

In Re: Paul J. Cavanaugh

Order Entered by the Board on November 13, 2006 Dismissing Petition for Discipline.

HEARING REPORT

A petition for discipline was filed by Bar Counsel on August 25, 2005 against the Respondent, Judge Paul J. Cavanaugh.<sup>1</sup> The petition charged, in essence, that the Respondent asked a member of the Commission on Judicial Conduct, Gerald C.J. Cook, about the CJC's investigation of Judge David E. Harrison; asked Mr. Cook to speak to Judge Harrison about the investigation; and obtained from Mr. Cook a copy of the CJC confidential investigative memorandum on Judge Harrison, which the Respondent then provided to Judge Harrison.

The Respondent, represented by counsel, filed an answer on September 15, 2005. Hearings were held on March 6, 7, 8, 13, 14 and 15, 2006. Eleven exhibits were admitted into evidence.<sup>2</sup> Bar Counsel called as witnesses Gerald C.J. Cook, Gillian Pearson, and Judge David E. Harrison. The Respondent testified and called as witnesses Charles Luongo, Sharon Ferrari, Joseph McDonough, John Zamparelli, Judge Bonnie MacLeod-Mancuso, Richard Egbert, and Alphonse R. Frezza. The parties filed proposed findings of fact, conclusions of law and recommendations on May 5, 2006. On July 11, 2006, the Chair of the Hearing Committee recused himself from this matter.

I. Findings of Fact

1. This case primarily revolves around three individuals, the Respondent, Judge David E. Harrison and Gerald J.C. Cook.

2. The Respondent, Judge Paul J. Cavanaugh, was admitted to the Massachusetts bar on November 10, 1959. (Ans. 2; Tr. 4:118 Respondent) He served in the state legislature from 1962 to 1974 (Tr. 4:119 Respondent) and was Register of Probate in Middlesex County from 1978 to 1989. (Tr. 4:129-130 Respondent) From August 1989 to March 20, 2002, when he agreed to retire as part of the disposition of the CJC's investigation into the matters involved here, the Respondent was a justice of Malden District Court and, starting in 1993, was the presiding justice in that court. (Tr. 4:130, 135, 5:34, 67, 72, 77 Respondent) On November 2, 2004, the Respondent assumed retired status when he filed his annual registration statement with the Board of Bar Overseers. (Ans. 2)

3. Judge David E. Harrison was admitted to the Massachusetts bar prior to 1970. (See Tr. 3:92 Harrison) He served in the legislature from 1962 to 1970. (Tr. 3:91 Harrison) From November 1988 to February 15, 2002, when he agreed to retire as part of the disposition of the CJC's investigation into the matters involved here, he was a justice of Gloucester District Court. (Tr. 3:90, 106, 110, 112 Harrison) During this period, because Gloucester District Court was closed on Wednesdays, he usually sat in other courts that day, including, on occasion, Malden District Court. (Tr. 3:95, 121-122 Harrison, 4:191 Respondent)

4. The Respondent and Judge Harrison became friends while both were serving in the legislature from 1962 to 1970. (Tr. 3:91 Harrison, 4:125-126, 5:6 Respondent) Their friendship continued during the time that both were sitting as judges. (Tr. 3:95 Harrison, 4:126-127,

173, 5:6-7 Respondent)

5. Gerald C.J. Cook was admitted to the Massachusetts bar on November 28, 1969. (Ans. 6; Tr. 1:76 Cook) Mr. Cook's law office was located in Melrose, which is within the jurisdiction of Malden District Court. (Tr. 1:76-77, 80 Cook) During the time that the Respondent was a judge in Malden District Court, Mr. Cook made himself known to him and appeared before him periodically. (Tr. 1:80-81 Cook) Mr. Cook served as a member of the CJC from November 1996 to February 12, 2001, when he resigned, upon request, due to his involvement in leaking confidential CJC information at issue here. (Ans. 6; Tr. 1:79, 129-130, 139-140 Cook; Ex. 2) Effective December 10, 2004, Mr. Cook was suspended from the practice of law for three years for his conduct in the events at issue here, namely the disclosure of confidential CJC information and, to cover up that misconduct, intentional misrepresentations to special counsel investigating the leak of the information. Matter of Cook, 20 Mass. Att'y Disc. R. 100 (2004).<sup>3</sup> (Tr. 1:73-75, 128 Cook)

6. Pursuant to G.L. c. 211C, § 6, and the rules of the Commission, all CJC proceedings are confidential and all members of the CJC are bound to maintain that confidentiality. (Tr. 3:22-25 Pearson) The purposes for the confidentiality rule are to protect the reputations of judges until the CJC determines whether complaints have merit; to protect complainants who may feel reluctant to complain against judges; and, during investigations, to protect witnesses being interviewed by CJC staff who may be court employees and attorneys who regularly appear before judges who are the subjects of an investigation. (Tr. 3:22-23 Pearson) At the hearing, Mr. Cook admitted that he knew at the time that CJC proceedings and investigative memoranda were confidential. (Tr. 1:135-136 Cook)

7. Mr. Cook had some long-standing disagreements with CJC staff, procedures and policies which he felt were unfair to judges. (Tr. 2:8, 23, 109-111 Cook) He was upset with the CJC and its staff about their handling of anonymous complaints, their failure to notify judges, and their intrusiveness into judges' lives. (Tr. 2:111 Cook) In addition, he disagreed with some of the CJC recommended dispositions: for example, he viewed a private reprimand coupled with a press release as inconsistent. (Tr. 1:174-175, 2:15-17 Cook)

8. After he became the presiding justice at Malden District Court, the Respondent was the subject of some anonymous complaints to the CJC. (Tr. 4:160 Respondent) At the time, the CJC investigated anonymous complaints by calling employees, lawyers, and friends and advising them not to tell the judge - all without notifying the judge who was the subject of the complaint. (Tr. 4:158-160 Respondent) As a result of the Respondent's personal dealings with the CJC,<sup>4</sup> the Respondent objected to the CJC's method of handling anonymous complaints against judges, and spoke with a number of people about this, including the CJC itself, a district attorney, Mr. Cook, Attorney Webber, who was then Chair of the CJC, other judges, including the regional judge, the legislature and Bar Counsel. (Tr. 1:144 Cook, 3:215-216 McDonough, 4:158, 160-161, 163-167, 171, 180 Respondent) In October 1999, the rules were amended to change the CJC's procedures for handling anonymous complaints.<sup>5</sup>

9. Shortly after his appointment to the CJC, Mr. Cook went into the Respondent's lobby in Malden District Court and formally introduced himself, informing the Respondent that he wanted the Respondent to know he had been appointed to the CJC. (Tr. 4:153-154 Respondent) Thereafter, Mr. Cook went to the lobby of Malden District Court to see the Respondent about four to ten times. (Tr. 2:57-58 Cook, 4:154-155 Respondent) They never discussed any specific cases (Tr. 1:156 Cook), but, as set forth above, they did discuss the policies of the CJC, including the handling of anonymous complaints. (Tr. 4:154-155, 158, 171 Respondent) After a time, the Respondent became concerned about Mr. Cook's presence in the lobby, since he was from the CJC and the Respondent had been the subject of complaints to the CJC, so the Respondent expressed his concerns to Mr. Cook, and sometimes when Mr. Cook came, the Respondent would say he could not see him. (Tr. 4:156, 177 Respondent) At one point, to avoid having him in the lobby, the Respondent made an appointment with Mr.

Cook for lunch at a restaurant the Respondent frequented, and they discussed CJC policies.<sup>6</sup> (Tr. 4:156-158 Respondent)

10. While he was presiding justice, the Respondent had two staff members, Sharon Ferrari, who was his chief administrative assistant, and Charles Luongo, who was responsible for taping court proceedings, handling orders for tapes, and purchasing for the court, among other responsibilities. (Tr. 2:178-179 Luongo, 4:135-136, 143-144, 144-145, 187 Respondent) Ms. Ferrari had a desk in the outer room of the judge's lobby, close to the doorway into the inner lobby. (Tr. 4:149-151 Respondent; Ex. 6, Ex. 7) Mr. Luongo worked primarily in the lobby, but also had an upstairs office. (Tr. 4:144-145 Respondent) He never wore a court officer uniform. (Tr. 4:145-146 Respondent) Only Ms. Ferrari and Mr. Luongo made appointments for the Respondent and he did not get a replacement for either when they were on vacation. (Tr. 4:187-188 Respondent)

11. In April or May 1999, Judge Harrison was under investigation by the CJC, and the Respondent was aware of this through stories in the newspapers and in judicial circles. (Tr. 4:178-180, 5:7-8 Respondent) The CJC investigation arose from certain remarks Judge Harrison made while attending a Zoning Board of Appeal hearing where his wife was representing a client at the hearing, and Judge Harrison made an offensive comment to an opponent of the proposal. (Tr. 4:174, 178-179 Respondent)

12. In support of the allegations in this disciplinary case, Bar Counsel's primary witness was Mr. Cook. The following is a summary of Mr. Cook's version of events. As set forth below in more detail, we generally did not find Mr. Cook's testimony to be credible.

(a) According to Mr. Cook, in April or May 1999,<sup>7</sup> when the Respondent was the presiding judge in Malden District Court and Mr. Cook was there on other business, a court officer, whom he later identified as Mr. Luongo, asked Mr. Cook to come speak with the Respondent. When Mr. Cook entered the Respondent's lobby, the Respondent said to him that a friend of the Respondent's had a matter pending before the CJC. The Respondent then said, "I'm not asking you to do anything wrong but could you give us an idea of what the commission might do with a case like his." (Tr. 1:81-83, 149-151 Cook)

(b) Mr. Cook then asked the Respondent what the facts were regarding the complaint. The Respondent told Mr. Cook he did not know, but asked Mr. Cook to contact Judge Harrison, the judge under investigation. (Tr. 1:84 Cook)

(c) Several weeks later, Mr. Cook was in Gloucester on other business and then went to Gloucester District Court and asked to speak with Judge Harrison. Mr. Cook asked Judge Harrison about the facts giving rise to the CJC complaint and told Judge Harrison that he could not predict the likely result without reviewing the CJC memorandum of investigation. (Tr. 1:89 Cook) Mr. Cook told Judge Harrison that the CJC practice was to provide its members with copies of investigative memoranda prepared by CJC staff before the CJC meeting when the matter would be on the agenda. (Tr. 1:105-106 Cook) This meeting in Gloucester District Court with Judge Harrison lasted about five minutes.<sup>8</sup> (Tr. 1:86 Cook)

(d) Shortly before the CJC meeting on September 14, 1999, Mr. Cook received a copy of the investigative memorandum prepared by CJC staff in the Harrison matter. (Tr. 1:95 Cook; Ex. 3) This memorandum was a confidential document of the CJC under G.L. c. 211C, § 6, and the rules of the CJC. (Tr. 3:23-24 Pearson) It contained the results of interviews the CJC staff conducted with attorneys and members of the public in Gloucester, where Judge Harrison sat, and it included the work product of the CJC staff. (Ex. 3; Tr. 3:127 Harrison) The CJC's confidential memorandum recommended that Judge Harrison receive a private reprimand with a press release. (Ans. 12)

(e) Mr. Cook attended and participated in the CJC meeting on September 14, 1999, during

which the CJC considered what action to take in the Harrison matter. (Ex. 2; Tr. 1:92 Cook) Mr. Cook admitted that he made no disclosure at any point before or during the meeting to the CJC members or staff that he had communicated with Judge Harrison concerning the Harrison matter.<sup>9</sup> (Ex. 4; Tr. 1:118-119 Cook) At the meeting, a majority of the CJC voted to offer Judge Harrison a private reprimand coupled with the issuance of a press release, or, if Judge Harrison did not agree to the proposed disposition, to issue a formal statement of allegations. (Ex. 3; Tr. 1:99 Cook) At the meeting, Mr. Cook supported a private reprimand without a press release.<sup>10</sup> (Ex. 4; Tr. 1:92 Cook)

(f) It was the practice of the CJC, after a vote, to have the CJC staff notify the judge of the vote and negotiate an agreement for the disposition voted by the CJC or, if no agreement was reached, prepare a formal statement of allegations. (Tr. 1:99 Cook, 3:27 Pearson, 142-143 Harrison) CJC members were not authorized to communicate or negotiate with judges who were under investigation. (Tr. 3:24-25 Pearson) Despite this practice and the confidentiality rule, Mr. Cook testified that on September 16, 1999, he contacted Judge Harrison by telephone (Tr. 1:101, 104 Cook; Ex. 5) and told him that the CJC had voted to issue a private reprimand and a press release in Judge Harrison's case, and that Judge Harrison expressed his dissatisfaction with this proposed disposition, saying, "I'll take my pension before I take a press release." (Tr. 1:104-105 Cook)

(g) Mr. Cook further testified that on September 21, 1999, he made an appointment with Sharon Ferrari, the Respondent's assistant, to meet with the Respondent at Malden District Court the following day. (Tr. 2:172-173 Cook) (Mr. Cook's testimony was clearly contradicted by the fact that, as set forth below, Ms. Ferrari was in Europe on September 21, 1999. (Tr. 3:175-176 Ferrari)) He admitted that he personally made a copy of the CJC's confidential investigative memorandum on the Harrison matter. (Tr. 1:111 Cook) Mr. Cook testified that he met with the Respondent on September 22, 1999, in his lobby at Malden District Court, and gave him the copy of the CJC's confidential investigative memorandum. (Tr. 1:81, 113 Cook) At the meeting, Mr. Cook also told the Respondent of the CJC's vote and some of the reasons for it. (Tr. 1:112 Cook) Mr. Cook admitted that he did not make any request of the Respondent to restrict his use or disclosure of the memorandum. (Tr. 1:117 Cook) He also admitted that the Respondent never asked him for a copy of any CJC document. (Tr. 2:74 Cook) (As set forth below, the Respondent clearly denied ever meeting with Mr. Cook in September 1999 or ever receiving from him a confidential CJC memorandum. (Tr. 4:185-186 Respondent))

13. In making its findings and conclusions in this matter, the Hearing Committee recognizes that Bar Counsel bears the burden of proving the charges in the petition for discipline by a preponderance of the evidence. *Matter of Mayberry*, 295 Mass. 155, 167 (1936); *Matter of Ruby*, 328 Mass. 542, 547 (1952). This case essentially turns on the credibility of witnesses, and Bar Counsel's case hinges primarily on Mr. Cook's testimony. The Hearing Committee specifically evaluated the demeanor and testimony of the witnesses and did not find Mr. Cook's testimony in general to be truthful or credible. As a result, after consideration of all of the evidence, the Hearing Committee finds that Bar Counsel has failed to meet its burden of proof with respect to most of the charges. Our finding that Mr. Cook's testimony generally was not truthful or credible is based on our evaluation of Mr. Cook as he testified and is supported by the following:

(a) Mr. Cook gave numerous inconsistent statements under oath concerning the events at issue. For example, he testified at this hearing that he copied and delivered the CJC confidential investigative memorandum concerning Judge Harrison without its attachments; however, he previously testified that the copy he claims to have delivered to the Respondent included the attachments.<sup>11</sup> (Tr. 1:110-115, 2:79-84, 159-161, 169-172 Cook) Mr. Cook also testified at the hearing that he was certain he made an appointment with the Respondent's secretary, Ms. Ferrari, on September 21, 1999, the day before meeting with the Respondent at the court and giving him the confidential memorandum; however, in prior statements under

oath he contradicted this statement. (Tr. 1:109-110, 2:46-55, 64, 172-174 Cook) Another example is that Mr. Cook testified that he went to the September 22, 1999 meeting with the Respondent, intending to give the confidential memorandum to the Respondent, when previously he stated that he did not at that point intend to give the Respondent the copy. (Tr. 2:64-73 Cook)

(b) Mr. Cook's testimony was contradicted at various points by other testimony and evidence. For example, as set forth above, Mr. Cook testified that on September 21, 1999, he spoke with Ms. Ferrari and made an appointment to meet with the Respondent on September 22, 1999. (Tr. 2:172-173 Cook) However, Ms. Ferrari testified and provided documentation (Ex. 9) that she was in Europe from September 13 through September 26, returning to work on September 27, 1999, and therefore, did not and could not make an appointment for Mr. Cook to meet with the Respondent. (Tr. 3:175-179 Ferrari) In addition, Mr. Cook testified that his meeting with the Respondent at which the Harrison investigation was first discussed was initiated by a court officer, whom he specifically identified as Charles Luongo, coming out and asking him to speak with the Respondent. (Tr. 1:83, 150-154 Cook) Mr. Luongo testified that he never asked Mr. Cook to come speak to the Respondent. (Tr. 2:181, 184-185 Luongo)

(c) We find that Mr. Cook lied under oath, revealed confidential CJC information in another matter, engaged in a cover-up of his misconduct, and made misrepresentations to special counsel. For example, at the hearing, Mr. Cook initially testified that he never leaked confidential CJC information to any other judges. (Tr. 1:106, 182-183, 2:24 Cook) This testimony was consistent with his testimony in earlier depositions. (Tr. 2:25, 41-42 Cook) However, when questioned further, he admitted that, in another matter, while he was a CJC member, he called up the judge who was the target of a CJC investigation, told him what the CJC had voted to do at its meeting, and advised him to get counsel. (Tr. 1:183, 2:24-39 Cook) He admitted that he disclosed confidential information in this other matter, and that he did so because he felt the judge was being treated unfairly and harshly by the CJC. (Tr. 2:28-39 Cook) In addition, as set forth above, even after Mr. Cook became aware of the CJC's concern about the leak of confidential information and the appointment of special counsel, and was interviewed by special counsel, through at least May 2001, when the SJC rejected Mr. Cook's Fifth Amendment claim, Mr. Cook did not disclose the fact that he was the source of the leak.<sup>12</sup> (Tr. 1:138-139, 2:88-100, 125-126 Cook) Indeed, he tried to mislead special counsel by indicating that perhaps a young member of the CJC staff was responsible for the leak. (Tr. 2:103-106 Cook)

14. Based on our findings regarding Mr. Cook's lack of credibility, we are left with the following facts.

15. The Respondent admitted that he referred to the Harrison matter on one occasion to Mr. Cook. (Tr. 4:178-180 Respondent) We credit the Respondent's testimony that, at the time, the Harrison matter had been reported in Lawyers Weekly and the local Gloucester newspaper. (Tr. 4:178-180 Respondent) The Respondent was in the middle of a conversation with Mr. Cook regarding the handling of anonymous complaints, and the Respondent mentioned Judge Harrison and said that he guessed his friend had problems too. (Tr. 4:178-181 Respondent) Mr. Cook shrugged and made no other response. (Tr. 4:178-181 Respondent) In response to a question by Bar Counsel, the Respondent specifically denied mentioning the CJC when he made this statement and we credit that testimony. (Tr. 5:21 Respondent) We also credit the Respondent's testimony that his mention of Judge Harrison was spontaneous, that he was not inviting a response, that he was not asking Mr. Cook to look into the matter or intervene on Judge Harrison's behalf, and that he did not intend for Mr. Cook to attempt any action on Judge Harrison's behalf. (Tr. 4:178-181 Respondent) We further find that Mr. Cook's subsequent conduct in this matter was not a reasonably foreseeable consequence of this comment. (See Tr. 4:181 Respondent)

16. As set forth above, Judge Harrison admitted that, during the CJC investigation into his conduct at the Board of Zoning Appeals meeting, Mr. Cook came and spoke with him at

Gloucester District Court and that they discussed CJC procedures. He denies Mr. Cook's claim that they spoke after the September 14, 1999 CJC meeting.<sup>13</sup> We need not resolve the conflicting testimony because, in our view, this conduct should not be attributed to the Respondent.

17. Judge Harrison admitted and we credit this testimony that he received in the mail an envelope addressed to him at Gloucester District Court with the return address of Malden District Court, which contained another sealed envelope with his name on it (no return address), and that in that envelope was a copy of the CJC investigative memorandum in his case. (Tr. 3:101-102 Harrison) He further admits that he read the memorandum and then destroyed it, and did not return it to the CJC or notify the CJC that he had received it. (Tr. 4:105-106 Harrison)

18. The Respondent testified that he never met with Mr. Cook in September 1999 and he never received the CJC's confidential memorandum from him. Consequently, the Respondent denies having knowingly provided the memorandum to Judge Harrison. (Tr. 4:185-186, 5:70 Respondent) The Respondent testified that around the time that this was occurring, an envelope addressed to Judge Harrison, without a return address, appeared on his secretary's desk and she forwarded that envelope to Judge Harrison. (Tr. 4:185 Respondent)

19. We credit Ms. Ferrari's testimony that she handled the mail that was delivered to Malden District Court for judges who were not sitting there, and that it was her practice not to open such mail, but to insert it into Malden District Court envelopes and mail it to the judges at the courts where they were then sitting. (Tr. 3:149, 166-167 Ferrari) Typically, she handled about 100-150 items of such mail a year. (Tr. 3:182 Ferrari) At some point after she returned from vacation on Monday, September 27, 1999, Ms. Ferrari testified that she found on her desk a sealed envelope, with no return address, addressed to Judge Harrison. (Tr. 3:167-168, 190-191 Ferrari) She further testified that, in accordance with her regular procedure, she did not open it, but put it in a Malden District Court envelope and mailed it to Judge Harrison at Gloucester District Court. (Tr. 3:167, 170-171 Ferrari)

20. Contrary to Bar Counsel's argument, the fact that the envelope to Judge Harrison was sent from Malden District Court does not imply that the Respondent must have known of the confidential memorandum and sent it on to Judge Harrison. In our view, if the Respondent had the confidential memorandum and wanted to give it to Judge Harrison, he would have mailed it to Judge Harrison's home or delivered it himself, and it makes no sense that he would have left it in the office to be forwarded by someone else to Gloucester District Court. The fact that the document was sent from one district court to another lends credence to the idea that it was sent as part of the general procedure for forwarding mail to judges. In any event, having rejected Mr. Cook's testimony as not credible, we find that Bar Counsel has failed to prove that Mr. Cook met with the Respondent in September, that he gave the Respondent the confidential CJC memorandum, and that the Respondent thereafter intentionally sent the memorandum to Judge Harrison.

21. In early 2000, the CJC staff became concerned that confidential information concerning the Harrison investigation had been leaked to Judge Harrison or his counsel. (Tr. 3:25 Pearson) At its meeting on March 14, 2000, the CJC voted to ask the Supreme Judicial Court to appoint special counsel to investigate the possible leak.<sup>14</sup> (See Ex. 1) Attorney Robert Muldoon was appointed special counsel by the SJC. (Tr. 3:25 Pearson) As part of his investigation, he interviewed Mr. Cook, Judge Harrison, the Respondent, and a number of CJC members and staff. (Tr. 2:102 Harrison, 4:194 Respondent)

22. On May 25, 2000, Attorney Muldoon interviewed Mr. Cook and asked him if he had any knowledge of any unauthorized disclosure of confidential CJC information concerning the Harrison investigation. Mr. Cook denied any such knowledge and falsely tried to shift blame to a young member of the CJC staff. (Tr. 2:103-106 Cook)

23. In the fall 2000, when next questioned, this time under oath, by Attorney Muldoon, Mr. Cook asserted the privilege against self-incrimination (Tr. 2:113-114 Cook), which the SJC eventually rejected as having no basis. Matter of Enforcement of a Subpoena, 435 Mass. 1 (2001).

24. Shortly after receiving the SJC decision, at Mr. Cook's continued insistence, he and the Respondent met at the 99 Restaurant in Charlestown (Tr. 1:125 Cook, 5:82 Respondent), but after they both arrived, the Respondent, seeing Mr. Cook's agitated condition, decided he did not want to talk with him there, and they met at a park near the Bunker Hill Monument. (Tr. 5:83 Respondent) We credit the Respondent's testimony that Mr. Cook told him of his assertion of his Fifth Amendment privilege and that he was sorry the Respondent's name had come up in the investigation. (Tr. 5:25-26 82-83 Respondent) The Respondent replied that Mr. Cook should have told the truth to begin with (Tr. 5:82-83 Respondent) and that if the Respondent were called upon that was what he was going to do - tell whatever he knew. (Tr. 5:26 Respondent) It should be noted that Mr. Cook admitted at the hearing that the Respondent never asked him not to tell the truth. (Tr. 1:157-158 Cook)

25. After the investigation into the leak of CJC confidential information, Judge Harrison settled with the CJC, by retiring from the bench and agreeing to a press release. (Tr. 3:110, 112 Harrison) As set forth above, Mr. Cook resigned from the CJC upon request. (Tr. Tr. 1:79, 129-130, 139-140 Cook) The Respondent settled with the CJC, by retiring from the bench and agreeing to a press release. Bar Counsel contends that this press release contained admissions which should form the basis for finding misconduct here.<sup>15</sup> Based on the testimony presented here, we decline to do so. We credit the Respondent's testimony that he did not intend those statements as admissions, but agreed to the statements for the purpose of resolving the CJC matter without further proceedings, and that he told his lawyer to settle the matter. (Tr. 5:67-69, 71-72 Respondent) We further credit his testimony that he was anxious to resolve the CJC matter because he did not want to continue to deal with the CJC given his previous experiences with the Commission,<sup>16</sup> and he had planned to retire shortly due to health reasons in any event.<sup>17</sup> (Tr. 4:195-196, 5:67-69, 71 Respondent)

## II. Conclusions of Law

26. Bar Counsel charges that (1) the Respondent's inquiry<sup>18</sup> of Mr. Cook, while Mr. Cook was a member of the CJC, concerning the CJC's confidential investigation of the complaint against Judge Harrison, (2) his asking Mr. Cook to speak to Judge Harrison about that investigation, and (3) his obtaining a copy of the confidential memorandum improperly and furnishing it to Judge Harrison interfered with the CJC's inquiry and assisted Mr. Cook and Judge Harrison in violating the laws protecting the confidentiality of the CJC's proceedings thereby violating Canon One and Canon Two (A) of the Code of Judicial Conduct and thus violated Mass. R. Prof. C. 8.4(a) (misconduct 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), (d) (misconduct to engage in conduct that is prejudicial to the administration of justice), (f) (misconduct to knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law) and (h) (misconduct to engage in other conduct that adversely reflects on his or her fitness to practice law).

27. As set forth above, we found that Bar Counsel has failed to prove that the Respondent asked Mr. Cook to speak to Judge Harrison about the CJC's investigation of his conduct or that the Respondent obtained a copy of the confidential memorandum and furnished it to Judge Harrison. In addition, we found that the Respondent did not ask Mr. Cook about the CJC's confidential investigation of the complaint against Judge Harrison: the only statement the Respondent made about the investigation was the casual, spontaneous comment he admitted making to Mr. Cook that the Respondent's friend, Judge Harrison, had troubles too, and this was made at a time when the Harrison incident had been publicized in the newspapers. (Tr. 4:178-181 Respondent) Thus, we find that Bar Counsel has failed to prove that the Respondent

intentionally solicited Mr. Cook to breach the confidentiality of the CJC. Moreover, as set forth above, we find that Mr. Cook's actions were not a foreseeable consequence of the Respondent's casual comment. As a result, we find that the Respondent's conduct did not violate the charged disciplinary rules.

28. In *Matter of Morrissey*, 366 Mass. 11 (1974), the court found that a sitting judge did not attempt to influence the handling of a pending case, but censured the judge for making an inquiry of a prosecuting officer in a pending case and accepting a substantial gift from the person who was the subject of the pending case. The conduct in this case is clearly distinguishable from that in *Morrissey*, since the Respondent only made a casual comment, not an inquiry, and he sought no response, let alone, received a gift.

29. In cases involving lawyer ex parte contact with judges, the type of conduct that has resulted in sanctions has involved an intent to influence the outcome of a pending matter. In *Matter of Orfanello*, 411 Mass. 551, 8 Mass. Att'y Disc. R. 184 (1992), an attorney spoke to a judge "with the hope that the judge would look favorably on reaching a result beneficial to [a friend's] client" and also informed the judge that the friend had been a supporter of the judge's appointment to the bench the previous year. The judge, interpreting the conversation as it was meant, was very taken aback, and arranged for another judge to handle the case. For this misconduct, Orfanello was suspended for three months. In *Matter of Ryan*, 6 Mass. Att'y Disc. R. 275 (1990), Ryan was a district attorney in another county who, at the behest of a U.S. Congressman, approached a judge and asked him to show some consideration in the sentencing of a defendant, without informing the appropriate district attorney. The judge informed him that he should voice his concerns to the district attorney and then continued the matter because of the impropriety of the conversation. Ryan received a public censure. The conduct in this case did not involve any intent to influence the CJC or to inquire into its confidential investigation and therefore did not violate the charged disciplinary rules.

### III. Factors in Mitigation and Aggravation

30. Excellent recommendations, particularly as to the Respondent's integrity, and reputation for truth and veracity, were received from Judge Bonnie MacLeod-Mancuso, who worked as a justice in the Malden District Court for three and a half years, during which time the Respondent was presiding justice, and Representative William Delahunt, who has known the Respondent for over thirty years, having met him in the state legislature. (Ex. 10; Tr. 4:83-84 MacLeod-Mancuso) We credit Judge MacLeod-Mancuso's testimony that she introduced her son to the Respondent because she saw him as an excellent role model. (Tr. 4:106-107 MacLeod-Mancuso) We also credit her testimony that the Respondent, as presiding judge, worked cooperatively with the associate judges in terms of assignment of cases. (Tr. 4:6-98 MacLeod-Mancuso)

31. While the Respondent was Register of Probate, after passage of the Domestic Relations Abuse Prevention Act, G.L. c. 209A, in 1978, the Respondent held the first forum with judges, probate clerks and police regarding the handling of such cases. (Tr. 4:130 Respondent)

32. During the time that the Respondent was presiding justice, he helped juveniles form a "Teen Advisory Program." (Tr. 4:137 Respondent) These were juveniles who were not in trouble; they would meet and discuss juvenile problems, ways to solve them and appropriate penalties. (Tr. 4:99 MacLeod-Mancuso, 4:137-138 Respondent)

33. The Respondent also publicized and organized an event to recognize the contributions to justice by Judge Emma Schofield, who was the first woman appointed to the bench in Massachusetts. (Tr. 4:140-141 Respondent)

34. Because we are recommending dismissal of this matter, we need not address whether the foregoing constitute "typical" as opposed to "special" mitigation. Compare *Matter of Alter*, 389 Mass. 153, 157, 3 Mass. Att'y Disc. R. 3 (1983) with *Matter of Owens*, 19 Mass. Att'y Disc.



R. 351 (2003) (sanction reduced based on lawyer's "dedication to pro bono work and civil rights causes")

#### IV. Recommendation for Discipline

Bar Counsel, based on all the charged misconduct, seeks disbarment. The Respondent seeks a dismissal or, at most, an admonition.

We rejected the charges against the Respondent based on the lack of credibility of Mr. Cook. We concluded that Bar Counsel failed to prove that the Respondent asked Mr. Cook to inquire about the confidential CJC investigation of Judge Harrison, that he asked Mr. Cook to talk with Judge Harrison about the investigation, or that he received a confidential CJC memo from Mr. Cook and knowingly delivered it to Judge Harrison. We found that the Respondent's off-hand comment to Mr. Cook that Judge Harrison was a friend, at a time when the matter had been publicized, was not a solicitation for Mr. Cook's assistance or interference in the matter, and that Mr. Cook's subsequent actions were his own and were not reasonably foreseeable. As a result, we concluded that the Respondent's conduct did not constitute a violation of the charged disciplinary rules.

Based on the foregoing, we recommend that the petition for discipline against the Respondent be dismissed and no discipline be imposed.

#### FOOTNOTES

<sup>1</sup> The original petition included Judge David E. Harrison as a Respondent. Represented by separate counsel, Judge Harrison filed an Affidavit of Resignation which, on March 1, 2006, was accepted by the Court as a disciplinary sanction, as recommended by the Board. Matter of Harrison, SJC No. BD-2006-016 (Greaney, J.).

<sup>2</sup> There are two exhibits numbered 9.

<sup>3</sup> Mr. Cook testified at his disciplinary hearing. With the exception of Gillian Pearson, the executive director of the CJC, none of the other witnesses here, including the Respondent and Judge Harrison, were called as witnesses in Mr. Cook's hearing. Matter of Cook, 20 Mass. Att'y Disc. R. 100 (2004) (administrative record).

<sup>4</sup> For example, (1) at one point, a judge called the Respondent and told him she had gotten a call from the CJC asking her what time the Respondent arrived at work and she was admonished not to tell anyone the CJC had called (Tr. 4:159 Respondent); (2) the Respondent also on occasion received letters from the CJC advising him that a complaint had been dismissed, when he had not even known one had been filed (Tr. 4:159-160 Respondent); (3) another time, the Respondent received notice of a complaint two years and ten days after it was filed, and thirty-five days later the CJC dismissed it - and this was not even an anonymous complaint (Tr. 4:160-161 Respondent); and (4) on his way home after speaking with the CJC, the Respondent received a call from his secretary, telling him that the executive director of the CJC said that the Respondent had purposely taken papers from a desk at the CJC and they wanted him to return to the CJC with them. He told his secretary to tell them he had no papers; she said they insist you return. He agreed to meet them half way. Near the court house, he opened his bag for a secretary from the CJC, who then went through it to see if he had taken any papers and she found none. The next day the CJC called him and admitted that he had not taken any papers. (Tr. 160-162 Respondent)

<sup>5</sup> Effective October 1, 1999, the Rules of the Judicial Conduct Commission were changed to establish detailed procedures for handling anonymous complaints, including requiring that "[t]he commission shall take reasonable steps to insure that as much notice as possible of the complaint's allegations is provided to the judge at the earliest feasible time in accordance

with this Rule.” Rule 6(G) (4) of the Rules of the Commission on Judicial Conduct. Prior to the amendment, it was up to the CJC’s executive director to decide when to notify the judge and when to investigate. After the amendment, the decision on whether to investigate had to be decided by the CJC. See Rules of the Commission on Judicial Conduct. (See Tr. 4:164-165 Respondent)

<sup>6</sup> In his testimony in this matter, Mr. Cook initially denied recalling any conversations with the Respondent prior to September 22, 1999, when, he claimed, the Respondent initiated a conversation with him regarding the CJC’s investigation of Judge Harrison. (Tr. 1:81-84 Cook) (See findings below) On cross-examination, Mr. Cook recalled meeting the Respondent at a restaurant for lunch, but did not recall that they discussed anonymous complaints, although he then admitted he was aware that the Respondent believed the way they were handled by the CJC was unfair and that Mr. Cook agreed with the Respondent that there should be corrective legislation on this issue. (Tr. 1:143-147 Cook)

<sup>7</sup> At the outset of his testimony, Mr. Cook claimed very specifically that this conversation occurred on September 22, 1999 (Tr. 1:81-83 Cook), but it is evident from the sequence of events set forth below, including the CJC meeting of September 14, 1999, that this was clearly erroneous.

<sup>8</sup> Judge Harrison admitted meeting with Mr. Cook at Gloucester District Court. (Tr. 3:96-99, 119 Harrison) It was a completely unscheduled meeting and when Mr. Cook was announced, Judge Harrison thought it was the police prosecutor for Gloucester District Court who wanted to see him because he is also named Gerald Cook. (Tr. 3:97, 118 Harrison) At the meeting, Mr. Cook told Judge Harrison how the system worked and the options the CJC would have in making a decision; Judge Harrison denied telling Mr. Cook anything about the events giving rise to the investigation. (Tr. 3:99 Harrison) We credit Judge Harrison’s testimony that he did not believe that Mr. Cook mentioned anything about the Respondent at that meeting. (Tr. 3:119 Harrison)

<sup>9</sup> Moreover, Mr. Cook participated in the discussion at the CJC meeting, stating that he did not know Judge Harrison personally, but he had friends who did and he named them (the Respondent was not one of the named friends). (Ex. 4) He also discussed Judge Harrison’s volunteer activities. (Ex. 4)

<sup>10</sup> Mr. Cook was required by law to maintain the confidentiality of the CJC meeting. Rule 5 of the Rules of the Judicial Conduct Commission. (See also Ans. 13)

<sup>11</sup> Judge Harrison testified that he did not receive the attachments. (Tr. 4:119-120 Harrison)

<sup>12</sup> Based on our findings that Mr. Cook’s testimony generally lacked credibility, his claimed statements to Judge Sally Kelly, a CJC member, at some point during the investigation, even if made, do not alter our findings. (See Tr. 2:94-95, 119-123 Cook)

<sup>13</sup> As to the alleged conversation between Mr. Cook and Judge Harrison on September 16, 1999, after the September 14 CJC meeting at which Judge Harrison’s case was decided, Judge Harrison denied that he spoke with Mr. Cook at that time. (Tr. 3:99-100, 130 Harrison) Mr. Cook supported his claim that they did talk with telephone records showing two calls of less than a minute each to Gloucester District Court on September 15 and 16 and then another one on September 16 for eleven minutes. (Ex. 5; see Tr. 1:100-106 Cook) Judge Harrison noted that Mr. Cook could have been on hold while court officers sought to notify him of the call. (Tr. 3:130 Harrison) As set forth above, we generally do not find Mr. Cook credible, and, in any event, either version establishes only that Mr. Cook initiated or made efforts at improper communication of confidential information, and, if the call was taken, that Judge Harrison allowed Mr. Cook to impart confidential information.

<sup>14</sup> Mr. Cook was aware that the CJC was concerned about a leak of confidential information and that it planned to seek appointment of special counsel to investigate it. (Tr. 1:117-118, 2:88-89, 91 Cook) He was not present at the March 14, 2000 CJC meeting. (Ex. 2; see Tr. 1:118, 2:91 Cook)

<sup>15</sup> The press release itself was not admitted into evidence, but Bar Counsel was permitted to question the Respondent about the specific statements which he contended were admissions. (Tr. 5:33-47, 66-73 Respondent) See *Zucco v. Kane*, 439 Mass. 503, 509 (2003) (rule that settlement agreements are inadmissible is designed to encourage settlements by limiting the consequences; this “rule does not extend beyond the fact of the settlement itself; admissions do not become privileged simply because they happen to be appended to a settlement.”)

<sup>16</sup> Given the Respondent’s past experiences with the CJC, as set forth above, we find this position to be understandable.

<sup>17</sup> As the Court stated in *Zucco*, supra at 508: “While there may, in fact, have been cogent explanations for the apparent inconsistencies between the agreement and the plaintiff’s testimony, this possibility does not render the document inadmissible. ‘As with all evidentiary admissions, it is always open to the party to give evidence that the pleading or other admissible declaration made by counsel was made or filed upon incorrect information.’ [Citation omitted]”

<sup>18</sup> We note that this was Bar Counsel’s characterization and, as set forth above, we have rejected Mr. Cook’s version of this conversation as not credible and have found that the Respondent only made a spontaneous comment to Mr. Cook concerning Judge Harrison.

Please direct all questions to [webmaster@massbbo.org](mailto:webmaster@massbbo.org).

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