IN THE COURT OF JUDICIAL DISCIPLINE
COMMONWEALTH OF PENNSYLVANIA

IN RE: SUPREME COURT JUSTICE J. MICHAEL EAKIN	:	: No. 13 JD 15

JUSTICE J. MICHAEL EAKIN'S BRIEF RE: PRE-TRIAL CONFERENCE ISSUES

TO THE HONORABLE JACK PANELLA, CARMELLA MULLEN and DAVID BARTON, JUDGES OF SAID COURT:

AND NOW comes the Respondent, Justice J. Michael Eakin, by and through his attorneys, William C. Costopoulos, Esquire and Heidi F. Eakin, Esquire, COSTOPOULOS, FOSTER & FIELDS, and respectfully files the following brief addressing the issues raised by this Honorable Court at the pretrial conference held on January 21, 2016 in this matter:

QUESTION/ISSUE NO. 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 canons." Pretrial conference, 1/21/15, N.T. 36.

Respondent seeks to call Attorney Samuel Stretton, as he did at the suspension hearing, as 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 2a, 5, and the constitutional section 17(b) and 18[(d)](1) of Article V." N.T. 51. This is the ultimate issue before the Court of Judicial Discipline, and the Pennsylvania Rules of Evidence now expressly permit an expert opinion on the ultimate issue before a factfinder.

Pa.R.E. 704 on "Opinion on an Ultimate Issue" provides: "An opinion is not objectionable just because it embraces an ultimate issue." Although such opinions were once excluded because they were thought to have intruded on or usurped the function of the jury, *see* McCormick Evidence § 12 (7th ed. 2013), that is no longer the case. For example, in *McManamon v. Washko*, 906 A.2d 1259, 1277-1279 (Pa.Super.2006), the

Pennsylvania Superior Court held admissible the expert opinion of a state trooper accident reconstructionist who opined on the fault of a driver in a traffic accident negligence case, which was the ultimate issue at hand, citing Pa.R.E. 704:

> Pennsylvania law allows expert opinion testimony on the ultimate issue. As with lay opinions, the trial judge has discretion to admit or exclude expert opinions on the ultimate issue depending on the helpfulness of the testimony versus its potential to cause confusion or prejudice.
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> * * *
>
> Pa.R.E. 704. Thus, Pennsylvania law allows expert opinion testimony on the ultimate issue. *Id.*

(citations omitted). The Court further stated: "We agree with [Appellee] that there is nothing improper in allowing the expert called by the defense to testify as to the cause of the accident. [Appellants] offered him as their expert on accident reconstruction and had the opportunity on direct and re-direct to challenge his testimony at trial. In addition, we remind [Appellants] that Pa.R.E. 704 provides that testimony in the form of opinion or inference otherwise inadmissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Pennsylvania law allows expert opinion testimony on the ultimate issue. The trial judge has the discretion to admit or exclude ultimate-issue testimony offered by an expert, and in so doing, must weigh the helpfulness of the testimony against its potential to cause confusion or prejudice." 909 A.2d at 1279 (citation omitted).

See also: Bey v. Sacks, 789 A.2d 232, 238-239 (Pa.Super.2001) (testimony by patient's expert, that nerve root irritation was a significant risk in tooth extraction, did not exceed permissible scope of expert testimony in patient's action against dentist in lack of informed consent case even though it was ultimately within the province of the jury to determine the materiality of the risk; citing Rule 704, "[a]lthough we agree with Dr. Sacks' contention that it is ultimately within the province of the jury or factfinder to determine materiality of a risk, we find no error in the trial court allowing the Beys' expert to testify as to his opinion whether the risk of nerve root extraction and whether that risk was not explained fully to Mr. Bey before the procedure. It was then for the jury to determine, after weighing all the evidence presented, the materiality of the risks involved.")

Experts testify routinely on the ultimate legal question presented in a case. Attorney Stretton is a well-known and experienced expert in judicial and attorney ethics.

His opinion on whether Justice Eakin's conduct violated the applicable judicial canons or the provisions of the Constitution certainly go to the ultimate factual and legal issues before this Honorable Court, but they are hardly binding on the Court as the triers of fact. That expert opinion should be considered, *along with all other relevant and admissible evidence in this matter*, in assisting the Court in reaching this determination. Each judge can give what weight, if any, to the opinion as he or she wishes. Does the Judicial Conduct Board seriously contend that the Court will be confused or prejudiced should Attorney Stretton be permitted to render his expert opinions? Indeed, "[e]xperts may testify to the same conclusions that the trier of fact is to determine because opinion evidence is not binding on the trier of fact but goes to the trier of fact to be weighed along with other evidence." *See 9 Standard Pennsylvania Practice 2d* § 55:8 on "Opinion or inference on ultimate issue" (citations omitted).

Attorney Stretton's expert opinions in this matter, which bear on the ultimate issues at hand, are both relevant and admissible, and the citizenry together with Justice Eakin deserve to have them entertained by this Honorable Court for the edification of the judiciary and the public alike.

QUESTION/ISSUE NO. 2

> "Regarding the proposed testimony of John Hare and Alicia Hickok, I believe you said, which it'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." Pretrial conference, 1/21/16, N.T. 36.

As noted by the Judicial Conduct Board, this Court has ruled the testimony of Attorneys John Hare and Alicia Hickok admissible on the absence of bias in any of Justice Eakin's appellate court opinions. "The Board does not have any further response." *See* Board's brief at p. 3. Both of these appellate attorneys are extremely qualified to render their respective legal opinions.

Further, if this Court would not allow their testimony for any reason, then the issue of the integrity of Justice Eakin's work product while he was on the Supreme Court for the past 14 years and on the Superior Court for the 6 years before that, should be a closed matter.

QUESTION/ISSUE NO. 3

> "[This Court] want[s] the brief to address the admissibility of e-mails received by Justice Eakin either at 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." Pretrial conference, 1/21/16, N.T. 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." Pretrial conference, 1/21/16, N.T. at 38.

First, the Board concedes that it cannot prove whether Justice Eakin even opened most of the emails, some pornographic or objectionable, that he received. Nevertheless, it insists that these unsolicited, unopened, unread emails are somehow relevant and admissible "to demonstrate a continuing pattern of emailing conduct (sending and receiving) by Justice Eakin." *See* Board brief at pp. 4-5. This JCB argument is disingenuous for the emails received in this case that are at issue were never forwarded.

The emails received by Justice Eakin in this case that are at issue were blast emails from Attorney Terrance McGowen and former Justice Seamus McCaffery ... hereinafter referred to as the iceberg. Some of these were pornographic in nature, others were insensitive jokes with graphics. However, these unsolicited emails, unopened and unread – apart from "a few" that Justice Eakin has informed the Board he did open and read – are not admissible because they are not relevant to any Canon violation. *None* of the Attorney McGowan emails received by Justice Eakin were forwarded by him to anyone; *none* of the former Justice McCaffery's emails received by Justice Eakin were forwarded by him to anyone.

The unopened and unread emails are irrelevant, inadmissible and undeniably prejudicial. The only conceivable premise for putting into evidence such emails would be to besmirch Justice Eakin in the eyes of this Court and in the court of public opinion. The presentation of these emails will amount to nothing more than a slide show of offensive emails, some of which are pornographic, and this slide show will only bring disrepute to the judiciary that Justice Eakin had no role in, disrepute that former Justice Seamus McCaffery had a major role in.

Justice Eakin – like everyone and anyone else who has an email address – receives

unsolicited emails. This Honorable Court can take judicial notice that each and every member of this Court, each and every member of the Judicial Conduct Board, and the entire judiciary of Pennsylvania has probably received unsolicited emails at least some of which were offensive, objectionable, or even pornographic. That is the nature of the digital world in which we live. But the passive reception of such emails cannot be construed as relevant to demonstrating some sort of nefarious conduct on the part of the receiver.

Indeed, it has recently been revealed by the media that two other Supreme Court Justices have received inappropriate emails. The blast emails from Attorney Terrance McGowen and former Justice Seamus McCaffery were also sent to fifteen other members of the judiciary, as well as district attorneys and federal prosecutors. Counsel for Justice Michael Eakin is loath to name them because, consistent with this memorandum, they had no control of unsolicited emails and did nothing wrong as recipients.

The esteemed Judge Joseph A. Del Sole, who was commissioned by the Pennsylvania Supreme Court to review Justice Eakin's emails and who determined that none of his conduct warranted immediate intervention, was careful to note in his report the distinction between emails received and emails sent. "First, the emails in question were received by, rather than sent by, Justice Eakin. Also, so-called jokes appear to be unsolicited by Justice Eakin. We are unable to find any analogous cases that involve the culpability of a jurist for *receiving* inappropriate materials. Many of the inappropriate emails were forwarded to Justice Eakin as one recipient of many on a "blast" email. Even for those that were limited to a smaller group of social friends, there does not currently exist a framework by which to assess whether materials received *by* a jurist may impute culpability *to* the jurist. On a related note, we find no authority placing an affirmative obligation upon a jurist who receives inappropriate material 1) to request to be removed from the distribution list or 2) to undertake other action vis-á-vis the sender." (Original emphasis; footnote omitted). *See* "Report of Special Counsel Regarding the Review of Justice Eakin's Personal Email Communications" (hereinafter "Del Sole Report") filed on October 30, 2015, at pp. 24-25.

As Judge Del Sole makes clear, a jurist is not subject to disciplinary culpability for the mere passive act of *receiving* emails, however offensive, crude, pornographic, etc. Nor does a jurist have the affirmative duty to demand of the sender that he be removed from the email chain. The Judicial Conduct Board in the pleadings and in its brief has provided this Court with no such authority – and undersigned counsel respectfully suggests that, as Judge Del Sole concluded, no such authority exists. It follows logically, then, that if there is no culpability for unsolicited, unopened, unread emails – however objectionable they may be – there is no basis for the Board to introduce the hundreds of

emails it concedes that Justice Eakin himself never saw. To prove that he sent and received emails? The Justice will stipulate that he sent and received emails. "Evidence that is not relevant is not admissible." Pa.R.E. 402 on "General Admissibility of Relevant Evidence"; *Commonwealth v. Cook*, 952 A.2d 594 (Pa.2008) (same).

As Pa.R.E. 403 states: "The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." "Unfair prejudice" in this context means "a tendency to suggest a decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially." *See* Comment; *Commonwealth v. Wright*, 961 A.2d 119 (Pa.2008). Exclusion is based on the concern that the evidence "would cause the jury to base its decision on something other than the legal propositions relevant to the case," *see, e.g., Smith v. Morrison*, 47 A.3d 131 (Pa.Super.2012), or "would divert the jury's attention away from their duty of weighing the evidence impartially." *See, e.g., Commonwealth v. Wright, supra; Commonwealth v. Taliaferro*, 455 A.2d 694, 698 (Pa.Super.1983); *Commonwealth v. Brown*, 414 A.3d 70 (Pa.1980).

Admitting Justice Eakin's received emails into evidence, when the Board has conceded it has no proof were ever opened or read, would be a distraction, diverting this Court's attention from the emails with which he was charged in the Board Complaint and its duty of weighing the evidence against him impartially, and it may result in a tendency to suggest a decision on an improper, prejudicial basis.

What about the emails sent by Justice Eakin years ago?

The only emails sent by Justice Eakin were approximately 18 in number (the number could be calculated higher depending on how you read the email chain but not much higher) and sent by him to several of his closest friends years ago, most of which relating to an upcoming Myrtle Beach vacation and none of which was pornographic in nature.

Finally, and most ironically, the Board in its brief actually cited Judge Kozinski's case as favoring the admission of these received-only emails, *In re Complaint of Judicial Misconduct (Kozinski)*, 575 F.3d 279 (3rd Cir.2009). *See* Board brief at pp. 6-7. The Third Circuit did no such thing. Judge Kozinski had a public website in his own name which posted numerous offensive and pornographic files. There can be no comparison to emails received , but not opened or read, by Justice Eakin.

As Judge Del Sole persuasively wrote: "A key distinction between Justice Eakin's

situation and [that of Judge Kozinski] is the fact that Justice Eakin did not have a website or email account in his own name and did not use a judicial email account. Justice Eakin's personal emails were sent from a pseudonymous email address. Indeed, neither the pseudonym "John Smith" nor the email address itself "wap092002@yahoo.com" give any indication that Justice Eakin was involved. Thus, a member of the public viewing sent or received emails would be unable to associate the content of the email with a member of the judiciary. This is a layer of insulation that was not present in the federal Judicial Council matters – **a layer of insulation that may be significant**. As the *Kozinski* opinion points out, the scrutiny of a jurist's personal life must take into account the reasonable zone of privacy to which a jurist is entitled." *See* Del Sole report at p. 22 (emphasis supplied). And for conduct much worse and more graphic than that with which Justice Eakin has been charged, the Third Circuit issued but an admonishment in its published opinion. "Thus, the Council meted out no further punishment or reprimand to Judge Kozinski." *See* Del Sole report at p. 19. No suspension before trial, no suspension as a sanction, no removal from office, nothing more.

The aforesaid emails merely received by Justice Eakin as a passive recipient, and unread and unopened by him, are clearly irrelevant and thus inadmissible at trial if the Rules of Evidence are to have any meaning.

QUESTION/ISSUE NO. 4

> The Court has several questions regarding the admissibility of Justice Eakin's self-report letters, any of his written or oral statements to the Board, whether he reported all of the emails now part of the Board Complaint, whether the Board had all the emails, etc.

The Judicial Conduct Board is the appropriate responder to this question.

This line of inquiry is investigatory in nature and usurps the function of the Judicial Conduct Board. The Court of Judicial Discipline should not be the investigative arm of the Judicial Conduct Board which may have already created the constitutional fundamental fairness issue to date.

Secondly, this office is asserting Justice Eakin's right not to testify at this time in response to this inquiry.

However, and finally, it is believed and therefore averred in this matter that Justice Eakin has always been forthcoming and truthful with the Judicial Conduct Board in his

self-reporting and cooperation. Whether the Court allows his statements to the Judicial Conduct Board into evidence, or not, is of no concern to the Respondent.

QUESTION/ISSUE NO. 5

> "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." Pretrial conference, 1/21/16, N.T. 40-41.

Justice Eakin may not be held responsible for pre-*Carney* conduct, that is, for any conduct which predated the date of that decision on October 30, 2013, and thus those emails predating that decision may not be used as to Counts 1 and 3, sub A of the Board Complaint. The Pennsylvania Supreme Court in *Carney* significantly changed the law on judicial discipline and held for the first time that jurists may be held culpable under the canons and Constitution even if their conduct did not entail the "judicial decision-making process," that is, for off-the-bench conduct. 79 A.3d at 507. However, this holding was made prospective only out of due process and notice concerns. 79 A.3d at 508.

Much of Justice Eakin's so-called emailing conduct predates October 30, 2013 and therefore a plain, sensible reading of *Carney* would prohibit the use of any such conduct in finding him culpable under the judicial canons or Constitution. Yet the Judicial Conduct Board urges this Honorable Court to adopt an expansive definition of the "judicial decision-making process" – or what it refers to as the "gloss" – which the Supreme Court itself heretofore has never adopted. Because Justice Eakin was in an administrative, supervisory capacity on the Supreme Court, because he was the Supreme Court's computer liaison justice, and because he was the liaison justice for the First Judicial District/Philadelphia Court system, according to the Judicial Conduct Board "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* Board brief at pp. 12-13 (citation omitted).

The Judicial Conduct Board has failed to provide this Honorable Court with any authority for this new exception to the Supreme Court's important *Carney* ruling and the Court is respectfully urged not to create one. There is absolutely no evidence that Justice Eakin's email conduct adversely affected his roles as a liaison justice for the Supreme Court or even any such "perception." Nor was he charged by the Board with any such specific conduct in these administrative/supervisory capacities. Accordingly, those emails predating *Carney* may not be used as to Counts 1 and 3, sub A of the Board Complaint.

QUESTION/ISSUE NO. 6

Whether the letter of the Court of Common Pleas, Cumberland County, Pennsylvania to the Court of Judicial Discipline before the suspension hearing in this matter is admissible at trial?

In continuing respect for the judiciary, this office will not be seeking the admissibility of this evidence and therefore this issue is moot.

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DATED: March 17, 2016.

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE:

J. Michael Eakin	:
Justice of the Supreme Court of	: No. 13 JD 2015
Pennsylvania	:

PROOF OF SERVICE

In compliance with Rule 122(d) of the Court of Judicial Discipline Rules of Procedure, on March 10, 2016, a copy of *Justice J. Michael Eakin's Brief Re: Pre-Trial Conference Issues* was provided to Francis J. Puskas, II, Sr. Deputy Counsel, by personal service at the following address:

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DATED: March 10, 2016