IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2436 Disciplinary Docket No. 3
	:	
Petitioner	:	No. 32 DB 2017
	:	
v.	:	Attorney Registration No. 74824
	:	
STACY PARKS MILLER,	:	(Centre County)
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 8th day of February, 2019, upon consideration of the Report and Recommendations of the Disciplinary Board and the parties' responses, Stacy Parks Miller is suspended from the Bar of this Commonwealth for a period of one year and one day, and she shall comply with all the provisions of Pa.R.D.E. 217. Respondent shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

A True Copy Patricia Nicola
As Of 02/08/2019

Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 32 DB 2017
v.	:	Attorney Registration No. 74824
STACY PARKS MILLER Respondent	:	(Centre County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

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

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

By Petition for Discipline filed on February 23, 2017, Petitioner, Office of Disciplinary Counsel, charged Respondent, Stacy Parks Miller, with violations of the Rules of Professional Conduct arising out of allegations contained in two separate charges. Charge I alleges that Respondent engaged in ex parte communications with judges. Charge II alleges that Respondent created, disseminated and used a fictitious Facebook page. Pursuant to Disciplinary Board Rule 89.54(a), on March 2, 2017,

Respondent sought and received a one-time 20-day extension to file her Answer, which was due on April 11, 2017. ODC-C.

On March 27, 2017, Respondent filed an Emergency Motion for Protective Order and for Temporary Stay of All Proceedings. ODC-D. Therein, Respondent indicated that she was prohibited from responding to the charges against her. This position was based on an Order entered on March 14, 2017, by the Honorable Norman A. Krumenacker, III, Supervising Judge of the 37th Statewide Investigating Grand Jury. ODC-B. On March 31, 2017, Petitioner filed a response in Opposition to Respondent's Motion for Protective Order and Temporary Stay. ODC-E. Therein, Petitioner indicated that Respondent should request disclosure from Judge Krumenacker, and further, that she was not prohibited from responding to Charge II of the Petition for Discipline.

On April 20, 2017, the Board entered an Order providing Respondent an opportunity to obtain evidence that she deemed necessary to mount her defense to the Petition for Discipline. ODC-F. The Order further directed Respondent to file her Answer to Charge II within five business days. Respondent failed to answer Charge II by April 27, 2017, the deadline set by the Board.

On or about April 24, 2017, Respondent filed with Judge Krumenacker Petitioner's Motion for Release/Disclosure or for Such Other Relief as the Court Considers Warranted ("Motion for Relief"), and filed an accompanying brief on May 18, 2017. Respondent requested that Judge Krumenacker enter an order staying the disciplinary matter. On May 19, 2017, Judge Krumenacker issued an Order on Respondent's Motion for Relief, and held that "ex parte judicial communications and two additional emails were not the subject of the Grand Jury investigation." ODC-I.

On June 12, 2017, after all deadlines for filing an Answer to Petition for Discipline had expired, Petitioner filed a Motion to Deem All Allegations in the Petition for Discipline Admitted. ODC-K. On June 26, 2017, Respondent filed an Answer in Opposition to the Motion for Admission. On August 4, 2017, Petitioner filed a Response to Respondent's Answer to the Motion for Admission.

On August 10, 2017, the Board entered an Order granting Petitioner's Motion for Admission, thereby precluding Respondent from filing an Answer and deeming all factual allegations in the Petition for Discipline admitted. ODC-N. That same date, Respondent provided an untimely Answer to the Petition for Discipline. By Order dated August 11, 2017, the Board stated that it had considered Respondent's Answer as a Motion for Reconsideration/Motion for Enlargement of Time for Submission, and denied Respondent's Motion. ODC-O.

On August 16, 2017, a District III Hearing Committee ("Committee") was appointed to preside over the disciplinary proceedings. On September 11, 2017, Respondent filed an Emergency Application for Special Relief ("King's Bench Petition") before the Supreme Court of Pennsylvania. ODC-P. Respondent requested that the Court reverse the Board's decision to preclude her from filing an Answer to Petition for Discipline. By Order dated November 9, 2017, the Court denied the King's Bench Petition, leaving the Board's Order of August 11, 2017 undisturbed.

Prehearing conferences were conducted on September 12, 2017, October 10, 2017, November 6, 2017, and November 29, 2017, before Committee Chair Joanne Ludwikowski, Esquire.

On April 19, 2018, Respondent provided Petitioner with a list of exhibits and witnesses, and included the Answer to Petition for Discipline as an exhibit. Prior to the

disciplinary hearing, Petitioner filed a Motion in Limine to preclude Respondent's Answer from being entered into evidence as contrary to the Board's Order dated August 10, 2017.

A disciplinary hearing was held on April 23, 2018, before Chair Ludwikowski and Members Kevin C. McNamara, Esquire and Seth T. Moseby, Esquire.[1] At the hearing, the parties submitted Joint Stipulations of Facts and Law, and Petitioner's Exhibits ODC-1 through 48 and ODC-A through T were admitted into evidence. Petitioner did not provide testimonial evidence during its case-in-chief. The Committee granted Petitioner's Motion in Limine and precluded Respondent from including the Answer as part of the record. Respondent testified on her own behalf and presented character and fact testimony from five witnesses. Respondent's Exhibits R-1 through 3 were admitted into evidence.

On June 4, 2018, Petitioner filed a brief to the Committee and requested that Respondent receive no less than a three-month suspension for her violations of the Rules of Professional Conduct.

On June 27, 2018, Respondent filed a Brief to the Committee and requested that the Committee conclude that she engaged in a very limited violation of the Rules of Professional Conduct pertaining to ex parte judicial communications and that she be subjected to a minimal sanction or to time-served.

The Committee filed a Report on August 21, 2018. The Committee concluded that Respondent violated Rules of Professional Conduct as to the charges contained in Charge I, relating to ex parte judicial communications, but did not violate the

[1] The hearing originally was scheduled for November 29, 2017 and was rescheduled twice.

rules as to the charges contained in Charge II, relating to the Facebook page. The Committee recommended that Respondent be suspended for a period of three months.

On September 6, 2018, Petitioner filed a Brief on Exceptions to the Report and Recommendation of the Committee and requested that the Board reject the recommendation of the Committee with respect to the Facebook charges and find that Respondent violated the rules pertaining to that conduct.

On September 11, 2018, Respondent filed a Brief on Exceptions to the Report and Recommendation of the Committee, raised six exceptions, and requested that the Board reject the Committee's recommendation for a three-month suspension as excessive, and in the alternative, make the suspension retroactive to January 1, 2018.

On September 26, 2018, Respondent filed a Brief Opposing Petitioner's Exceptions and contended that the Committee correctly concluded that Respondent did not violate the Rules regarding the Facebook page, but further contends that even if the Board concludes that she violated those Rules, no additional discipline is warranted above the three-month suspension recommended by the Committee.

On October 1, 2018, Petitioner filed a Brief Opposing Respondent's Exceptions and requested that the Board reject Respondent's exceptions to the Committee's Report.

The Board adjudicated this matter at the meeting on October 25, 2018.

II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, Harrisburg,

Pennsylvania 17106, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings in accordance with the various provisions of the aforesaid Rules.

2. Respondent, Stacy Parks Miller, was born in 1969 and admitted to the practice of law in the Commonwealth of Pennsylvania in 1994. Her registered public address is 113 Harvest Run Road S., State College, Centre County, Pennsylvania 16823. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania. Joint Stipulation ("JS") 2, 3.

3. Respondent has no record of professional discipline in Pennsylvania. JS 37.

4. Following her admission to the bar in 1994, Respondent worked briefly for a sole practitioner, then became an Assistant District Attorney in Clearfield County, where she was employed for six or seven years, after which time she moved to private practice in Centre County. She was elected District Attorney of Centre County in 2009 and served two terms. N.T. 29-31; JS 38.

5. At all times relevant, Respondent served as the District Attorney of Centre County, Pennsylvania. ODC-A at 2; N.T. 28, 32.

6. In or about December 2014, Petitioner opened a complaint on its own motion after receiving information which raised concerns with Respondent's actions as Centre County's District Attorney. Petitioner also received additional complaints which necessitated further investigation. JS 4.

7. Petitioner filed a Petition for Discipline against Respondent on February 23, 2017. JS 5.

8. Respondent failed to timely file an Answer to the Petition and the factual allegations as alleged in the Petition were deemed admitted by Order of the Board dated August 10, 2017. JS 6.

9. Respondent attempted to file an Answer after the issuance of the Board's Order, but the Board did not accept the Answer. JS 6.

The Ex Parte Matters

The Cluck Matter

10. On February 1, 2013, Respondent sent an email to: Centre County Court of Common Pleas Judge Bradley Lunsford; his secretary; his law clerk; and Christopher Sheffield, Esquire, defense counsel for Justin Cluck, relating to a criminal prosecution. The subject of the email was "Justin Cluck." ODC-A 3, 4. Respondent acted on an emergency basis to prevent what she believed to be the illegal release of Mr. Cluck, who was serving a sentence for rape in a state correctional institution. JS 9.

11. In the email, Respondent asked the Judge to strike a portion of his Order that set bail and sought a hearing on the bail issue. ODC–A 5; JS 9.

12. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, without copying defense counsel. He stated: "Good point. Probably should have brought him back here first for that hearing. We'll schedule one in." ODC-A 6; JS 10.

13. In response to Judge Lunsford's email, Respondent replied ex parte to Judge Lunsford, without copying Attorney Sheffield. In the email, Respondent argued that Judge Lunsford should "rescind the order." ODC-A 7, 8, 9.

14. Specifically, the email stated:

> Will u [sic] rescind that order so we can deal with it then? He is still in. He has not been let out yet as your order just came through. Otherwise, we [sic] will walk out. You have no idea where he will go etc. U [sic] don't even have a supervised bail eval! ODC-A 9.

15. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, stating: "He is already gone." ODC-A 11.

16. By Supplemental Request for Statement of Respondent's Position (Form DB-7A) dated June 8, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the ex parte communications that had occurred between her and Judge Lunsford. ODC-A 16.

17. On June 18, 2015, Respondent filed her verified response to the Form DB-7A, in which she stated, *inter alia*, "It is denied that [Respondent] intended to communicate with Judge Lunsford ex parte or that she realized at the time that Judge Lunsford had left off of the e-mail chain the other counsel of record." ODC-A 17.

The Horan Matter

18. On April 21, 2014, Patrick Horan filed a pro se Petition for Writ of Mandamus against Respondent. ODC-A 19. JS 11.

19. On May 8, 2014, Judge Lunsford scheduled a hearing to determine the propriety of the writ. ODC-A 20.

20. On May 14, 2014, Respondent sent an email only to Judge Lunsford and did not copy Mr. Horan. ODC-A 21.

21. The subject of the email was "Horan v. DA Stacy Parks Miller." ODC-A 22.

22. Respondent's email stated:

> Are you serious? Scheduling a hearing with me and a pro se inmate on a [w]rit of mandaum [sic] making me answer to him about the complaints he filed about guards? Giving him a teleconference face to face making me report to him? ODC-A 23.

23. Respondent's email also included two caselaw citations to convey Respondent's point, evidencing her intention to influence Judge Lunsford's decision. ODC-A 25.

24. On that same day, in response to Respondent's email, Judge Lunsford replied, only to Respondent, stating: "Ok. Thanks for clearing that up. I'll cancel the hearing." ODC-A 27.

25. Thereafter, on June 2, 2014, Judge Lunsford denied the Petition for Writ of Mandamus in Horan, with prejudice. ODC-A 28.

26. By Form DB-7A dated June 8, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the ex parte communications that had been sent from Respondent to Judge Lunsford relating to Horan. ODC-A 31.

27. In Respondent's verified DB-7A Answer dated June 18, 2015, she admitted that the email was sent ex parte, that she never should have sent it to Judge Lunsford, and should have filed a motion. ODC-A 32.

The Shirk Matter

28. On May 12 and 13, 2014, a jury trial took place before Centre County Court of Common Pleas Judge Jonathan Grine in Commonwealth v. Shirk, CP-14-CR-182-2013 (Centre Co). ODC-A 33.

29. During the trial, Brian Manchester, Esquire, defense counsel for Mr. Shirk, presented the testimony of Dr. Randall Tackett, a pharmacologist, challenging the evidence of Mr. Shirk's blood alcohol level. ODC-A 34.

30. On behalf of the Commonwealth, Respondent introduced Dr. Harry Kamerow, a pathologist at Mount Nittany Medical Center, to dispute the validity of Dr. Tackett's findings. ODC-A 35.

31. During closing, Attorney Manchester included argument which calculated Mr. Shirk's blood alcohol content based upon the number of alcoholic beverages he had allegedly consumed. ODC-A 36.

32. On May 13, 2014, Mr. Shirk was found guilty and released on bail pending sentencing scheduled for July 7, 2014, before Judge Grine. ODC-A 37.

33. On May 14, 2014, at 8:55 a.m., Respondent began text messaging with Judge Grine. In total, fifteen message were sent by Respondent to Judge Grine between 8.55 a.m. and 9:45 a.m. ODC-A 39, 40.

34. These messages were deleted from Respondent's phone on an unknown date. ODC-A 40.

35. The first thirty characters of each message were recovered from Respondent's phone's internal storage by Petitioner though digital forensic analysis. Only Respondent's outgoing messages were recovered. ODC-A 41, 42; JS 25.

36. Of the fifteen messages sent by Respondent to Judge Grine, six specifically related to the Shirk matter:

a. At 9:02: "You laughed when Kamerow told…";

b. At 9:03: "U laughed!!";

c. At 9:05: "Yes agreed. You didn't bust ou[t]…";

d. At 9:15" Calculations adding and subtra[cting]...";

e. At 9:16""Wonder what that poor kids fam[ily]..." and

f. At 9:17" "As part of restitution you sho[uld].."

ODC-A 43; JS 26.

37. On July 7, 2014 a sentencing hearing was held in Shirk. Judge Grine sentenced Mr. Shirk to a minimum of three years in prison; the sentence included a requirement of ordinary restitution. ODC-A 47, 51; JS 27.

The Best Matter

38. On May 19, 2014, a Motion in Limine hearing (Rape Shield Hearing) took place between 1:00 p.m. and approximately 1:24 p.m., before Judge Lunsford as a pretrial matter in Commonwealth v. Best, CP-14-CR-1772-2013 (Centre Co). The Rape Shield Hearing occurred the day before the jury trial was to begin. ODC-A 52, 53, 55.

39. The purpose of the Rape Shield Hearing was to determine whether the defense would be permitted to pierce the rape shield exclusion during the trial. JS 17.

40. During the hearing, Assistant District Attorney Nathan Boob stated, "So not only does the DNA then match from the vaginal swab of Mr. Best but also the penile swab has indicia of her presence there as well." ODC-A 56; JS 18.

41. On that date, Respondent sent two text messages to Judge Lunsford between 1:26 and 1:27 p.m. These messages were deleted from Respondent's phone on an unknown date. ODC-A 57, 58.

42. The first thirty characters of each messages were recovered from Respondent's phone's internal storage by Petitioner through digital forensic analysis. Only Respondent's outgoing messages were recovered. ODC-A 59, 60; JS 19.

43. The 1:27 p.m. message to Judge Lunsford began "Vag. Swab. Oh he said inducia..[,]" ODC-A 61; JS 20..

44. This text message copied ADA Boob in the correspondence but did not include opposing counsel. ODC- A 62; JS 21.

45. In her "group" text message, Respondent was referring to ADA Boob's statement during the hearing. ODC-A 63; JS 22.

46. On that same date, Judge Lunsford entered an Order at 4:16 p.m. granting the Commonwealth's motion. ODC-A 67.

47. By Request for Statement of Respondent's Position (Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the text messaging that had occurred between her and Judge Lunsford. ODC-A 68.

48. On February 27, 2015, Respondent filed her verified response to the Form DB-7 (DB-7 Answer), in which she stated, *inter alia*:

> With respect to the text messaging at issue,...[w]hile [Respondent] knows that none of the text messaging that was sent as between her and Judge Lunsford involved any pending criminal matter, she acknowledges that, with hindsight, she wishes she had not communicated with Judge Lunsford in that manner at all. [Respondent] did not make any false statements, and she did not engage in any fraud or misrepresentation to the Court. [Respondent] never intended to influence the judiciary or to influence the Court improperly. Nevertheless, as the text messaging was not improper ex parte communication with the Court and was not used to influence the Court, [Respondent] did not violate the Rules of Professional Conduct.
>
> ***
>
> As for the text messaging itself, [Respondent] did not use that communication in any way with respect to pending criminal matters.
>
> (emphasis added).

49. By Supplemental Request for Statement of Respondent's Position (Form DB-7A-2) dated June 16, 2016, Petitioner revisited its concerns arising from the text messages that had been sent by Respondent to Judge Lunsford. ODC-A 76.

50. On August 1, 2016, Respondent filed her verified response to the Form DB-7A-2 (DB-7A-2 Answer) in which Respondent stated, *inter alia*:

> [Respondent] has no independent recollection of sending two (2) text messages to Judge Lunsford (or anyone else) for that matter. On the contrary, [Respondent] does remember a group text in which she later learned that Judge Lunsford may have been included on the list, but she has no recollection that he was the intended recipient for the referenced texts.
> (emphasis added).

51. Respondent's knowledge of Judge Lunsford being included in the text is evidenced by Respondent's use of "he," referring to ADA Boob's statements during the Rape Shield Hearing, rather than directing the statement to ADA Boob (which would have been stated as "you".). ODC-A 79.

The McClure Matter

52. On October 30, 2014, a hearing was held on a Motion for Recusal filed by Bernard Cantorna, Esquire, on behalf of his client, Jalene McClure. Commonwealth v. McClure, CP-14-CR-1778-2012 (Centre Co.). ODC-A 80.

53. The Motion stated: "Judge...Lunsford is a personal friend of [Respondent], lead counsel in the above-captioned case, outside the bounds of a professional courthouse relationship...That personal friendship includes text messaging, telephone calls, social media contact and social interactions outside of the courthouse." ODC-A 82.

54. During the hearing, Respondent stated: "In terms of the rest of the allegations [*inter alia* Respondent's text messaging], I am not dignifying them. He has to bring forth proof before this Court goes any further, and notably, I expected him not to because there is none." ODC-A 83.

55. Judge Lunsford also made the statement: "There are no text messages between me and these two. I swear to God...There are no e-mails – well you are going to find e-mails because we are always attached on e-mails but you are not going to find any e-mail that is inappropriate that relates to this trial or any trial whatsoever. They're not there." ODC-A 85.

56. Respondent failed to correct Judge Lunsford's statement. ODC-A 86.

57. Respondent made these statements in open court only five months after the ex parte communications with Judge Lunsford in Horan and Best. ODC-A 89.

58. Respondent knew that Judge Lunsford's claim with respect to text messages was not true, as she and he sent each other text messages. ODC-A 90.

59. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the allegedly false statement made during the hearing in McClure by both her and Judge Lunsford. ODC-A 93.

60. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*, "It is admitted that [Respondent] did not correct Judge Lunsford. It is denied that she had any reason to believe that she needed to correct him." ODC-A 94.

61. By Form DB-7A dated June 8, 2015, Petitioner revisited its concerns arising from, *inter alia*, the allegedly false statements made during the McClure hearing by both her and Judge Lunsford. ODC-A 96.

62. In Respondent's verified DB-7A Answer dated June 18, 2015, Respondent stated, *inter alia*, "[Respondent] did not correct Judge Lunsford because, at the time, she had no reason to believe that what Judge Lunsford was stating was incorrect. [Respondent] had no recollection of the Horan e-mail or the fact that her last e-mail in the Cluck matter excluded counsel of record. ODC-A 97.

63. By Form DB-7A-2 dated June 16, 2016, Petitioner, again, revisited its concerns arising from, *inter alia*, the allegedly false statements made during the McClure hearing by both her and Judge Lunsford. ODC-A 99.

64. In Respondent's verified DB-7A-2 Answer dated August 1, 2016, Respondent stated, *inter alia*, that "the only issue before the court during the McClure hearing was whether there had been text messaging between ADA [] Boob and Judge Lunsford...[Respondent] had no recollection of any text messaging in the Best matter and such texts were not ex parte communications..." ODC-A 100.

The Hoy Matter

65. On November 21, 2014, a hearing was held on a Motion to Recuse and Supplemental Motion to Recuse filed by Public Defender Patrick Klena, Esquire, on behalf of his client, Michele Hoy. Commonwealth v. Hoy, CP-14-CR-83-2012 (Centre Co.). ODC-A 102.

66. At issue was, *inter alia*, whether evidence existed which would warrant Judge Lunsford's recusal from the matter. ODC-A 103.

67. The Motion stated: "62 text messages have been exchanged between [Judge Lunsford] and [Respondent]." ODC-A 104.

68. During the hearing, Respondent stated that Attorney Klena "has no indication and he has no evidence or proof to suggest that any communications between my office and your office are ex parte...Never has this Court had ex parte conversations about any cases..." ODC-A 105.

69. Respondent made these statements in open court only six months after the ex parte communications in Horan and Best. ODC-A 107.

70. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the false statement made during the hearing in Hoy. ODC-A 109.

71. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*: "to [Respondent]'s understanding, none of the text messages were improper ex parte communications with the Court." ODC-A 110.

72. By Form DB-7A dated June 8, 2015, Petitioner revisited its concerns arising from, *inter alia*, the allegedly false statements made during the Hoy hearing. ODC-A 112.

73. In Respondent's verified DB-7A Answer dated June 18, 2015, Respondent stated, *inter alia*, "When [Respondent] made the statement during the argument in the Hoy matter, she had no recollection of the Horan e-mail or the fact that her last e-mail in the Cluck matter excluded counsel of record. [Respondent] never intended to make a false statement or to mislead anyone." ODC-A-113.

74. Petitioner concedes that it does not possess evidence that the vast majority of text message communications were intended to influence the court. Instead,

many were personal, jocular in nature, and in some instances, arguably authorized by law. JS 15.

75. Respondent admits that she engaged in ex parte communications via email with Judge Lunsford relating to the Cluck and Horan matters and that these communications violated the Rules of Professional Conduct. JS 8, 42.

76. Respondent testified at the disciplinary hearing that she inadvertently emailed Judge Lunsford in the Cluck matter without copying Attorney Sheffield. N.T. 51; JS 10.

77. In the Horan matter, Respondent admits that she should have expressed her opposition to the scheduling of a hearing through a formal motion that included the opposing party, rather than through an ex parte communication with Judge Lunsford. JS 12.

78. Respondent admitted that she intended to influence the court when she sent the email in the Horan matter. N.T. 53, 61.

79. Respondent admits that she engaged in ex parte communications via text messages with Judge Lunsford and Judge Grine, related to two matters, and that these communications violated the Rules of Professional Conduct. JS 13, 42.

80. Respondent admitted that she communicated ex parte via text messages with Judge Lunsford relating to a criminal prosecution in the Best matter. JS 16.

81. Respondent testified that her text messages to Judge Lunsford were a "joke within the office." N.T. 57. She further admitted that it is not appropriate to joke about cases with a Judge. N.T. 79.

82. Respondent admitted that she communicated ex parte via text messages with Judge Grine relating to a criminal prosecution in the Shirk matter. JS 24.

83. Respondent testified that to the best of her recollection, her communications with Judge Grine were intended as "a joke," and not intended to influence the court. N.T. 54; JS 27.

The Facebook Page Matter

The Creation and Use

84. Pending legislation to make bath salts illegal, the judiciary of Centre County declared the sale of bath salts to be a nuisance and instituted injunctions against thee stores for selling bath salts. N.T. 63.

85. On or about May 16, 2011, in order to track the stores until legislation was passed to make the bath salt sales illegal and to enforce the injunctions, Respondent created a fictitious Facebook account under the name of "Britney Bella," for the purpose of "liking" establishments suspected of selling illegal bath salts, so that her office could be alerted to events where the establishments provided free "samples," which could be obtained and tested. JS 29; ODC-A 116.

86. Persons who had also liked the bath salt establishments "friended" the fictitious Facebook page, and the page sent and accepted "friend requests" in order to appear legitimate. JS 29.

87. In creating the fictitious account, Respondent utilized photos from around the internet of young female individuals to enhance the page's allure. ODC-A 117.

88. The account indicated that "Britney Bella" was a Pennsylvania State University drop-out who had moved to State College from Pittsburgh, in order to portray a connection to the local community. ODC-A 118.

89. Prior to creating the Facebook page, Respondent discussed with the Pennsylvania State Police the possibility of that entity creating a similar Facebook page, but the State Police declined due to information technology concerns, among other issues. N.T. 64.

90. Respondent did not seek an advisory opinion prior to creating and utilizing the Facebook page. N.T. 77.

91. On May 17, 2011, Respondent sent an email to the Assistant District Attorneys in her office as well as to the office secretarial staff, stating that she had "made a [F]acebook page that is fake for us to befriend people and snoop. Her name is Britney Bella...Use it freely to masquerade around [F]acebook. Please edit it...to keep it looking legit...Use it to befriend defendants or witnesses if you want to snoop." ODC-A 120.

92. By Form DB-7 dated January 21, 2015, Petitioner advised Respondent of its concerns arising from, *inter alia*, the "Britney Bella" Facebook account. ODC-A 121.

93. In Respondent's verified Answer dated February 27, 2015, Respondent stated, *inter alia*, "[Respondent] has not located the described email and does not believe that she would have used language in the nature described [in the Form DB-7]." ODC-A 122.

94. In Respondent's verified Answer, Respondent alleged, *inter alia*, the "Britney Bella" Facebook account constituted a "proper law enforcement operation" which "lacked active ongoing interaction with the targets of the investigation," and that the

"Britney Bella" Facebook account's "exclusive purpose" was "to facilitate the self-identification of sellers of illegal and highly dangerous synthetic drugs and paraphernalia." ODC-A 123.

95. Respondent's verified Answer dated February 27, 2015, alleged that, specifically, "three stores were raided, the owners were later prosecuted, and two [stores] were put out of business as a result." ODC-A 124.

96. Based on Respondent's statements, the "stores" that the "Britney Bella" Facebook account would have been "tracking and targeting" were raided in or about February 2012. ODC-A 125.

97. The Facebook account remained active and was utilized long after the investigation into the establishments selling illegal bath salts concluded. JS 29.

The Hill Matter

98. On or about May 29, 2012, a criminal matter was initiated against Samuel Hill in Centre County. Commonwealth v. Hill, MJ-49305-CR-157-2012 (Center CO.). Mr. Hill's matter was not drug-related. ODC-A 136.

99. On May 29, 2012, Mr. Hill was charged with simple assault and harassment and represented by counsel before the Magisterial District Court and the Court of Common Pleas. On or about August 29, 2012, Mr. Hill became a "friend" of the "Britney Bella" Facebook account. On November 15, 2012, Mr. Hill entered a plea of guilty and was sentenced. ODC-A 138.

The McClure Matter

100. On or about September 11, 2012, a criminal matter was initiated against Jalene McClure in Centre County. Commonwealth v. McClure, MJ-49302-CR-

282-2012 (Centre Co.) Ms. McClure's matter was not drug-related. ODC-A 141.

101. In September 2012, Ms. McClure was charged with various offenses relating to the injury of an infant under her care and was represented by counsel before the Centre County Court of Common Pleas. ODC-A 143.

102. On November 9, 2012, the same date Ms. McClure's criminal case was transferred from the Magisterial District Court to the Court of Common Pleas, the "Britney Bella" Facebook account was utilized to search Facebook for Ms. McClure and her three sons. ODC-A 145.

103. At an unknown date, presumptively the same date of the search, "friend requests" were sent from the "Britney Bella" Facebook account to, at a minimum, Ms. McClure and one of her sons. ODC-A 146.

104. Ms. McClure and her son did not accept the "friend request" sent from the "Britney Bella" Facebook account. ODC-A 149.

105. Respondent's verified Answer to the DB-7 dated February 27, 2015, stated that "to the best of [Respondent's] knowledge and understanding, and based upon a review of the "friend request" section of the Facebook profile in question....individuals became "friends" of the Britney Bella profile on his or her own initiative, not due to any invitation sent by anyone on behalf of the Britney Bella profile." ODC-A 144.

106. Respondent testified that her efforts curbed a dangerous bath salts epidemic and contributed to the issuance of a novel county injunction to stop the sale of the deadly substance in her county before the legislature formally criminalized the substance. The page assisted with subsequent raids and seizures of thousands of packets of bath salts, the prosecution of the owners and seizure of large amounts of profits from drug sales. JS 30.

Miscellaneous Findings

107. At the disciplinary hearing, Respondent acknowledged remorse for her ex parte communication with Judge Lunsford in the Horan matter and understands that she should not have done it. N.T. 53; JS 41.

108. Respondent did not acknowledge her other misconduct and did not accept responsibility or express sincere remorse. The regret expressed by Respondent was directed at her personal feelings that she had been charged with misconduct. Respondent expressed embarrassment and testified that she was "mortified" that she was charged with professional misconduct. N.T. 70; JS 41. Respondent did not express regret that she caused harm to her profession and the public.

109. Respondent believed that the rumors and speculation surrounding the disciplinary matter cost her the job she loved. JS 36.

110. Respondent presented the credible testimony of five character witnesses, two of whom also testified as fact witnesses.

111. Thomas R. Kline, Esquire, has practiced law in Pennsylvania for decades and came to know Respondent in her capacity as District Attorney in approximately February 2017, through his representation of Jim and Evelyn Piazza, whose son had died as the result of a Pennsylvania State University fraternity hazing incident. N.T. 113.

112. Mr. Kline, in his limited experience with Respondent, found her to be zealous, moral, ethical and competent, N.T. 115.

113. Mr. Kline was unfamiliar with the disciplinary charges against Respondent. N.T. 117 ("I don't know a lot about these charges, and I really still don't. I know nothing more than the public accounts which I read.")

114. Kristin Ann Shirey became acquainted with Respondent in June 2017 through a case involving the murder of Ms. Shirey's sister. N.T. 129.

115. Ms. Shirey found Respondent to be of good character with a deep concern for the victims of crime. N.T. 134.

116. Ms. Shirey was only generally aware of the disciplinary charges against Respondent. N.T. 132.

117. Jeffrey S. Helffrich, Esquire, has known Respondent since 2009, when he interned for Respondent for approximately one year while attending law school. He had the opportunity to observe her in court when he served as a law clerk for Judge Grine. N.T. 136, 139, 142, 143.

118. Mr. Helffrich described Respondent as an individual with high integrity and as a zealous advocate for victims. N.T. 140.

119. Mr. Helffrich had a "general familiarity" with the disciplinary charges against Respondent. N.T. 140.

120. William A. Shaw, Jr., Esquire, testified as a character and fact witness. He serves as the District Attorney for Clearfield County. N.T. 146 He has known Respondent for approximately twenty years, when they both served as Assistant District Attorneys in Clearfield County. N.T. 147.

121. District Attorney Shaw testified that Respondent is very conscientious and mindful of the victims of crimes. N.T. 148.

122. District Attorney Shaw never observed Respondent engage in unethical behavior during the six or seven years they worked together. N.T. 148.

123. District Attorney Shaw testified that as the District Attorney of a small county with two judges, ex parte communications are wholly inappropriate, at a minimum

cause the appearance of impropriety, and should be given "zero tolerance." N.T. 155-156.

124. District Attorney Shaw testified that he would terminate an employee in his office for engaging in ex parte communications to influence a judge. N.T. 165.

125. Bruce L. Castor, Jr., Esquire, testified as a character and a fact witness. Although Mr. Castor testified favorably about Respondent's character, the value of his testimony is limited by his role as her counsel in other matters for the last three years.

III. CONCLUSIONS OF LAW

By her conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

The Ex parte Matters

1. RPC 3.5(a) – A lawyer shall not seek to influence a judge, juror, prospective juror or other official by means prohibited by law.

2. RPC 3.5(b) – A lawyer shall not communicate ex parte with such a person during the proceedings unless authorized to do so by law or court order.

3. RPC 4.1(a) – In the course of representing a client a lawyer shall not knowingly make a false representation of material fact or law to a third person.

4. RPC 8.1(a) – A lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact.

5. RPC 8.4(d) – It is professional misconduct for lawyer to engage in conduct that is prejudicial to the administration of justice.

6. RPC 8.4(f) – It is professional misconduct for a lawyer to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Respondent was charged with violation of RPC 8.1(b), which states that a lawyer in connection with a disciplinary matter shall not...knowingly fail to respond to a lawful demand for information from...disciplinary authority. We conclude that Petitioner did not meet its burden of proof with respect to Respondent's violation of this rule.[2]

The Facebook Matter

1. RPC 4.3(a) – In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

2. RPC 4.3(c) - When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

3. RPC 5.3(b) – A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

4. RPC 5.3(c)(1) – A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by lawyer if....the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

[2] The Committee did not discuss RPC 8.1(b) and did not make an affirmative conclusion that Respondent violated RPC 8.1(b). Petitioner did not take exception to the Committee's conclusions of law relating to the ex parte communication matter.

5. RPC 5.3(c)(2) – A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by lawyer if...the lawyer...has comparable managerial authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

6. RPC 8.1(a) – A lawyer in connection with a disciplinary matter shall not knowingly make a false statement of material fact.

7. RPC 8.4(a) – It is professional misconduct for a lawyer to...violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

8. RPC 8.4(c) - It is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

9. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

This matter is before the Board for consideration following the issuance of a Report and Recommendation by the Committee and the parties' exceptions thereto. Petitioner initiated disciplinary proceedings against Respondent by way of a Petition for Discipline filed on February 23, 2017, which charged Respondent with violating multiple Rules of Professional Conduct in two separate matters. Charge I alleged that Respondent engaged in ex parte communications with members of the judiciary, in violation of RPC

3.5(a), 3.5(b), 4.1(a), 8.1(a), 8.1(b), 8.4(c), 8.4(d), and 8.4(f). Charge II alleged that Respondent created, disseminated and used a fake Facebook page, in violation of RPC 4.3(a), 4.3(c), 5.4(b), 5.3(c)(1), 5.3(c)(2), 8.1(a), 8.4(a), 8.4(c) and 8.4(d). Petitioner has the burden of proving ethical misconduct by a preponderance of clear and satisfactory evidence. ***Office of Disciplinary Counsel v. John Grigsby***, 425 A.2d 730, 732 (Pa. 1981). Based on the evidentiary record, and for the reasons stated herein, we recommend that Respondent be suspended from the practice of law for a period of one year and one day.

This disciplinary proceeding has a protracted and convoluted history, as set forth above, during which Respondent's various deadlines to file her Answer to the Petition for Discipline expired, resulting in the Board's Order dated August 10, 2017, whereby the Board precluded Respondent from filing an Answer and deemed all factual allegations admitted. That same day, Respondent attempted to untimely file an Answer; the Board refused to accept it. The Supreme Court denied Respondent's King's Bench Petition, leaving the August 10, 2017 Board Order undisturbed.

The facts as deemed admitted and Joint Stipulations of Facts and Law establish that at all times relevant, Respondent, while serving as the duly elected District Attorney of Centre County and representing the Commonwealth in that capacity, engaged in ex parte communications with the judiciary by email and text messages, and created, disseminated and used a fictitious Facebook page.

Respondent engaged in improper email communications in two matters. During the pendency of the Horan matter, Respondent emailed Judge Bradley Lunsford and did not copy the pro se defendant. She sought to influence the Judge by requesting that he cancel a hearing, and in response to Respondent's ex parte communication,

Judge Lunsford canceled the hearing. During the pendency of the Cluck matter, Respondent emailed Judge Lunsford and defense counsel to oppose the release of a prisoner. While Respondent's initial email was proper, Judge Lunsford replied only to Respondent without copying defense counsel, and Respondent replied ex parte to Judge Lunsford, seeking to influence the Judge to rescind his order. He did not rescind the order, as the prisoner had been released.

Respondent engaged in improper text message communications with Judge Lunsford during the pendency of the Best criminal proceeding. The text messages were sent ex parte without including defense counsel. These messages made reference to a Rape Shield hearing that had occurred less than 30 minutes prior to the time of the text messages and referenced statements made during that hearing by an assistant district attorney. Respondent engaged in improper text message communications with Judge Jonathan Grine relating to the pending criminal prosecution in the Shirk matter. The text messages were sent one day after Mr. Shirk was convicted in a jury trial before Judge Grine, but prior to Mr. Shirk's sentencing.

Respondent admitted that she engaged in the ex parte email and text communications and that her communications violated the Rules of Professional Conduct. She further admitted that she intended to influence the court in the Horan matter and the proper course of action would have been to file a motion and copy the pro se defendant. Respondent admitted that her email communication in the Cluck matter were improper, although she claims that her ex parte responses to Judge Lunsford were inadvertent. Respondent explained that her text messages in the Best matter were an "office joke," and also a "joke" in the Shirk matter, but she admitted that they were improper and a violation of the conduct rules.

In addition to sending the communications themselves, Respondent made false and misleading responses to inquiries regarding the communications. In her response to Petitioner's Form DB-7, she represented that she knew that none of the text messaging that was sent between her and Judge Lunsford involved any pending criminal matter and that to her understanding, none of the text messages were improper ex parte communications. Additionally, Respondent made statements in open court in two separate matters indicating that no text messages existed between her and the judiciary.

The admitted facts establish that Respondent in her capacity as the District Attorney of Centre County, created, disseminated and used a fake Facebook page. Respondent used social media to "friend" the Facebook pages of several establishments in Centre County known for selling illegal bath salts, in order to be alerted to events where these establishments provided free samples, which could be obtained and tested. Respondent intended the Facebook page to assist in curbing bath salt sales in her county, and she testified that the information gathered from the Facebook page assisted with raids and seizure of thousands of packets of bath salts, the prosecution of the owners, and the seizure of large amounts of profits from drug sales.

Respondent did not seek ethical guidance on the propriety of such a course of action, believing that the fictitious Facebook activity constituted a "proper law enforcement operation" which "lacked actively ongoing interaction with the targets of the investigation." ODC-A-123. She recalled a conversation with the State Police to determine if they had any interest in setting up a similar page, but they declined. Respondent's email announcement of the Facebook page to her staff, attorneys and non-attorneys alike, pointedly directed staff to freely "masquerade" and "snoop" around Facebook under the guise of "Britney Bella." Respondent provided no guidelines or restrictions to her staff to

prevent contact with defendants or witnesses. Although Respondent described the fictitious Facebook page as exclusively targeting the bath salts investigation, the Facebook account remained active and was utilized after the bath salts prosecutions concluded in February 2012. In August 2012, the page received a "friend request" from a defendant in a non-bath salts prosecution, who became a "friend" of the "Britney Bella" account. In September 2012, the "Britney Bella" page sent a "friend request" to another non-bath salts defendant, who did not accept the request.

The Committee, considering these facts, issued a Report and concluded that Respondent violated RPC 3.5(a), 3.5(b), 4.1(a), 8.1(a), 8.4(d) and 8.4(f) pertaining to the ex parte communications. The Committee further concluded that Respondent did not violate any rules pertaining to the Facebook charge.

The Committee reviewed the totality of the circumstances of the Facebook page and found that it was a matter of first impression, and further found that Respondent's conduct did not rise to the level of violating any of the rules, although the Committee noted its concern about "the lack of care and inquiry made by Respondent with regard to the Facebook page, both before and after its creation." Hearing Committee Report, p. 12. While the Committee found that Respondent was genuinely remorseful for her ex parte communication in the Horan matter, it concluded that she did not regret the remainder of her conduct. The Committee recommended a suspension for a period of three months.

Both parties filed exceptions to the Committee's Report and exceptions in opposition to the other party's exceptions. We address these exceptions below.

Petitioner contends that while the Committee correctly concluded Respondent's ex parte communications constituted violations of the Rules of Professional

Conduct, it argues that the Committee erred in its conclusion that the creation, dissemination, and use of a fictitious Facebook page did not rise to the level of any rules violations.[3] After review of this issue, we agree.

The question of whether a prosecutor violates the Rules of Professional Conduct by engaging in covert activity through the use of social media is novel within Pennsylvania's adjudication of disciplinary matters. There is no dispute that covert activity is permitted in criminal investigations; however, attorneys themselves are prohibited from participating in such activity. RPC 8.4(c) broadly prohibits an attorney from engaging in dishonesty, fraud, deceit or misrepresentation. Significantly, Pennsylvania has no express prosecutorial investigation exception that allows prosecutors to engage in activity prohibited by RPC 8.4(c).[4]

The case law from other jurisdictions and Pennsylvania ethics opinions are not binding precedent on the Board or the Court, but nonetheless, constitute persuasive authority in a matter of first impression.

In ***In re Pautler***, 47 P.3d 1175 (Co. 2002), Pautler, a deputy district attorney, was introduced during a telephone call to a suspect as a public defender in order to obtain the suspect's surrender. The fact that Pautler engaged in this deceptive behavior constituted violation of Colorado's Rule of Professional Conduct 8.4(c) and 4.3, and warranted discipline.

The specific issue involving prosecutors using fake online persona to obtain otherwise protected information has been addressed by other jurisdictions. *See*

[3] Petitioner does not take exception to the Committee's recommendation of a three month period of suspension, even in the event that the Board concludes Respondent violated the rules pertaining to the Facebook charge.

[4] Exceptions exist in other jurisdictions for prosecutorial investigations. *See*, Oregon RPC 8.4(b) (specifically permitting 'covert activity" by a lawyer, Amendment effective 2015).

Disciplinary Counsel v. Brockler, 48 N.E. 4d 557 (Oh. 2016). Brockler was an assistant district attorney assigned to a murder investigation. During the investigation, Brockler did not believe the defendant's alibi, but the alibi witnesses refused to discuss the matter with Brockler when he approached them and truthfully identified himself. Thereafter, Brockler engaged in deceptive tactics, posing as the defendant's paramour through a fake Facebook persona, to contact the witnesses.

The Ohio Supreme Court found that Brockler's conduct violated Ohio's Rule of Professional Conduct 8.4(c), among others. While Ohio's rules permitted supervision of nonlawyers for lawful covert investigative activities, the Court refused to broaden the exception to the actions of attorneys themselves.

A 2009 Pennsylvania ethics opinion relating to this issue generally condemns covert attempts to gain access to restricted social media websites, a point which Respondent conceded. JS 31; R-2. In 2009, the Philadelphia Bar Association Professional Guidance Committee found that the mere act of concealing a "highly material fact" as to why the contact was being made would violate multiple Rules of Professional Conduct, including RPC 8.4(c), 4.3, and possibly 5.3, depending on the attorney's authority over the third party. JS 31; R-2. This Opinion existed at the time Respondent created the fictitious Facebook page in 2011, although she sought no guidance before she created the page. This issue was revisited in a 2014 Opinion, which reinforced the fact that even the innocuous act of having a third-person send a friend request to a represented party in order to gain access to the private portion of their profile violates RPC 8.4(c).

Respondent knowingly created a fake social media persona, provided access to a fake Facebook page to her staff, and indicated that the page should be used

to "masquerade" and "snoop" around Facebook. Respondent sought no ethical guidance prior to embarking on the Facebook operation and had no compunction about potential communication with represented parties. The page created by Respondent used pictures of an individual who had no association with the District Attorney's office, and had a fabricated backstory. Respondent encouraged her staff to send "friend requests," in order to maintain the appearance of legitimacy, thereby giving a false impression to the public and concealing the fact that the page was operated by the District Attorney's office. In the course of the District Attorney's operation of the fake Facebook page, individuals represented in criminal proceedings either sent friend requests to the page or received friend requests from the page.

The Facebook page created by Respondent and disseminated to her staff was fake, and constituted fraudulent and deceptive conduct, in violation of RPC 8.4(c). Regardless of Respondent's intent to curb criminal activity in her county, she was not permitted to engage in dishonest conduct. Respondent's tactics crossed the boundaries of professional ethics. As the Court stated in ***Office of Disciplinary Counsel v. John Grigsby, III***, 425 A.2d 730, 733 (Pa. 1981) "[t]ruth is the cornerstone of the judicial system; a license to practice requires allegiance and fidelity to truth." Every lawyer licensed in Pennsylvania, including prosecutors, is bound by the ethics rules to practice law within this construct.

Respondent induced her staff, both attorneys and non-attorneys alike, to engage in dishonest behavior and to imply disinterest in matters, without correcting any misapprehensions. The staff carried out Respondent's directives and used the page to "friend" individuals, some of whom were defendants. Respondent enabled her staff to

engage in deceptive conduct, without specific direction, for an unrestricted period of time. This conduct violated RPC 4.3(a), 4.3(c), 5.3(b), 5.3(c)(1) and 5.3(c)(2). .

Respondent raises six exceptions to the Committee's Report and generally excepts to the Committee's recommendation of a three-month suspension as excessive. Upon review, we find no substance to these exceptions, for the following reasons.

Respondent argues the Committee erred in refusing to admit her untimely filed Answer and further avers that the Board's Order to deem the factual allegations in the Petition admitted was excessive, given the totality of the circumstances. We conclude that the Committee did not err in their refusal to accept Respondent's Answer, as the Committee had no legitimate basis to overturn the Board's Order, which was entered after Respondent missed previous deadlines to file her Answer.

Respondent next argues that she was prejudiced by her former counsel's withdrawal without notice or opportunity to respond. Respondent's former counsel filed a Motion to Withdraw on August 11, 2017, which was granted. There is no authority in the Pennsylvania Rules of Disciplinary Enforcement or case law that permits the Board to deny a counsel's request to withdraw. Respondent received notice of her former counsel's intention to withdraw when he filed the Motion with the Board. The fact that Respondent's counsel withdrew did not stay the proceedings.

Respondent further avers that the Committee erred in refusing to admit into evidence an affidavit which gave rise to the Grand Jury investigation. While the Committee accepted the Grand Jury Report into evidence, Respondent submits that a more complete record would show that the factual predicate for the Petition for Discipline derived from the "fruits of a highly poisonous and toxic tree." We conclude that the Committee did not err in considering the grand jury investigation as irrelevant to the issues

presented in the Petition for Discipline. The Committee found that Petitioner opened a complaint on its own motion after receiving information concerning Respondent's actions as District Attorney, and conducted a thorough investigation. Respondent's fixation on the Grand Jury Report appears to be an attempt to divert attention from Respondent's misconduct at issue in this disciplinary proceeding.

Respondent next contends that the Committee's reasoning that Respondent was only remorseful for the Horan matter mischaracterizes Respondent's testimony in its totality. Our review of the record indicates that the Committee did not err. The Board accords substantial deference to the Committee's credibility findings. ***See In re Anonymous No. 116 DB 93***, 31 Pa. D. & C. 4th 199, 206 (1995) (citing ***Office of Disciplinary Counsel v Wittmaack***, 522 A.2d 522, 524 (Pa. 1987) ("[I]n matters of witness credibility, great deference is accorded to determinations of the trier of fact.") Other than the instance when Respondent expressed remorse for her actions in the Horan matter, her testimony deflected blame for her actions. Respondent did not appear remorseful for the conduct; rather, she was "mortified" that she found herself in such a predicament. N.T. 70.

Respondent further avers the Committee erred by failing to make the recommended three-month suspension retroactive. In support of her request for entry of a retroactive suspension, Respondent claims that she has self-imposed her own suspension, commencing January 1, 2018, when she was out of her position as District Attorney, and seeks retroactivity to that date. We conclude that the Committee did not err.

The Pennsylvania Rules of Disciplinary Enforcement and Board Rules and Procedures do not provide for when or if retroactivity should be granted. Indeed,

retroactivity of a suspension is a discretionary act implemented by the Court on some occasions, typically where a respondent has been placed on temporary suspension from the practice of law and an order imposing suspension or disbarment is thereafter imposed. The retroactivity component of a disciplinary order recognizes that the respondent has been without a license to practice for a previous time frame. In a situation where an attorney maintains an active license to practice, such as the instant matter, there is no precedent to make a suspension retroactive.

Finally, Respondent argues that the Committee erred in admitting Petitioner's exhibits, which she claims were hearsay, irrelevant and inflammatory, and without material relevance. The exhibits generally consisted of newspaper articles, docket entries involving certain criminal proceedings, and certain Grand Jury documentation, which Respondent argues is at best redundant, given the deemed factual admissions. Petitioner's rationale for the evidence is to show that there was negative publicity. The presentation of this type of evidence for consideration is supported by prior disciplinary case law. "Both the Board and the Court have considered the impact of a respondent's misconduct on the reputation of the bar to be[a] factor in assessing the measure of discipline. ***Office of Disciplinary Counsel v. Jeff Foreman***, 164 DB 2009 (D. Bd. Rpt. 5/19/2014) (S. Ct. Order 9/17/2014) (citing ***In re Lawrence Greenberg***, 749 A.2d 434 (Pa. 2000). Upon review, we conclude that the Committee properly admitted Petitioner's exhibits.[5]

Having reviewed the record and having considered the parties' arguments, we conclude that Respondent engaged in professional misconduct by her ex parte

[5] It appears from the Report that the Committee gave little, if any, weight to the newspaper articles. The Report did not specifically state that the Committee considered adverse publicity as an aggravating factor.

communications with judges and creation, dissemination and use of a fictitious Facebook page. This matter is ripe for the determination of discipline.

In looking at the general considerations governing the imposition of final discipline, it is well-established that each case must be decided individually on its own unique facts and circumstances. ***Office of Disciplinary Counsel v. Robert Lucarini***, 427 A.2d 186 (Pa. 1983). In order to "strive for consistency so that similar misconduct is not punished in radically different ways," ***Office of Disciplinary Counsel v Anthony Cappuccio***, 48 A.3d 1231, 1238 (Pa. 2012) (quoting ***Lucarini***, 473 A.2d at 190), the Board is guided by precedent for the purpose of measuring "the respondent's conduct against other similar transgressions." ***In re Anonymous No. 56 DB 94***, 28 Pa. D. & C. 4th 398 (1995). The Board is mindful when adjudicating each case that the primary purpose of the lawyer discipline system in Pennsylvania is to protect the public, preserve the integrity of the courts, and deter unethical conduct. ***Office of Disciplinary Counsel v. Akim Czmus***, 889 A.2d 117 (Pa. 2005).

Examining the record before us, we find several aggravating factors. Most significantly, at the time of her misconduct, Respondent served as the duly elected District Attorney of Centre County, the highest law enforcement official in that jurisdiction. As District Attorney, she represented the Commonwealth of Pennsylvania and owed an allegiance to her constituency: victims; the general public; and the accused. To all of these individuals, Respondent owed a duty to conduct herself with the highest degree of integrity and honesty. ***Office of Disciplinary Counsel v. Ernest Preate***, 731 A.2d 129 (Pa. 1999). Respondent failed to balance these interests and compromised her ability to exercise her broad discretion fairly, and to protect the legal rights of all citizens of

Centre County. Respondent placed herself squarely in the public eye; it is in this context that her misconduct must be judged.

Respondent's position as District Attorney is an aggravating factor in the Board's assessment of discipline. ***Cappuccio,*** 48 A.3d at 1240, ("[T]he fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter.") The Court reasoned that many attorneys hold positions of trust with respect to individual clients, but "[t]hat trust is not the same as the broader public trust reposed in judges, prosecutors and the like." ***Id.*** Respondent betrayed the faith and trust of the public by engaging in misconduct in her official capacity, including dishonest acts, and this factor weighs heavily in the assessment of discipline.

Respondent demonstrated genuine remorse only for her ex parte communication in the Horan matter. She did not acknowledge her remaining misconduct and expressed no regret for it, but did express personal embarrassment that she found herself accused of professional misconduct, for which she felt "mortified." Respondent fails to grasp the larger consequences of her actions. When the trust between a public servant and the public is broken, there is no doubt that the public's perception of the legal profession is damaged. Intertwined with the issue of remorse is Respondent's complete failure to appreciate and acknowledge the damage she has done to the reputation of the bar. ***Office of Disciplinary Counsel v. Brian Preski***, 134 A.3d 1027 (Pa. 2016) ("[T]he transgressions of a lawyer who is also a public servant are even more injurious to the reputation of the bar because they bring dishonor both to the profession and to our democratic institutions.")

In mitigation, Respondent has practiced law in Pennsylvania since 1994 and has no prior discipline. Respondent presented character evidence from five witnesses. These witnesses all credibly testified as to Respondent's zealous representation of victims and her competency as a litigator. However, several of the witnesses were unfamiliar with the details of Respondent's misconduct. Thomas Kline, Esquire, Kristen Shirey, and Jeffrey Helffrich, Esquire, testified that they either did not know much about the charges against Respondent or only had a general familiarity with the charges. William Shaw, Esquire, also a District Attorney, was generally aware of the charges against Respondent, and did not appear to be aware of the fact that Respondent had been texting with members of the judiciary. Mr. Shaw credibly testified that as a District Attorney, he does not communicate by text message with the judiciary in his county and testified that ex parte communications with the judiciary are wholly inappropriate and at a minimum, cause the appearance of impropriety. The value of the testimony of Bruce Castor, Esquire, is limited by his role as Respondent's counsel for the past several years.

Our review of prior Pennsylvania disciplinary cases did not yield a case with similar factual circumstances to Respondent's matter. Two prior matters involving ex parte communications also involved other misconduct. In the matter of ***Office of Disciplinary Counsel v. Ronald James Gross***, 174 DB 2014 (S. Ct. Order 4/10/2015), Gross engaged in a single ex parte communication with a Magisterial District Judge, whereby he met in person with the Judge to request a sentence modification for his criminal client. Gross admitted that he intended to influence the judge. This misconduct was accompanied by acts of neglect in a separate client matter. Gross had a history of discipline, showed genuine remorse for his conduct and consented to a six-month license suspension. Unlike the instant Respondent, Gross was not a prosecutor.

In the matter of ***Office of Disciplinary Counsel v. Gary Scott Silver***, Nos. 56 & 178 DB 2003 (D. Bd. Rpt. 1/7/2005) (S. Ct. Order 4/6/2005), the respondent engaged in comingling of client funds, failure to maintain records, and failure to promptly distribute client funds, as well as a separate instance of ex parte communication, whereby he sent a facsimile to a judge to request that a hearing be rescheduled, without copying opposing counsel. Silver had a history of private discipline and expressed sincere remorse. Similar to the respondent in ***Gross***, Silver was not a prosecutor. The Court suspended Silver for a period of six months, with probation for twelve months and a practice monitor.

Our review included prior cases resulting in discipline of a prosecutor. Three respondents engaged in criminal conduct while serving as prosecutors. In ***Cappuccio***, the respondent served as a Chief Deputy District Attorney in Bucks County. While serving in that capacity, he engaged in criminal acts that resulted in his entering a guilty plea in Bucks County to offenses including three counts of endangering the welfare of children, one count of criminal use of a communication facility, three counts of corruption of minors, and three counts of furnishing liquor or malt or brewed beverages to minors. The Supreme Court disbarred Cappuccio, retroactive to the date of his temporary suspension, after considering the aggravating factor of his position as a prosecutor and the fact that his misconduct occurred over an extended period of time and involved three minor victims. In the matter of ***Office of Disciplinary Counsel v. Mark Peter Pazuhanich***, No. 15 DB 2005 (D. Bd. Rpt. 8/11/2006) (S. Ct. Order 11/17/2006), the respondent, a two-term District Attorney of Monroe County, recently elected to the trial bench, was arrested because he was observed fondling a ten-year old girl at a concert. Pazuhanich pleaded *nolo contendere* to indecent assault, endangering the

welfare of children, corruption of minors, and public drunkenness. The Board found Pazuhanich's position as an elected official in a powerful law enforcement position at the time the criminal conduct occurred aggravated the final discipline. The Court disbarred Pazuhanich, retroactive to the date of his temporary suspension. In ***Preate***, while serving as District Attorney of Lackawanna County, the respondent solicited, either indirectly or directly, illegal cash contributions from owner-operators of video poker gambling machines. In order to conceal the illegal cash contributions, Preate, while either the District Attorney or the Attorney General of Pennsylvania, caused false and materially misleading campaign finance reports to be filed under oath with the Commonwealth of Pennsylvania Bureau of Elections. Preate pled guilty to one count of mail fraud. He presented character evidence in mitigation of discipline. The Court imposed a suspension for a period of five years, retroactive to the date of the temporary suspension.

In the matter of ***Office of Disciplinary Counsel v. James Paul Carbone***, No. 71 DB 2014 (D. Bd. Rpt. 6/17/2015) (S. Ct. Order 8/12/2015), the respondent, while serving as an assistant district attorney in Venango County, engaged in misconduct in three separate matters. This conduct included interviewing a witness in violation of a court order; making misrepresentations to the court; utilizing intemperate language and making a profane hand gesture during a closing argument; yelling and pointing at a defendant and his counsel during closing argument; misrepresenting evidence during an opening statement; and, discussing a case with a represented defendant. The Board found aggravating factors in that Carbone's position as a prosecutor harmed the public's confidence in the integrity of the legal system. In addition, Carbone failed to participate in his disciplinary proceeding. The Board recommended that Carbone be disbarred, and the Court ordered his disbarment.

The Court imposed a three-year period of suspension in the matter of ***Office of Disciplinary Counsel v. John T. Olshock***, No. 28 DB 2002 (D. Bd. Rpt. 7/30/2003) (S. Ct. Order 10/24/2003). Olshock maintained a private practice of law and was also the First Assistant District Attorney for Washington County at the time of his misconduct, which involved misappropriation of estate monies related to a case in his private practice. The Board considered as an aggravating factor Olshock's position as a prosecutor, noting that even though his misconduct did not occur during the exercise of his public duties, his position demanded integrity, as he was entrusted with the protection of the public. The Board found mitigating factors related to his character evidence and his lack of prior disciplinary history.

The Court imposed a Public Censure in the matter of ***Office of Disciplinary Counsel v. Charles J. Aliano***, No. 25 DB 2003 (D. Bd. Rpt. 8/31/2005) (S. Ct. Order 12/1/2005). At the time of Aliano's misconduct, he was the part-time District Attorney in Susquehanna County and maintained a private practice of law. Aliano represented a client in his private practice, and a short time after being retained, the client's husband was charged with Driving Under the Influence. Aliano remained actively involved in the institution and disposition of criminal charges against the husband, violating the conflict of interest provisions of the Rules of Professional Conduct. The Board found that Aliano used his position as District Attorney to impact the outcome of the case and to get more serious charges against his client's husband dismissed. In considering the matter, the Board found that Aliano abused his position as a public official.

The misconduct in ***Cappuccio***, ***Pazuhanich***, ***Preate***, ***Carbone***, and ***Olshock*** is more egregious than the instant Respondent's conduct. Unlike the respondents in several of those cases, Respondent has not been criminally convicted

and did not misappropriate client funds, nor does her conduct rise to the same level of prosecutorial misconduct as in the ***Carbone*** matter.

Herein, Respondent's serious misconduct involved ex parte communications with judges about pending criminal matters. Respondent created the appearance of impropriety in the judicial system, as well as in fact influencing a judge. Respondent engaged in deceitful conduct by creating, disseminating, and using a fictitious Facebook page. All of these actions subjected the District Attorney's office and Centre County Court to scrutiny and suspicion by the public. Respondent failed to acknowledge the seriousness of her conduct and failed to accept responsibility. Considering the weighty aggravating factors, Respondent's misconduct warrants a suspension of one year and one day.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Stacy Parks Miller, be Suspended for one year and one day from the practice of law in this Commonwealth.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

By:_____
Dion G. Rassias, Member

Date: 12.6.18

Members Porges, Trevelise and Haggerty recused.