.3d ___ (Pa. 2015), 2015 WL 9282354, at *12** ("It is well settled that determining whether an activity, entity, or object falls within the meaning of a statutory definition is a matter of statutory interpretation, and this is a question of law for the court to decide."). Despite the liberal standard used to qualify expert witnesses in this Commonwealth and the obvious close interplay of fact and law on the questions presented by the Board's complaint in this case, this Court is still the sole arbiter of the legal duties imposed by the Code and the Constitution under a given set of facts. ***Id.; see also Kelly v. Thackray Crane Rental, Inc.*** 874 A.2d 649, 654 (Pa. Super. 2005) (explaining that, in a negligence case, where basis of expert's

testimony relied upon application of a standard of care contained in American National Standards Institute (ANSI) regulation, question of whether ANSI standard imposed a duty of care for the defendant was for the trial court to decide in the first instance.); **see also *Browne v. Com. of PA, Dept. of Trans.***, 843 A.2d 429, 433-34 (Pa. Cmnlth. 2004) (explaining that expert witness cannot offer testimony regarding legal responsibility of parties vis-à-vis an ordinance; witnesses may testify as to action he or she took with regard to an ordinance in order to develop factual basis to assist the court in determining whether ordinance applies and whether a party complied with the ordinance, but cannot testify as to whether a party's actions constitute a violation of an ordinance).

Further, assuming all of the relevant facts are before it, this Court needs no assistance in reaching a legal decision whether certain facts demonstrate that a violation of the Code or the judicial conduct provisions of the Constitution has occurred in a given case; such is this Court's entire reason for existence. **Cf. *Commonwealth v. Page***, 57 A.3d 1118, 1135 (Pa. Super. 2013) (holding that purpose of expert testimony is to assist factfinder in grasping complex issues not within the knowledge, intelligence, and experience of ordinary layman). Therefore, Attorney Stretton's testimony, and the testimony of any other experts whom Justice Eakin intends to call for the same purpose on the subject of whether Justice Eakin violated the Code and the Constitution as charged in the Board complaint, is irrelevant and inadmissible. **See, e.g., *Gilbert, supra*; see also *Browne***, 843 A.2d at 433-34.

QUESTION/ISSUE 2:

"Regarding the proposed testimony of John Hare and Alicia Hickok, I believe you said, which it's [the Court's] understanding that addresses their review of Justice Eakin's decisions when he was on the Superior Court and Justice Eakin's decisions while he's been Supreme Court Justice, and whether those decisions indicate any hint of bias." N.T., Pre-trial conference, 1/21/2016, at 36.

BOARD'S RESPONSE:

The Court ruled the testimony of Attorneys Hare and Hickok admissible at trial at the pre-trial conference. N.T., Pre-trial conference, 1/21/2016, at 37-38. The Board does not have any further response.

QUESTIONS/ISSUES 3 AND 4:

"[This Court] want[s] the brief to address the admissibility of e-mails received by Justice Eakin at either his court e-mail address or his personal e-mail address, which the Judicial Conduct Board at the time of trial will not be able to prove were opened. [This Court] would like both sides to address the admissibility of those emails." N.T., Pre-trial conference, 1/21/2016, at 38.

"[This Court] would like the parties to address the relevancy of unsolicited e-mails received by Justice Eakin at either his court e-mail address or his personal e-mail address, and if admissible, what purpose do they serve in this case. N.T., Pre-trial conference, 1/21/2016, at 38.

BOARD'S RESPONSE:

First, the Board notes that, as a technical matter, it is unable to prove with particularity that Justice Eakin opened and read all of the emails that he was charged with receiving in the Board's complaint. However, the Board is able to prove with particularity that Justice Eakin opened those emails or email threads wherein the email or email thread indicates that he responded as part of the thread or, as was the case with one or two of the emails shown to him at his deposition, he admitted that he remembered seeing the content (or part of the content) of an email or email thread that was shown to him by Board counsel. Nevertheless, the Board submits that the emails Justice Eakin received are admissible, regardless of whether it can prove with particularity that he read each and every one of them.

Matters of the relevance and admissibility of evidence are governed generally by Pa.R.E. 401, 402, and 403. Taken together, these rules prescribe the following: (1) evidence is relevant if it tends to make a material fact more or less probable than it would be without the evidence; (2) all relevant evidence is admissible; (3) irrelevant evidence is inadmissible; and (4) even relevant evidence may be excluded from trial where its probative value is outweighed by danger of potential prejudice. Pa.R.E. 401-403; **see also Commonwealth v. Dillon**, 925 A.2d 131, 136, 141 (Pa. 2007) (citations omitted). Of course, evidence may not be relevant and admissible for one purpose but is relevant and, therefore, admissible for another purpose. **Bialek v. Pittsburgh Brewing Co.**, 242 A.2d 231, 235 (Pa. 1968). Where, as here, the trial court sits as factfinder, it is presumed that the trial court will consider any evidence admitted for its proper purpose and disregard any prejudicial aspect of the admitted evidence. **See, e.g., Commonwealth v. Fears**, 86 A.3d 795, 819 (Pa. 2014) (trial court sitting as fact-finder will disregard prejudicial evidence) (citations omitted).

The emails that Justice Eakin received, regardless of whether he opened each and every one of them, are obviously relevant to demonstrate a continuing pattern of

emailing conduct (sending and receiving) by Justice Eakin. Further, and of equal importance, the "received" emails demonstrate Justice Eakin's state of mind while he was engaged in this pattern of conduct. To explain, a comparison of the content of the emails that Justice Eakin *sent* and the content of the emails that he *received* demonstrates that the humor contained in each is similar. This similarity of content bespeaks the fact that Justice Eakin *knowingly* accepted such emails from the members of the golfing group and Attorney McGowan and that he, in fact, enjoyed such attempts at humor as were contained in the emails. It is further undisputed that Justice Eakin did not, at any point, object to receiving emails with such content. These facts, the similarity of the content and lack of objection, point to Justice Eakin's state of mind and bear directly on whether Justice Eakin's emailing conduct detracted from the dignity of his office, which is a central issue in this case. **See, e.g.,** Old Code of Judicial Conduct, Canon 5A.

In fact, by Justice Eakin's own admission, at some point several years ago, he changed his personal email address from something identifiable like "JudgeEakin@yahoo.com" to "wap092001@yahoo.com," in part due to the content of an email or emails he received from Attorney McGowan. The email address "wap092001@yahoo.com" and the pseudonym "John Smith" attached to the email address was obviously less identifiable than "JudgeEakin@yahoo.com" would have been to other persons who may have been part of the list of recipients on Attorney McGowan's multiple email threads. Logically, one of the benefits Justice Eakin drew from changing his email address from something identifiable to something less identifiable was the ability to continue to receive the offending emails without same being revealed publically.

Of itself, Justice Eakin's attempt to obfuscate his identity on the email threads demonstrates a culpable state of mind regarding the content of the emails that he received and its potential effect on his reputation. **See generally Commonwealth v. Hernandez**, 590 A.2d 325, 329 (Pa. Super. 1991) (evidence showing obfuscation of an act demonstrates consciousness of guilt). Therefore, when viewed jointly, the facts of the similarity of the content of the emails that Justice Eakin sent and received and Justice Eakin's subsequent attempt to obfuscate his identity on the list of email recipients by changing his email address demonstrate with even greater force that Justice Eakin knew that his emailing conduct (both sending and receiving) could subject both himself and the judiciary to embarrassment. Accordingly, the emails that Justice Eakin received, regardless of whether it can be demonstrated that he opened all of them, are admissible and relevant to demonstrate his state of mind during the time that he was engaged in the emailing conduct.

It is evident that Justice Eakin contends that the emails which he received but which the Board cannot prove with particularity that he opened are neither relevant nor admissible. For the reasons set forth above, this argument lacks merit.

Given his responses at both his deposition before the Board and on cross-examination at his suspension hearing, the following facts are clear: (1) Justice Eakin opened at least some of the emails that he received from Attorney McGowan and the golfing group because he was aware of some of the emails' contents; (2) that the content of these emails was similar to the emails that he admitted that he sent; and (3) that part of the reason he obfuscated his identity through the use of a pseudonymous email address was to avoid the then-potentially embarrassing effect that the content of the emails could have had on both his reputation and the reputation of the Supreme Court. N.T., Suspension hearing, 12/21/2015, at 131-32. Of course it is the view of the Board that the release of these emails publically did, in fact, damage both Justice Eakin's reputation and the reputation of the Supreme Court. In reality, Justice Eakin's present challenge to the "received" emails is an attack upon the evidentiary weight to be afforded to those emails and the inferences to be drawn from them, not their admissibility. **See, e.g., Commonwealth v. Charlton**, 906 A.2d 554, 562 (Pa. Super. 2006) (province of the factfinder to resolve all issues of credibility, resolve conflicts in evidence, and make reasonable inferences from the evidence) (citation omitted). Here, it is presumed that this Court, as factfinder, will accept the evidence of the "received" emails for its proper purpose, *i.e.*, Justice Eakin's state of mind, and will not consider any prejudicial effect the evidence may have. **Fears**, 86 A.3d 819.

Ironically, **In re Complaint of Judicial Misconduct (Kozinski)**, 575 F.3d 279 (3rd Cir. 2009), one of the cases cited by Justice Eakin at his suspension hearing, partially mirrors the present factual circumstance presented to this Court and, in fact, supports the Board's position regarding the admissibility of the "received" emails. In **Kozinski**, Chief Judge Alex Kozinski was admonished by the Judicial Council of the Third Circuit for possessing offensive material on a publically-accessible website, which Chief Judge Kozinski intended to be privately shared among close friends. **Kozinski**, 575 F.3d at 293-295. Chief Judge Kozinski received some material on the website *via* email attachment from his friends, but he testified that, in some cases, he saved the email attachments without opening them and that, in other cases, he opened the attachments and saved them, and that, in other cases, he went back and looked at what he saved but did not initially open. **Id.**, at 285-86. In reaching its decision to admonish Chief Judge Kozinski, the Third Circuit did not distinguish between material that Chief Judge Kozinski sent by placing it on the website and material that he received and saved without opening. **See generally Kozinski, supra**. Clearly, the Third Circuit did not wish to make its decision on a diminished evidentiary record delimited by the memories

of the respondent judge. This Court should follow a similar path as the *Kozinski* court and admit the "received" emails for their proper purpose. *Id.*

QUESTION/ISSUE 5:

"[This Court] would like the parties to brief whether the self-report letter sent by [Justice Eakin] to the Board dated October 17th, 2014, as referenced in the Board's pretrial memorandum in Paragraph C, 30 and 32, should be made part of the record." N.T., Pre-trial conference, 1/21/2016, at 38.

BOARD'S RESPONSE:

To the extent that Justice Eakin's October 17, 2014 self-report letter constitutes either a signed statement of a party opponent or a statement of a then existing mental or emotional condition held at the time of the writing of the letter, it is admissible. *See, e.g.,* Pa.R.E. 803(3), (25)(A),(B). If viewed as a statement of a party opponent, Justice Eakin's self-report letter is plainly relevant because it relates to his view of at least some of the issues being tried in this case and the extent of his report to the Board. Further, because both the contents of the October 17, 2014 letter and Justice Eakin's act of writing constitute integral parts of the history of the case, it is relevant and admissible. *Cf. Commonwealth v. Lark*, 543 A.2d 491, 497 (Pa. 1988) (evidence of other crimes, wrongs, acts admissible to "complete the story" of crime on trial by proving its immediate context). Accordingly, Justice Eakin's October 17, 2014 self-report letter is admissible and should be made part of the record.

QUESTION/ISSUE 6:

"Was there a second self-report letter. In reference to that, Justice Eakin testified at the hearing on the suspension that about a year later, he made a second, quote, self-report; and that's on Page 125 of the transcript of the hearing, and whether that should be made part of the record." N.T., Pre-trial conference, 1/21/2016, at 38.

BOARD'S RESPONSE:

Neither Justice Eakin nor his counsel sent a second self-report letter to the Board in 2015 in the form of the letter that was sent to the Board on October 17, 2014. Rather, the Board's investigation was opened by Chief Counsel Robert A. Graci following the Board's receipt of a letter in the form of a complaint (and an accompanying CD containing Microsoft Outlook files culled from Justice Eakin's "John Smith" emails) from Attorney General Kathleen Kane (AG Kane) on September 28, 2015.

After it was revealed publically that the emails were from Justice Eakin's personal "John Smith" email account, Justice Eakin, through the communications office of the Administrative Office of Pennsylvania Courts (AOPC Communications), made the following public statement on October 2, 2015, which was emailed to Chief Counsel Robert A. Graci by AOPC Communications on that same day:

I recognize the Attorney General's statement that she has discovered still more emails involving her office and my private email account, and that she has referred those to the Judicial Conduct Board. I will fully cooperate with the Board's review as I did a year ago with a similar matter involving former Justice McCaffery. I believe it would be inappropriate to comment further pending the outcome of the [B]oard's review.

Justice Eakin's emailing of the aforementioned statement could be viewed as a "self-report" of misconduct, inasmuch as it acknowledged his emailing conduct with employees of the Office of Attorney General and pledges cooperation with the Board's review of that activity. Given that this statement was already made part of the public record by Justice Eakin and because it is the statement of a party opponent, it is relevant and admissible, and it is the view of the Board that it should be made part of the record. Pa.R.E. 803(25)(A), (B).

QUESTION/ISSUE 7:

"Whether [Justice Eakin] gave any written or oral statements under oath to the Board during its initial investigation as referenced in the Board's pretrial memorandum in Paragraph C 32, and whether such statements, if any, should be made part of the record." **See** N.T., Pre-trial conference, 1/21/2016, at 39.

BOARD'S RESPONSE:

Justice Eakin did not give any statements under oath to the Board in its 2014 investigation, and the Board has not pleaded that Justice Eakin gave any statement under oath to the Board in 2014. Rather, Justice Eakin was interviewed without counsel or a stenographer present on three occasions in 2014 by John C. "Jack" Harlacker, the Board's investigator. Justice Eakin also provided written answers to questions propounded by the Board's counsel in a Notice of Full Investigation. Because the reports of interview prepared by Investigator Harlacker contain statements of Justice Eakin, a party opponent, that were made voluntarily within the context of an official investigation, and because Investigator Harlacker is available to testify regarding the interviews and the reports that resulted from the interviews, the reports are, therefore admissible and relevant and should be made

part of the record. Likewise, Justice Eakin's response to the Notice of Full Investigation is the statement of a party opponent regarding a contested issue and is therefore relevant and admissible. Consequently, it should be made part of the record.

QUESTION/ISSUE 8:

"Whether [Justice Eakin] in his self-report or at any other time during the first investigation, which the Board refers to in its pretrial memorandum as 2014-647, as referenced in Paragraph C 30, whether [Justice Eakin] reported all of the e-mails which are now cited in the Board's complaint." N.T., Pre-trial conference, 1/21/2016, at 39.

BOARD'S RESPONSE:

Justice Eakin did not report all of the emails which are now cited in the Board's complaint during the 2014 investigation of his emailing conduct. In essence, Justice Eakin's position on his "John Smith" emails in the 2014 investigation was that he did not retain emails and, as such, could not reconstruct his email history in order to determine whether he sent or received any emails that were inappropriate or offensive and that he did not review or recollect the emails that were disseminated to the media through the agency of former Justice McCaffery, which was the event that touched off the 2014 investigation.

QUESTION/ISSUE 9 AND 10:

"At the time of Board Counsel's presentation of the initial investigation to the Board on December 8th, 2014, as referenced in the Board's pretrial memorandum in Paragraph C 46, was the Board's action based on all the e-mails that are currently cited in the Board's complaint." N.T., Pre-trial conference, 1/21/2016, at 39-40.

"In the report referenced in the Board's pretrial memorandum in Paragraph C 48 and 49, did the report address all of the e-mails which are currently cited in the Board's complaint." N.T., Pre-trial conference, 1/21/2016, at 40."

BOARD'S RESPONSE:

During the 2014 investigation, the Board issued a subpoena to AG Kane directing her to provide to the Board "[p]rinted copies of any and all emails and printed copies of any and all attachments to those emails (if same are capable of reproduction by printing) sent to or from any email address used by, or known to be used by, Justice J. Michael Eakin, including but not limited to, the email address

wap092001@yahoo.com or identified as being sent or received from "John Smith" that were exchanged between him and current or former OAG staff, for the time period of January 1, 2008, up to and including December 31, 2012, that contained "pornographic images, sexually explicit, sexually suggestive or sexually-charged material, or racially-charged jokes or other improper content." The Board also directed AG Kane to provide electronic copies of the attachments to the emails, if the attachments could not be printed.

Despite the clear language of this subpoena, and, as pleaded in the Board's complaint, AG Kane provided only 48 of Justice Eakin's "John Smith" emails to the Board on a CD and printed copies of those emails. Of the 48 emails provided to the Board by the OAG in November 2014, only 4 emails were sent by Justice Eakin from his "John Smith" email account. The remaining 44 emails were emails that Justice Eakin received from other persons at his "John Smith" email account.

AG Kane, through her subordinates, later provided the Board access to an "electronic vault," which contained 415 emails sent to or received by Justice Eakin at his JusticeEakin@pacourts.us email address. Generally, the emails exchanged (sent or received) between Justice Eakin and OAG staff using his JusticeEakin@pacourts.us email address were either proper professional communications or limited social exchanges that did not contain content that a person of reasonable sensibilities would find offensive. The only emails that Justice Eakin received at JusticeEakin@pacourts.us that contained content that a person of reasonable sensibilities would find offensive were a number of "blast" emails sent to him and others, including OAG staff, by former Justice McCaffery. The emails that Justice Eakin received from former Justice McCaffery are recounted in the Board complaint at Paragraph 42(c). Contrary to statements that she made to the press in September 2015, neither AG Kane nor her staff provided any other emails to the Board until September 28, 2015, and neither she nor her staff informed the Board that such emails existed in 2014. Mere reference to the Board's complaint indicates that AG Kane provided a far greater number of "John Smith" emails to the Board in 2015, which were not provided in 2014. Consequently, Board counsel did not possess all of the emails that the Board was entitled to receive under the terms of subpoena in 2014; Board counsel was not aware of the existence of any emails that were not then-provided by AG Kane. As such, Board counsel could not and did not report to the Board on these emails. AG Kane's failure to comply with the Board's 2014 subpoena is, of course, reflected in her subsequent failure to comply with this Court's subpoena, issued in 2015.

QUESTION/ISSUE 11:

"Does the Board have the dates of the e-mails referenced in the Board's pretrial memorandum in Paragraphs C 80 and 81[?]" N.T., Pre-trial conference, 1/21/2016, at 40.

BOARD'S RESPONSE:

The Board has the dates of the emails referenced in the Board's pre-trial memorandum at Paragraphs (C)(80) and (81), and they are being supplied to this Court and opposing counsel in Attachment A to this letter brief.

QUESTION/ISSUE 12 AND 13:

"Whether the deposition of [Justice Eakin] as referenced in the Board's pretrial memorandum in Paragraph (C)(83), should be made part of the record." N.T., Pre-trial conference, 1/21/2016, at 40.

"Whether there was more than one deposition." N.T., Pre-trial conference, 1/21/2016, at 40.

Board Counsel's October 20, 2015 deposition of Justice Eakin constitutes the statement of a party opponent that is admissible pursuant to Pa.R.E. 803(25). The deposition is clearly relevant because it constitutes Justice Eakin's explanation of his emailing conduct, which is the basis for the Board's charges. It should, therefore, be made part of the record. The Board did not conduct any other depositions of Justice Eakin.

QUESTION/ISSUE 14:

"Whether application of *In Re: Thomas Carney*, 79 A.3d 490, which is a Pennsylvania Supreme Court decision of 2013, bars the use of certain e-mails as to Counts 1 and 3, sub A." N.T., Pre-trial conference, 1/21/2016, at 40-41.

BOARD'S RESPONSE:

In *Carney*, the Supreme Court overruled its prior decisions in *In re Cicchetti*, 743 A.2d 431 (Pa. 2000) and in *In re Harrington*, 899 A.2d 1120 (Pa. 2006). *Cicchetti* and *Harrington* stood for the proposition that judges could not violate Canon 2A (or Rule 2A of the Rules Governing Standards of Conduct of MDJs, which has nearly-identical language) if their conduct did not implicate the "judicial-decision making process." *Cicchetti*, 743 A.2d at 441; *and Harrington*, 899 A.2d at 1120; *overruled by Carney*, 79 A.3d at 506-507. *Carney* holds that a judge may violate Canon 2A, which requires a judge to "respect and comply with the law and ... conduct [himself] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," through illegal conduct which affects the integrity of the office, whether or not the conduct occurred within the judicial decision-making process. *Id.*, 79 A.3d at 507. The holding of *Carney* regarding

Rule (or Canon) 2A was made prospective by the Supreme Court due to due process concerns of fair notice of prohibited conduct. *Id.*, 79 A.3d at 508. Accordingly, cases arising from acts prior to October 30, 2013, the effective date of **Carney**, are considered under the law established by **Cicchetti** and **Harrington**.

Though Justice Eakin's emailing conduct predates and postdates **Carney**, it is the view of the Board that he may, nonetheless, be subject to sanction for violating Canon 2A for his pre-**Carney** emails. To explain, the phrase "judicial-decision making process" that is utilized in **Cicchetti** was never defined by the Court. Judges at all levels of the Unified Judicial System make decisions that can be categorized as "legal" and "administrative," and, indeed, Canon 3 of the Old Code implicitly recognizes that judges have a dual-decision making role. *See, e.g.*, Canon 3(A), 3(B). Therefore, the gloss put on the term "judicial-decision making process" by some as implicating only a judge's legal decisions denies the reality of the role judges play as administrators in the Unified Judicial System. Indeed, this gloss is found nowhere in any case that interprets either **Cicchetti** or **Harrington**. A full view of the term "judicial decision-making process," then, necessarily includes whether a judge's conduct in a given case could have had any influence over a judge's decisions in their administrative role. *Cf. Cicchetti*, 743 A.2d at 441 ("Canon 2 similarly addresses the judicial decision-making process and seeks to avoid the appearance of influence over judicial activities.") (emphasis added).

It is obvious that a given judge's administrative role in the Unified Judicial System is proportional to that judge's particular place in the Unified Judicial System. A Supreme Court Justice, like Justice Eakin, sits at the apex of the Unified Judicial System; the Supreme Court exercises the full power, both legal and administrative, of the judicial branch of the Commonwealth's government. *See, e.g., In re Bruno*, 101 A.3d 635, 663-664 (Pa. 2014). The Supreme Court of Pennsylvania has summarized some of the more routine facets of its administrative authority as follows: (1) general oversight of the daily operations of the entire Unified Judicial System, including management and oversight of judicial and other system personnel; (2) the formulation of rules of judicial procedure; and (3) oversight of judicial education. *Id.*, at 664. As admitted by Justice Eakin, the Supreme Court formulates relevant rules of conduct for lawyers, judges, and state court employees, including the Unified Judicial System's Policy on Non-Discrimination. N.T., Suspension hearing, 12/21/2015, at 133-34. As to state court employees and lawyers, Justice Eakin and his colleagues enforce those rules. *Id.* Ironically, Justice Eakin was the Supreme Court's computer liaison justice and was responsible, in part, for approving the change to the Court's computer policy to include judicial officers in the policy's application. *Id.*, at 135. Indeed, until recently, Justice Eakin served as the liaison justice for the First Judicial District, and, in that capacity acted as the administrative go-between for the Supreme Court as a whole and the Philadelphia Court system.

Justice Eakin's emails, when viewed against the backdrop of his administrative responsibilities as a Supreme Court Justice, raise the specter of the appearance of influence over his administrative responsibilities and, therefore, fall within the pre-**Carney** ambit of Canon 2A. As explained above, the breadth of a Supreme Court Justice's administrative responsibilities is broad; the authority that they exercise over the Unified Judicial System is such that they have the power to regulate the personal conduct of each and every state court system employee and judicial officer through their rule-making power. Evidently, the Supreme Court, including Justice Eakin himself, recognized, albeit, obliquely, through its subsequent computer use policy rule change that it is impossible to separate that great authority from the responsibility to respect its application, and the application of other such policies, to itself. Otherwise, the Court, or its individual justices, could be subject to a well-founded charge of hypocrisy, which, of course, could only *detract* from the public's confidence in the judiciary and, thereby, violate Canon 2A. Such is the case before this Court – Justice Eakin's private email conduct, measured against his contrary public administrative actions taken in collaboration with his fellow justices has resulted in the public's claim that the variance between the two marks a lack of respect for the law he helped to foster and has detracted from the public's confidence in the judiciary. Accordingly, Justice Eakin's pre-**Carney** emails fall within the ambit of Canon 2A because they create the perception that they affected his administrative judicial duties. *See, e.g., Cicchetti*, 743 A.2d at 441.

QUESTION/ISSUE 15:

"Whether the Judicial Conduct Board Rule of Procedure Number 15 bars the use of certain e-mails, or whether the Board is seeking to proceed on using the pattern of conduct exception to Rule 15." N.T., Pre-trial conference, 1/21/2016, at 41.

BOARD'S RESPONSE:

Justice Eakin's conduct of sending and receiving the emails in question constitutes a consistent pattern of conduct dating from 2008 until the date of the last email he received on April 30, 2014. Accordingly, all of the emails cited in the Board complaint fall within the exception to the Board's four-year rule of limitation as defined by JCBRP 15.

QUESTION/ISSUE 16:

"As [this Court] said at the time of the suspension hearing, this is an issue we wish we didn't have to address, but it has again been raised by [Justice Eakin], so we will do our jobs, and we will uphold the canons."

"The Court makes part of the record Court's Exhibit Number 1, which we will mail to counsel, which includes an e-mail sent to the Court of Judicial Discipline by way of an e-mail sent to Court counsel, Joseph Metz, which included in it was an e-mail from a judge of the Cumberland County Court, attached to it was a letter dated December 18th, 2015."

"The letter dated December 18, 2015 was made part of the record by [Justice Eakin] at the hearing held on December 21, 2014, as part of [his] Exhibit Number 13, and read into the record by [his] counsel."

"If necessary, the Court will make Counsel Metz available to answer questions regarding receipt of this e-mail."

"We would like the parties to address whether the letter and the way it was sent to the Court of Judicial Discipline violates any of the following: Canon 2, Rule 2.9 A, ex parte communications. Canon 2, Rule 2.10 A, judicial statements on pending and impending cases."

"Pennsylvania Rule of Judicial Administration, Rule 1701 Sub E, appearance of judge or district justice as character witnesses." **See** N.T., Pre-trial conference, 1/21/2016, at 40-41.

BOARD'S RESPONSE:

The Board respectfully declines to respond. As noted at the December 21, 2015 suspension hearing, this Court referred this matter to the "appropriate bodies for investigation." To the extent that this Court's question requests information regarding matters that may be the subject of Board proceedings, absent a waiver or request from the subject judicial officer, the Board is foreclosed from providing such information by Article V, § 18(a)(8) ("All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality.") and JCBRP 17. Even in the case of a request or a waiver from the subject judicial officer, such decisions to release information are left to the Board itself, not to its counsel. JCBRP 11 (regarding voting); **and see generally** JCBRP 17 (regarding confidentiality) and 18 (regarding disclosures). Moreover, the personal legal opinions of counsel on violations of the Code or Constitution in the context of confidential Board proceedings are the work product of the Board, which is generally not subject to disclosure. JCBRP 18(H). As such, Board counsel declines respectfully to answer these questions.

QUESTION/ISSUE 17:

"Does the suggested stipulation by the Board in suggested Proposed Stipulation 3 C, conflict with the proposed testimony and article regarding David Cohen which was dated 12-18-15, December 18th 2015, which was included in the Board's exhibit Number 2." N.T., Pre-trial conference, 1/21/2016, at 42.

BOARD'S RESPONSE:

At the outset, it must be noted that it has long been the view of Board counsel that the propositional nature of the witness lists and stipulations that appear in pre-trial memoranda to this Court speak against them being a precisely-defined "road map" for any trial presentation but, rather, demonstrate that the parties to a CJD case at this stage are in the process of defining the issues for their in-court presentations and are attempting to guard against the waiver that might result from the exclusion of a proposed witness or stipulation. As such, it has often been the case that both proposed witnesses and proposed facts that were first noted in pre-trial memoranda were ultimately omitted from any trial presentation in favor of other witnesses or facts as the positions of the parties and this Court on the issues develop in the progression to trial.

With the aforementioned observation in mind, it is, nonetheless, the view of Board counsel that the proposed testimony of David Cohen, Esquire, *i.e.*, that Justice Eakin's emailing conduct creates the appearance of impropriety and subjects the judiciary to public scorn, is fully consonant with both the opinion article that he wrote on December 18, 2015, which appeared in the *Pittsburgh Post-Gazette* under the title "Eakin is Unfit to Judge," and the Board's proposed stipulation that Justice Eakin was never shown to have exhibited any *overt* bias toward a litigant on the basis of their race, gender, or sexual orientation in a written opinion. **See** Attachment B (12/18/2015 article by Attorney Cohen); **see also** Board's pre-trial memorandum at Proposed Stipulation 3(c).

To explain, it is clear that the polestar of Attorney Cohen's analysis in the article was the observation that "in light of [his] emails, ask yourself whether you want [Justice Eakin, who has] such obvious disregard for women and black people sitting in judgment of the following cases...." Without challenging Justice Eakin's reasoning on legal grounds, the article then proceeded to describe a number of appellate cases and Justice Eakin's actions (decision, concurrence, or dissent) in those particular cases that could have subsequently been cast into doubt by the content of the emails that Justice Eakin sent and received. The article concludes by positing (and, in some cases, answering) the following rhetorical questions:

Is someone who trades emails that sexualize women, including two of his employees, able to set aside his explicit or implicit biases in a case involving workplace sexual harassment? The fact that Justice Eakin wrote separately to explain that some public employees engage in sexual harassment that is not egregious and they should not lose their jobs for it indicates that he cannot. After all, was he thinking about himself when he penned that opinion?

The other cases raise the same issues. Is someone who thinks of women in demeaning ways qualified to judge important issues related to rape? Is someone who sends and receives emails about the inferiority of black people able to see race bias in jury selection? His votes in these cases seem to indicate that the answer to these questions is no.

See Attachment B, at 2.

The gravamen of this article is that, now that his emailing conduct has been made public, the fairness and probity of Justice Eakin's past judicial decisions, however adroitly and fairly they may have been expressed in writing from a technical legal point of view, have been called into question retrospectively by people who believe that the views expressed in his private emails are replete with content that is insensitive, and, therefore, biased, against persons of different races, genders, and ethnic backgrounds. In other words, the *perception* of Justice Eakin's overt public fairness and probity on contested issues involving gender, ethnicity, and race in his written opinions has been called into question by his private conduct, despite the apparent facial propriety of those decisions.

Neither Attorney Cohen nor Board counsel have the ability to peer into Justice Eakin's mind and determine any secret personal biases that he may (or may not) have held when he wrote his past decisions, and the Code and the Constitution do not require such an endeavor. As the Supreme Court succinctly stated in the context of recusal, "[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. A trial judge should not only avoid impropriety, but also must avoid the appearance of impropriety." ***Interest of McFall***, 617 A.2d 707, 714 (Pa. 1992). Here, Justice Eakin's private conduct calls into question the facial fairness of his written work, creates the appearance of impropriety and subjects the judiciary as a whole to public scorn, points made by both the Board and Attorney Cohen. Thus, it is logically consistent to say that Justice Eakin's body of judicial work does not manifest overt bias, while at the same time contending that Justice Eakin's private emailing conduct as revealed to the public puts the cloud of bias over all of his past and future judicial actions, including his written work, and, as such, violates the Code and the Constitution.

QUESTION/ISSUE 17.1 (proposed by Judge Barton):

"Looking at the Board's proposed -- I realize these weren't agreed to, but the Board's proposed stipulations, beginning at Proposed Stipulation 13, that Justice McCaffery had contacted Justice Eakin on October 16th, 2014, and then continuing down through that subchapter, if you will [...] I'm trying to see where it ends. Twenty-four. I'm trying to understand how those are material and relevant to the issues before this Court." **See** N.T., Pre-trial conference, 1/21/2016, at 43.

BOARD'S RESPONSE:

As explained briefly at the pre-trial conference, the paragraphs in the Board's pre-trial memorandum that recount the confrontation between Justice Eakin and former Justice McCaffery are relevant and material to the proceedings before this Court because they are part of the *res gestae* of the factual development of the case, and, consequently, they "complete the story" regarding the contextual facts that prompted the Board to investigate Justice Eakin in 2014. **See, e.g., Lark**, 543 A.2d at 497 (evidence of other crimes, wrongs, acts admissible to "complete the story" of crime on trial by proving its immediate context).

QUESTION/ISSUE 18:

"Proposed Stipulation Number 25 is that Justice Eakin reported to the Judicial Conduct Board by way of a letter dated October 17, 2014, and released this letter to the news media."

"Does the Judicial Conduct Board have the letter of October 17, 2014, and should it be made part of the record?" N.T., Pre-trial conference, 1/21/2016, at 44.

BOARD'S RESPONSE:

The Board has already responded to this question in part, above at Question/Issue 5. The letter of October 17, 2014, should be made part of the record because it is a statement of a party opponent. The Board possesses the October 17, 2014 letter.

QUESTION/ISSUE 19:

"On October --- Proposed Stipulation Number 28, is that on October 17, 2014, Justice Eakin issued another press release responding to

Justice McCaffery. Does the Judicial Conduct Board have this, and should it be made part of the record?" N.T., Pre-trial conference, 1/21/2016, at 44-45.

BOARD'S RESPONSE:

The Board possesses Justice Eakin's responsive press release to Justice McCaffery's press release. It should be made part of the record because it is the statement of a party opponent.

QUESTION/ISSUE 20:

"Proposed Stipulation Number 30. Justice Eakin's letter of October 17, 2014 was considered a self-report and the Judicial Conduct Board opened investigation Number 2014-647."

"Is this the same letter as first noted in suggested Proposed Stipulation Paragraph 25[?] Should it be made part of the record, and did Justice Eakin report all of the e-mails that are mentioned in the Board's complaint in this self-report? N.T., Pre-trial conference, 1/21/2016, at 45.

BOARD'S RESPONSE:

The Board has already responded to this question/issue in part above at its response to Question/Issues 5 and 8. Justice Eakin did not report all of the e-mails that are described in the Board's complaint in the self-report; he did not report any of them. The October 17, 2014 letter identified at Proposed Stipulation 30 is the same letter identified at Proposed Stipulation 25. It should be made part of the record for the reasons stated above.

QUESTION/ISSUE 20.1 (proposed by Judge Mullen):

"[...]. Proposed Stipulation Number 32. On October 17, 2014, Justice Eakin was interviewed by the Board's investigators. Who were the investigators?"

"Two further interviews were done. After the Board's authorization of a full investigation, Justice Eakin provided a timely written response. Was Justice Eakin deposed? Did Justice Eakin ever give a statement under oath? Did his written response mention all of the e-mails which are now relevant? Did Justice Eakin or counsel, chief counsel, Robert Graci, disclose a personal relationship during this process? Thank you." N.T., Pre-trial conference, 1/21/2016, at 45-46.

BOARD'S RESPONSE:

The Board has already responded to the majority of these questions/issues above at its response to Questions/Issues 7 and 8. Justice Eakin did not give any statements under oath to the Board in its 2014 investigation, by deposition or otherwise. Justice Eakin was interviewed without counsel or a stenographer present on three occasions in 2014 by John C. "Jack" Harlacker, the Board's investigator. Justice Eakin also provided written answers to questions propounded by the Board's counsel in a Notice of Full Investigation, but he did not mention any of the emails contained in the Board's complaint within that response.

The Board respectfully declines to answer the remainder of this question/issue. The disclosure of a potentially-disqualifying conflict held by Board counsel in a Board investigation, and the Board's decision, if any, regarding same, is clearly a matter relating to Board proceedings and is, therefore, confidential. **See** Article V, § 18(a)(8). Further, the response to this question, if any, is of no relevance to the question of Justice Eakin's conduct, which is the matter pending before this Court.

QUESTION/ISSUE 21:

Withdrawn by the Court.

QUESTION/ISSUE 22:

"Proposed stipulation 46, is that on December 8, 2014, Board Counsel presented the Justice Eakin matter to the Board, and the Board voted to dismiss the two complaints."

"Who presented it to the Board, and was it Chief Counsel Graci? At any time prior to the Board's vote for dismissal, did Chief Counsel Graci disclose his prior relationship and support of Justice Eakin?"

"At any time prior to the Board's dismissal, did Justice Eakin disclose his prior relationship and report received from Chief Counsel Graci?"
N.T., Pre-trial conference, 1/21/2016, at 46.

BOARD'S RESPONSE:

The Board respectfully declines to answer this series of questions for the reasons set forth above at its response to Question/Issue 20.1. **See** Article V, § 18(a)(8).

QUESTION/ISSUE 23:

"Proposed Stipulation Number 83. Justice Eakin was deposed on October 20, 2015. Should that deposition be marked as an exhibit?"

"In reference to Justice Eakin's pretrial memorandum, his exhibit Number 1, indicates that it is the Judicial Conduct Board letter of December 14, 2014^[1] dismissing the 2014 complaint."

"Brief for us whether it would be admissible as to whether Justice Eakin gave any sworn statement prior to that dismissal; and should that sworn statement be made part of the record." N.T., Pre-trial conference, 1/21/2016, at 47.

BOARD'S RESPONSE:

As indicated above, Justice Eakin's deposition constitutes a statement of a party opponent regarding material issues and, as such, it is admissible and relevant. It will be made part of the record.

Justice Eakin did not make any sworn statement to the Board prior to its 2014 dismissal. Rather, Justice Eakin was interviewed on three occasions, and he provided a written response to the Board's Notice of Full Investigation. These statements constitute the statements of a party opponent regarding material issues and they are, as such, admissible and relevant. They will be made part of the record.

QUESTION/ISSUE 24:

"[...] Exhibit Number 6 from [Justice Eakin] was the report of Special Counsel Kathy Speaker MacNett, Esquire, dated December 23rd, 2015. The relevance, whether such a report would constitute relevant evidence in this proceeding."

BOARD'S RESPONSE:

The stated purpose of Attorney MacNett's investigation (which the Board played no role in) was to determine whether any employee of Justice Eakin's office staff had been sexually harassed in violation of the Government Employee Rights

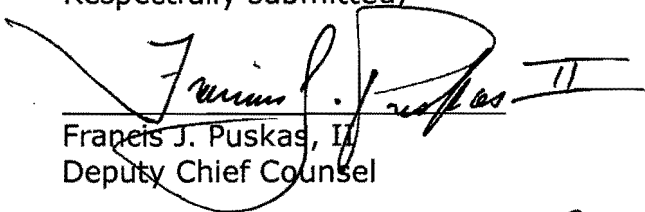
¹ The description in Justice Eakin's pre-trial memorandum of the Board's dismissal letter as being issued on December 14, 2014, is incorrect. The Board issued the dismissal letter to Justice Eakin on December **17**, 2014.

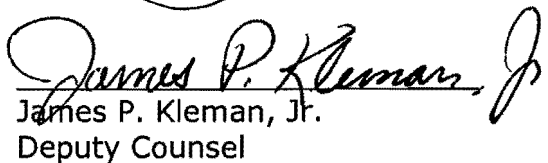
Act of 1991, 42 U.S.C. §2000e-16a(b), *et seq.* Justice Eakin's Exhibit 6, at 2. Attorney MacNett's appointment by AOPC and her subsequent investigation was touched off by two email exchanges between Justice Eakin and others. Justice Eakin's Exhibit 6, at 5. Despite the content of the email exchanges, Attorney MacNett's investigation did not uncover any sexual harassment among Justice Eakin's office staff.

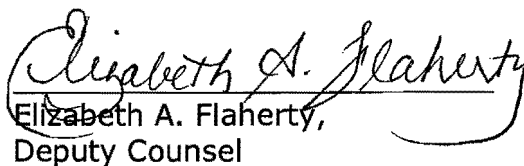
From a purely technical point of view, the contents of this report are not relevant to the charges contained in the Board complaint because the Board has not charged Justice Eakin with sexually harassing his employees in violation of the Code or the Constitution. Moreover, to the extent that persons interviewed as part of Attorney MacNett's investigation provided information to her that relates to matters pending before this Court, the substance of these statements constitutes hearsay not subject to any enumerated exception, and is, therefore, inadmissible unless the particular interviewee testifies at trial regarding the substance of their interview. ***See, e.g., Commonwealth v. DiSilvio***, 335 A.2d 785, 787-788 (Pa. Super. 1975) (holding that when statement offered in evidence to prove truth of fact asserted therein, speaker's credit and circumstances become basic to proper evaluation of statement; therefore, hearsay rule generally excludes such evidence unless speaker on hand to testify). Accordingly, the Board objects to the admission of Attorney MacNett's report as substantive evidence.

Wherefore, the Board respectfully requests that this Court consider the aforementioned arguments and grant the relief requested therein, if any, by the Board.

Respectfully submitted,


Francis J. Puskas, II
Deputy Chief Counsel


James P. Kleman, Jr.
Deputy Counsel


Elizabeth A. Flaherty,
Deputy Counsel

CC: William C. Costopoulos, Esquire, and Heidi F. Eakin, Esquire, *counsel for Justice J. Michael Eakin*

Salvatore Cagnetti, Esquire

ATTACHMENT A:
Proposed Stipulations 80 and 81 with Dates

80. Contained on the September 28, 2015 disc or the "PA_Supreme_Court_Review_10-14-2014.pst" file were emails received by Justice Eakin at his "John Smith" email from members of the golfing group during the time period of 2008-2012 and 2012-2014.
- a. A number of the emails received by Justice Eakin from the golfing group contained pictures of nude women; sexually-suggestive themes; gender stereotypes; homophobic content; socioeconomic stereotypes; violence towards women; racial humor; ethnically-based humor; and stereotypes of religious groups. These emails contain material including, but not limited to, the following:
- i. A video clip entitled "What have we done" of a black woman speaking to the camera about Barack Obama's election and saying that, because of that, black people won't have to "pay bills." She later bemoans the fact that black people will "have to get jobs" and will, consequently, no longer get a government assistance check. This clip was forwarded by DAG Baxter, and it was not included in the November 5, 2014 disc. **This email was sent on Monday, September 21, 2009.**
- ii. A picture of a large-breasted professional tennis player named Simona Halep, who is described as wanting breast reduction surgery to help her tennis game. The subject line of the email is "FW: a Sad Day for Tennis." There is no nudity. This email was noted above at Paragraph C(39)(w), with similar content. This email was forwarded by Attorney McGowan, and it was also forwarded to Justice Eakin by B.M. The email from Attorney McGowan was not included on the November 5, 2014 disc, although the picture was included in a different email from B.M. **This email was sent on Tuesday, June 15, 2010.**

- iii. A video clip consisting of an audio track of a prank phone call played on the "Bob and Tom Show," wherein a telemarketer is told by the pranker that the person who was called by the telemarketer was killed and the police were investigating the murder scene. This clip contains some profanity. The email was forwarded by C.S. of the golfing group and it was not included in the November 5, 2014 disc. **This email was sent on Monday, March 14, 2011.**
- iv. A series of pictures and text with the subject line "FW: Black is In!" showing pictures of notable black celebrities, including President Obama, highlighting their accomplishments, and concluding with a picture of Michael Jackson, which stated "...Michael Jackson must be kicking himself." This email was sent by DAG Baxter to Justice Eakin and others. It was not included in the November 5, 2014 disc. **This email was sent on Wednesday, April 22, 2009.**
- v. A video clip of a woman throwing out a "cheap pair of Kmart earrings" on Christmas morning to find that her husband has actually purchased a new Cadillac SUV for her. When she gets in the Cadillac and starts it, it explodes. The video concludes with the words "Merry Christmas, Bitch." This email was forwarded by DAG Baxter, and it was not included in the November 5, 2014 disc. **This email was sent Wednesday, December 21, 2011.**
- vi. A joke wherein the punchline is a man's name representing the things he enjoys the most, i.e., "B.J. Titsengolf." This joke was forwarded by C.S. to Justice Eakin, and it was not included in the November 5, 2014 disc. **This email was sent on Tuesday, June 16, 2009.**
- vii. A video clip containing an audio track of a man prank calling a cable company about a new gay and lesbian channel. The audio contains profanity and jokes portraying a negative view of gays and

lesbians based on stereotypes. This email was forwarded to Justice Eakin by DAG Baxter. It was not included in the November 5, 2014 disc. **This email was sent on Monday, September 14, 2009.**

- viii. A video clip in German about Nintendo Wii games which women "should" play, including games that simulate cooking and performing oral sex on men. This email was forwarded by DAG Baxter to Justice Eakin, and it was not included on the November 5, 2014 disc. **This email was sent on Wednesday, April 29, 2009.**
- ix. A series of nude or semi-nude photographs of women entitled "Friendship strings," which is a reference to the g-string panties worn by some of the women in the pictures. This email was mentioned above at Paragraph C(39)(d). This email was forwarded to Justice Eakin by DAG Baxter. This email, or some part of the thread that it generated, was included on the November 5, 2014 disc. **This email was sent on Monday, February 9, 2009.**
- x. A forwarded joke saying "It was once said that a black man would be president when 'pigs fly.' Indeed, 100 days into Obama's presidency... 'swine flu'!!!" This email was forwarded to Justice Eakin by DAG Baxter. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, April 30, 2009.**
- xi. A joke entitled "golf panties" about couples of Swedish, Irish, and Scottish origin golfing when the wind reveals that the women of the group are not wearing underwear. Upon seeing that his wife is not wearing underwear, the Scotsman offers his wife a comb and tells her to "tidy" up. This email was sent by DAG Baxter to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent Thursday, August 20, 2009.**

- xii. A joke entitled "Man Rules." This lists a number of "rules" for women to follow when dealing with men. These rules are evidently based on gender stereotypes such as "Christopher Columbus didn't need directions and neither do we!" This email was sent by C.S. to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, January 26, 2012.**
- xiii. A joke video clip with a puppet Osama Bin Laden threatening to kill Santa Claus. This email was sent by DAG Baxter to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Monday, December 7, 2009.**
- xiv. A comedy routine by a woman named "Mrs. Hughes," who jokes about her husband and her family life. This email was sent by DAG Baxter to Justice Eakin. It was not included in the November 5, 2014 disc. **This email was sent on Wednesday, October 27, 2010.**
- xv. A series of "demotivational" posters entitled "New Motivational posters." The jokes are geared toward animals, parenting, female breasts, and Asian accents. This email was sent by DAG Baxter to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, May 7, 2009.**
- xvi. An email entitled a "prayer for dad" with a picture of a young girl praying, with the text "Dear God, please send clothes for all the ladies on Daddy's computer. Amen." This email was sent by C.S. to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, December 1, 2009.**
- xvii. A series of jokes entitled "rotten but funny," which include jokes about race, gender, and ethnicity. This series of jokes was sent by DAG Baxter to Justice Eakin. It was not included on the

November 5, 2014 disc. **This email was sent on Monday, December 27, 2010.**

- xviii. A joke about an environmentalist woman having to slide down a tree in haste. When she goes to the doctor and asked what took him so long to tend to her wounds, the doctor says "Well, I had to get permits from the Environmental Protection agency, the Forest Service, Fish and Wildlife Commission and the Bureau of Land Management before I could remove old-growth timber from a recreational area. I'm sorry, but due to Obamacare, they turned me down." The joke was sent by DAG Baxter to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, January 11, 2011.**
- xix. A picture of a woman using her nipples as "beer temperature" testers. This email was sent by B.M. to Justice Eakin. This email was noted above at Paragraph C(39)(x). It was included on the November 5, 2014 disc. **This email was sent on Tuesday, February 14, 2012.**
- xx. A series of pictures entitled a "Real man's Chain Letter" featuring pictures of women in a wet t-shirt contest and a topless woman. This email was sent to Justice Eakin by B.M., his golfing friend. This email was noted above at Paragraph C(39)(v). It was included on the November 5, 2014 disc. **This email was sent on Thursday, November 12, 2009.**
- xxi. A joke email regarding a woman's vagina which states, that "the best engine in the world is the vagina. It can be started with one finger. It is self-lubricating. It takes any size piston. And it changes its own oil every four weeks. It is only a pity that the management system is so fucking temperamental." This email was sent by B.M. to Justice Eakin. There are no nude pictures. This email was not included on the November 5, 2014 disc. **This email was sent on Sunday, July 25, 2010.**

- xxii. A picture of bare breasted women of increasing breast size entitled "Cup sizes." The last picture is of an oversized golf tee, and the email asks "Which cup size excites older men the most?" This email was noted above at Paragraph C(39)(y) sent by B.M. to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Monday, January 2, 2012.**
- xxiii. A slide show called "Farewell to my Golf Friends," which includes pictures of bare breasted women and pictures of their buttocks. This email was noted above at Paragraph C(39)(z). This email was sent by B.M. to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Sunday, December 19, 2010.**
- xxiv. A slide show called "Daily meds" which contains pictures of nude or semi-nude women evidently scanned from Playboy magazine. This email was sent by B.M. to Justice Eakin. This email was noted above at Paragraph C(39)(aa). It was included on the November 5, 2014 disc. **This email was sent on Friday, February 26, 2010.**
- xxv. A video clip of both clothed and bare female breasts bouncing while the song "Don't Worry, Be Happy" plays. This email was noted above at Paragraph C(39)(bb). This email was sent by B.M. to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Saturday, November 27, 2010.**
- xxvi. A picture of a large breasted woman holding a can of beer between her bare breasts, with the warning, "Don't do this to a can of beer, it will get warm and explode." This email was sent to Justice Eakin by B.M. It was not included on the November 5, 2014 disc. **This email was sent on Sunday, April 25, 2010.**

- xxvii. A picture entitled "Priceless" of two women riding a roller coaster with their breasts exposed. This email was noted above at Paragraph C(39)(dd). It was sent to Justice Eakin by B.M. It was included on the November 5, 2014 disc. **This email was sent on Tuesday, June 8, 2010.**
- xxviii. A video clip of a man farting in his car after he leaves his girlfriend's apartment; she runs to the car to give him one final kiss, and she discovers that he farted in the car. This email was sent to Justice Eakin by DAG Baxter. It was not included on the November 5, 2014 disc. **This email was sent on Monday, February 27, 2012.**
- xxix. A series of pictures of bare breasted women entitled "We stare because we care." This email was sent by B.M. to Justice Eakin. This email was noted above at Paragraph C(39)(ee). It was included on the November 5, 2014 disc. **This email was sent on Wednesday, September 23, 2009.**
- xxx. A picture entitled "Will the Dollar Fall," of a dollar bill squeezed between a woman's buttocks. This email was noted above at Paragraph C(39)(ff). It was sent by B.M. to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Thursday, February 25, 2010.**
- xxxi. A joke about a little girl receiving a ticket from a mounted policeman for a safety violation while riding her new bike that Santa brought her. The girl asks, "Did Santa bring you that horse?" The policeman said "Yes." The little girl responds, "Tell Santa for next year that the dick goes beneath the horse, not on top of it." There is also a picture of a little girl giving the finger to whoever took her picture. This email was sent by B.M. to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Monday, May 10, 2010.**

- xxxii. A picture of a woman with an exposed breast sitting at a dinner table entitled "Fwd: Greek economy." The joke with the picture asks how many cigarettes were in an ashtray next to her. This email was noted above at Paragraph C(39)(gg). It was sent to Justice Eakin by B.M. It was included on the November 5, 2014 disc. **This email was sent on Saturday, November 27, 2010.**
- xxxiii. A series of "Motivational Posters" or "demotivational posters." This email was noted above at Paragraph C(39)(ii). One picture asks, "Dear Abby, I'm an 18 year-old virgin in Arkansas. Are my brothers gay?" This email was sent to Justice Eakin by B.M. It was included on the November 5, 2014 disc. **This email was sent on Wednesday, February 15, 2012.**
- xxxiv. A series of nude pictures entitled "Neck exercises sent to me by a doctor." This email was noted above at Paragraphs C(39)(jj) and C(39)(nn). The position of the photographs requires the viewer to bend their neck to see them properly. This email was sent to Justice Eakin by B.M. It was included on the November 5, 2014 disc. **This email was sent on Sunday, January 29, 2012.**
- xxxv. A series of pictures of bare breasts called "Protect your nose from the sun." The pictures are of a man kissing the stomach of a woman in a bikini, while the two swam in the ocean. This email was noted above at Paragraph C(39)(ll). It was sent to Justice Eakin by B.M. It was included on the November 5, 2014 disc. **This email was sent on Monday, August 2, 2010.**
- xxxvi. A joke called the "Water Miracle." This joke is the same as the "sweet tea" joke, but in this instance, the woman is told by the doctor to swish water in her mouth. This email was sent to Justice Eakin by B.M. It was not included on the November 5, 2014 disc. **This email was sent on Friday, December 9, 2011.**

- xxxvii. A joke about robot golf caddies. According to the joke, the silver color of the robot caddies blinded the other golfers, and the golfer using the robot asks, "Why didn't you paint them black?" The man in the golf shop said, "We did. Then four of 'em didn't show for work, two filed for welfare, one of them robbed the pro shop, and the other thinks he's the President." This email was sent by DAG Baxter to Justice Eakin. It was not included in the November 5, 2014 disc. **This email was sent on Thursday, August 18, 2011.**
- xxxviii. A joke about "hand jobs." This email was sent by DAG Baxter to Justice Eakin. This email was not included in the November 5, 2014 disc. **This email was sent on Wednesday January 6, 2010.**
- xxxix. A repeat emailing of the "May all Your Days Start this Well" email described above at Paragraph C(78)(g). This email was sent to Justice Eakin by B.M. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday July 6, 2010.**
- xl. A photograph/joke combination entitled "Fwd: Don't give up Golf" about a "homeless golfer." The joke says, "I'm reaching out on behalf of a friend of mine who needs some help who wishes to remain anonymous. His wife told him to go out and get some of those pills that would help him get an erection. When he came back, he handed her diet pills. ANYWAY, he's looking for a place to live. Can you help him?" This email was sent to Justice Eakin by DAG Baxter, it was not included in the November 5, 2014 disc. **This email was sent on Monday, January 23, 2012.**
- xli. A link to a YouTube video clip of the "Key and Peele" show on Comedy Central, wherein a black inner-city teacher substitutes in a predominantly white middle-class school district and mispronounces all of the students' names. For

example, the teacher pronounces "Aaron" as "A-A-ron." This email was sent by DAG Baxter to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, November 14, 2012.**

- xlii. An email thread containing a message from DAG Baxter to, presumably, Justice Eakin and his golfing friends, which contains the statement, "While most of us are shoveling a foot of snow from our driveways, I thought now would be a good time to bring thoughts of warmth, golf, and titties your way!" This message was forwarded to Justice Eakin by DAG Baxter. It was not included on the November 5, 2014 disc. **This email was sent on Friday, January 3, 2014.**
- xliii. A series of pictures of a large breasted woman, fully clothed, doing yoga poses. There is a joke with these pictures asks whether the grass the woman is posing on needs to be cut. This email was noted above at Paragraph C(78)(o). This email was sent to Justice Eakin by B.M. Justice Eakin saw the email because he responded to it. It was not included on the November 5, 2014 disc. **This email was sent on Saturday, December 21, 2013.**
- xliv. A picture of a nude woman driving a convertible BMW. There is a joke about the car's "airbags" functioning, but not its air conditioning. This email was sent to Justice Eakin by B.M. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, April 30, 2014.**

81. Contained on the September 28, 2015 disc or the "PA_Supreme_Court_Review_10-14-2014.pst" file were emails received by Justice Eakin at his "John Smith" email from Attorney McGowan in his "blast emails," during the time period of 2008-2012 and 2012-2014.
- a. A number of the emails received by Justice Eakin from Attorney McGowan contained pictures of nude women; sexually-suggestive themes; gender stereotypes; homophobic content; socioeconomic stereotypes; violence towards women; racial humor; ethnically-based humor; and stereotypes of religious groups. These emails contain material including, but not limited to, the following:
 - i. A "demotivational picture" entitled "Guys Night Out – there is no way that this could end poorly, with a picture of Ben Roethlisberger and Tiger Woods. The humor is obviously due to the accusations women made against them. This picture was forwarded by Attorney McGowan. This was not included in the November 5, 2014 disc. **This email was sent on Monday, May 3, 2010.**
 - ii. A video clip of a beer commercial where a man is seen furiously brushing his teeth and swishing mouthwash, the clip says "earlier..." and cuts to a group of friends drinking. One says, "Can I have another light beer?" The man who was seen brushing his teeth says, "If this is light beer, I'll suck Bill's co-" and his statement is interrupted with the advertisement for Big Rock Beer Company. This clip was forwarded by Attorney McGowan. This was not included in the November 5, 2014 disc. **This email was sent on Tuesday, March 30, 2010.**
 - iii. A video clip of a scene from the motion picture "Say It Isn't So," showing the sister of one of the main characters defiantly showing off her pierced nipples to her family. This email was noted above at Paragraph C(39)(a). This clip was forwarded by Attorney McGowan, and it was included in the

- November 5, 2014 disc. **This email was sent on Thursday, April 8, 2010.**
- iv. A video clip of a car commercial for Mercedes Benz highlighting two unfaithful couples; the tagline of the commercial is "at least there's one thing you can rely on." This email was forwarded by Attorney McGowan, and it was not included in the November 5, 2014 disc. **This email was sent on Friday, August 27, 2010.**
- v. A video clip entitled "The craziest white man ever," which appears to be a satirical video of a white man picking up Hispanic individuals at a Home Depot and offering them work at his home, but he ends up taking them to the Immigration and Customs Enforcement office. In the video, the man uses racial and ethnic slurs such as "beaner" and "wetback." This video was forwarded to Justice Eakin by Attorney McGowan and it was not included in the November 5, 2014 disc. **This email was sent on Tuesday, June 15, 2010.**
- vi. A joke about a man taking a woman out to eat at an expensive restaurant, where the woman eats a lot of expensive items on the menu. The man asks, "Does your mother feed you like this when you eat at home?" The woman responds, "No, but my mother is not expecting a blow job." This email was forwarded by Attorney McGowan. It was not included in the November 5, 2014 disc. **This email was sent on Wednesday, April 6, 2011.**
- vii. A series of pictures of strange looking and strangely-attired people getting married entitled "the people of Walmart weddings." This email was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Monday, March 29, 2010.**
- viii. A "demotivational" poster of a young girl smiling eerily at the camera while a house in the background of the shot burns. The tagline says "Girl Scouts - Maybe next time you'll buy the

fucking cookies." This email was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Monday, November 1, 2010.**

- ix. A series of pictures entitled "girls you can't take anywhere." This series of pictures are of women, fully clothed, generally engaged in sexually-suggestive poses with statues, signs, and other inanimate objects. This email was noted above at Paragraph C(39)(h). This email was sent to Justice Eakin by Attorney McGowan. It was included on the November 5, 2014 disc. **This email was sent on Saturday December 4, 2010.**
- x. A video clip called "Happy Ending Massage." This email was noted above at Paragraph C(39)(i). This video clip is a joke clip where, after a man receives a massage from a female Asian masseuse in a bikini, she asks if he wants a "happy ending," impliedly, a sexual favor. He responds "yes," and balloons and clowns fill the room as if it was a birthday party. This email was sent by Attorney McGowan to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Monday, May 10, 2010.**
- xi. A picture entitled "If she hasn't yet, she will soon..." The picture is a shot of a woman squatting to relieve herself in the African veldt with a lioness stalking her (at the same time) in the background of the photo. This email was sent by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, August 31, 2010.**
- xii. A joke entitled "instant spark," which implies that a man tasered a "beautiful woman" who he saw in a park and then raped her. This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Monday, December 20, 2010.**

- xiii. A joke picture of a baby doll in traditional Islamic garb. The punchline of the joke is "Nobody knows what the hell it says 'cause no one's got the balls to pull the cord!" This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, September 8, 2011.**
- xiv. A joke entitled "Leroy's Hearing Problem," wherein "Leroy" asks a Preacher to pray for help with his hearing, the preacher prays and asks how his hearing is, and Leroy says, "I don't know, Reverend, it ain't till next Wednesday." This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, March 24, 2010.**
- xv. A joke about a "magic green hat" that cleared out an emergency room. The hat was a U.S. Customs and Border Patrol hat, implying that the emergency room was full of illegal immigrants. This email was sent by Attorney McGowan. It was not on the November 5, 2014 disc. **This email was sent on Friday, February 18, 2011.**
- xvi. A joke about a woman golfer who fails at golfing and kills a man. The woman says, "I guess all those fucking lessons I took over the winter didn't help." One of the men in the all-male crowd observing responded "Well, there you have it. You should have taken golf lessons instead!" This email was sent by Attorney McGowan. It was not included in the November 5, 2014 disc. **This email was sent on Friday, May 13, 2011.**
- xvii. A joke about a marriage counselor who asks a couple what they both have in common. The husband responds, "Well, for starters, neither one of us sucks dick." This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Friday, August 6, 2010.**

- xviii. A joke entitled "Men Should Never Do Advice Columns." In the joke, a woman writes a male advice column writer with a story of her broken down car and how it led her to discover that her husband was cheating. The advice column writer responds with advice as to why her car broke down. This email was sent by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, April 19, 2011.**
- xix. A joke entitled "mother of all," where two Muslim women reminisce about their children. At the close of the joke, one woman says "they blow up so fast, don't they?" This email was sent by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, March 25, 2010.**
- xx. A video clip of a man who takes his new girlfriend fishing on his Nitro speed fishing boat, who ejects her from the boat after she complains. The girlfriend does not die. This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, April 15, 2010.**
- xxi. A series of pictures entitled "Prom Night at Camden High School." The pictures are predominantly of black students in prom attire that would generally be considered unusual. This email was sent by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, May 19, 2010.**
- xxii. A video clip of a dog pulling a chicken into its dog house and mounting the chicken. The clip is entitled "Roethlisberger's dog." This email is an evident reference to the rape allegations against Ben Roethlisberger. The email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Monday, April 26, 2010.**

- xxiii. A video clip of a man lying on the couch watching TV, who has a remote controlled refrigerator. He sends the remote controlled fridge to his girlfriend, and asks her to get him a beer. The tagline is "When your lady friend can't get to the fridge, get the fridge to your lady friend." This email was sent by Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, March 9, 2011.**
- xxiv. A series of pictures entitled "New Female Wal-Martians." These pictures are mainly of obese women in ill-fitting clothing in Wal-Mart. This email was sent by Attorney McGowan to Justice Eakin. This email was not included on the November 5, 2014 disc. **This email was sent on Monday, February 14, 2011.**
- xxv. A video clip of a UPS man delivering a package to a woman's home. The woman, who is nude, is visible from behind. When she approaches the door, the UPS man opens the mail slot and says "Hey curly, is your mom home?" The woman runs away. This email was noted above at Paragraph C(39)(s). The email was sent by Attorney McGowan to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Wednesday, October 20, 2010.**
- xxvi. A two-picture series entitled "Vibrator warning." The first picture attempts to warn women against using a corn cob for a vibrator. The second picture is of a topless woman with her legs spread, with her genital area entirely covered by popcorn. This email was noted above at Paragraph C(39)(t). This email was sent by Attorney McGowan to Justice Eakin. It was included on the November 5, 2014 disc. **This email was sent on Monday, June 21, 2010.**
- xxviii. A joke video entitled "Mohammed Brand Condoms," which indicates that jihadists should wear the condoms so they do not have to worry about the sexual pasts of their goats. This email was sent by

Attorney McGowan to Justice Eakin. It was not included on the November 5, 2014 disc. **This email was sent on Monday, August 16, 2010.**

xxiv. A joke picture of the "Home Alone" movie poster. In it, the robber's face behind Macaulay Culkin is replaced with a smiling Jerry Sandusky. This email was sent by C.K.P., an email contact of Attorney McGowan, to Attorney McGowan, Justice Eakin, and a number of other recipients. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, December 21, 2011.**

xxv. An email with the phrase "Jerry Sandusky as Santa Claus with a crying baby boy on his lap..." This email was sent by J.M.C, an email contact of Attorney McGowan, to Attorney McGowan, Justice Eakin, and a number of other recipients. It was not included on the November 5, 2014 disc. **This email was sent on Wednesday, December 21, 2011.**

xxvi. A series of pictures purporting to be Houston Oilers player Mike Comrie proposing to his girlfriend. The last picture appears, from behind, to be Comrie's girlfriend performing oral sex on him, although the viewer cannot see anything other than her head in his lap. The series is called "How to propose to your girlfriend - as demonstrated by Oilers' Mike Comrie." This email was sent to Justice Eakin, Attorney McGowan, and a number of other recipients by P.T., an email contact of Attorney McGowan. This picture was not included on the November 5, 2014 disc. **This email was sent on Thursday, March 4, 2010.**

xxvii. A picture of an obese nude woman wearing a pig costume entitled "How to tell if your house is infected with the swine flu.". The email was noted above at Paragraphs C(39)(j) and C(39)(mm). The email was sent by E.S., an email contact of Attorney McGowan, to Attorney McGowan, Justice Eakin, and a number of other recipients. This

email was included on the November 5, 2014 disc.
This email was sent on Friday, May 15, 2009.

- xxviii. A joke entitled "sex in the shower." The joke states that, "in a survey 86% of inner city residents (almost all of whom are registered democrats) said that they have enjoyed sex in the shower. The other 14% said that they have not been to prison yet." This joke was sent to Justice Eakin, Attorney McGowan and many other recipients by P.T. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, December 18, 2008.**
- xxix. A two-picture series of pictures entitled "for a dreary day," which are of a wrecked golf cart and a large breasted woman in a bikini top. This email was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Thursday, January 3, 2013.**
- xxx. A two-picture series entitled "Difference between Ravens/SF fans;" the first picture is of a woman in a Ravens' football jersey exposing her breasts to the camera. The second picture is two male San Francisco fans in a bar kissing each other. This email was sent to Justice Eakin by Attorney McGowan. It was not part of the November 5, 2014 disc. **This email was sent on Tuesday, February 5, 2013.**
- xxxi. A photograph/joke combination entitled "Wife's First Hunt;" the picture is of a woman hunting in a hat with antlers on it. The joke describes the hat as the "first timer's lucky hat." The obvious implication is that the husband wanted the wife to get shot by mistake because of the hat. This email was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, November 26, 2013.**

xxxii. A photograph/joke combination that is entitled "Howard was always slow!" The picture is of a nude woman, on a couch, with a skeleton between her legs, apparently performing oral sex on her. There is a word balloon that says "Come on Howard, you're taking forever!" This email was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Saturday, April 20, 2013.**

xxxiii. A link to a YouTube video entitled "Kodak Moment" or "How Not To Instagram." The video is of two women in a swamp. One of the women was taking "selfies" of herself by the water when she is eaten by an alligator or a crocodile. This link was sent to Justice Eakin by Attorney McGowan. It was not included on the November 5, 2014 disc. **This email was sent on Tuesday, November 12, 2013.**

xxxiv. A picture slide show entitled "Morning Funnies" or "All men are the same," which shows pictures of small children ogling women's breasts. One photograph has a picture of a woman on a nude beach with a baby sitting next to her grabbing one of her nipples, and one photograph has a small child putting the breasts of an unclothed Barbie doll in his mouth. This email was noted above at Paragraph C(39)(m). It was sent to Justice Eakin by Attorney McGowan. It was included on the November 5, 2014 disc. **This email was sent on Wednesday, July 29, 2009.**

Honorable Jack A. Panella
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ATTACHMENT B: "Eakin is unfit to Judge" by David S. Cohen, December 18, 2015, reprinted from www.post-gazette.com

Eakin is unfit to judge

Did views expressed in offensive emails color his rulings?

December 18, 2015 12:00 AM

By David S. Cohen

Amid the calls for Pennsylvania Supreme Court Justice Michael Eakin to resign because he is a high public official regularly engaging in behavior that demeans large groups of people based on race, sex and other characteristics, an important part of the discussion is missing.

Not only is his behavior morally reprehensible for an important part of our government, but it is uniquely problematic for a justice of the state's highest court because he frequently decides cases that touch on these issues.

To recap, the problem here is that Justice Eakin sent and received emails that, according to the Philadelphia Inquirer, contained explicit sexual images of women; mocked gays, lesbians and feminists; lampooned African-Americans; discussed plans for visiting strip clubs; and made sexually suggestive comments about two women working for the justice.

In light of these emails, ask yourself whether you want a justice with such obvious disregard for women and black people sitting in judgment on the following cases:

Child victims of sexual assault:

In 2008, the Supreme Court heard the case of an 11-year-old girl who was raped in the parking lot of Veterans Stadium in Philadelphia. In the midst of the girl's lawsuit against the Phillies baseball team, the trial court judge allowed the Phillies

to claim that the young girl consented to the sex. Because of the limitations of a young child's ability to consent to such serious acts, in criminal cases, consent is never a defense with someone under 13, and the Supreme Court decided that the same rule should apply to civil cases.

Justice Eakin dissented from this decision, joining the opinion of Chief Justice Castille, who argued that the Phillies and other defendants in cases like this one should be able to show that the 11-year-old had the capacity to consent.

Expert testimony about victim's responses to sexual violence:

Just last month, the Supreme Court upheld a statute that permits prosecutors to use experts to explain why child victims of sexual violence may not report the crime right away. The horrible case involved the regular sexual abuse of a child between the ages of 4 and 7.

The court found that the statute allowing this type of testimony was constitutional, but Justice Eakin dissented. He argued that this type of expert testimony is likely to inappropriately influence a jury's determination of whether the child witness is credible or not, and he proposed instead that a judge address the matter through jury instructions.

Race bias in jury selection:

In 2008, the Supreme Court heard the death penalty case involving Robert Cook. One of Cook's claims on appeal was that his jury in 1988 was tainted by race discrimination. Cook's proof was a videotape of the prosecutor on his case, Assistant District Attorney Jack McMahon, explaining that he picks juries based on racial and gender stereotypes and that he tries to cleverly frame his questions to jurors so that he can provide a race-neutral explanation for removing black people from the jury.

In Cook's case, two unemployed black people were removed from the jury, even though one unemployed white person was kept on the jury. The Supreme Court found that there was no race bias in the selection of Cook's jury. Justice Eakin joined the opinion, which explained that the two potential black jurors gave the prosecutor reasons to believe they were unstable, while the white juror did not. Two justices dissented, finding this excuse "exceptionally weak" given how explicit Mr. McMahon had been about keeping black people off juries.

Sexual harassment in the workplace:

Under Pennsylvania law, only employers of four or more are prohibited from discriminating based on sex, including sexual harassment. In 2009, the Supreme Court had to decide whether people who work for a small business with fewer than four employees are also protected against sexual harassment. The case involved Mallissa Weaver, who worked for a company with three employees and who was mercilessly sexually harassed by her boss until she resigned.

The Supreme Court, in an opinion joined by Justice Eakin, found that Ms. Weaver was not protected because the basic principle of at-will employment applied in the absence of a clear statute.

Two justices "vigorously" dissented because they believed that sexual harassment was unmistakably against the public policy of Pennsylvania.

Gradations of sexual harassment in the workplace:

In another sexual harassment case, the Supreme Court decided in 2012 that a public employee could not be reinstated who was found to have committed sexual harassment. The opinion was unanimous, but Justice Eakin wrote a separate opinion to explain his view that the case should only apply to "egregious" sexual harassment and that some sexual harassment is "lesser" and should not be punished in this way.

This last case really drives home the point. Is someone who trades emails that sexualize women, including two of his employees, able to set aside his explicit or implicit biases in a case involving workplace sexual harassment? The fact that Justice Eakin wrote separately to explain that some public employees engage in sexual harassment that is not egregious and they should not lose their jobs for it indicates that he cannot. After all, was he thinking about himself when he penned that opinion?

The other cases raise the same issues. Is someone who thinks of women in demeaning ways qualified to judge important issues related to rape? Is someone who sends and receives emails about the inferiority of black people able to see race bias in jury selection? His votes in these cases seem to indicate that the answer to these questions are no.

These are just a sampling of the cases that have come before the Pennsylvania Supreme Court while Justice Eakin has served on it that raise these important issues.

What they make clear is that Justice Eakin is not qualified to be a member of the highest court in this state and must resign immediately.

David S. Cohen is a professor of law at the Thomas R. Kline School of Law at Drexel University, where he teaches constitutional law and sex discrimination and the law (dsc39@drexel.edu). He is on the board of the Women's Law Project.