BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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IN THE MATTER OF:

JIC COMPLAINT NO. 38-2022
SUPREME COURT NO. 22-862

HONORABLE DEANNA R. ROCK,
FAMILY COURT JUDGE of the
TWENTY-THIRD FAMILY COURT CIRCUIT

RESPONDENT'S BRIEF

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I. Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In **BRIEF OF SPECIAL JUDICIAL DISCIPLINARY COUNSEL**, the Special Judicial Disciplinary Counsel (Special JDC) seeks to persuade this Court that the actions of Respondent Deanna R. Rock, a Family Court Judge in the Twenty-Third Circuit, are so vile and despicable that the citizens who elected her to office should be deprived of her public services for the remainder of her elected term and she should be fined $5,000 and ordered to pay the costs of this proceeding. After hearing all of the evidence presented, the Judicial Hearing Board (JHB) rejected the Special JDC's recommendations, based largely on Respondent's credibility, but did not completely exonerate Respondent. Instead, the JHB recommended the dismissal of five of the eight ethics charges leveled against her. In this appeal, Respondent respectfully submits that this Court should enter a final decision completely exonerating her of all charges to help clear her name so that she can continue fulfilling the oath she took when the citizens in the Twenty-Third Circuit elected her to office.

The underlying event that ultimately resulted in eight judicial ethics charges being filed against Respondent began innocently enough with the following exchange of Instant Messages (IM's) between Joy Renee Campbell, the family case coordinator for Family Court Judge Glen R. Stotler, and Respondent:

> **Campbell, Joy** **3/22/2021** **2:50:51 PM**
> Sorry – what is your title again as President? and Keith Hoover? The directory shows him as a Deputy Administrative Director of the Administrative Office.
>
> **Rock, Deanna** **3/22/2021** **3:11:55 PM**
> mine is just &quot: President, Family Court Judicial Association" and what you have there is correct for Keith. (JA at 39-40).[1]

In the Special JDC's brief at 7, this exchange of IM's is mischaracterized as "Respondent and J.R. Campbell began to put the final touches on the `Stotler letter,'" when, in fact, there is nothing in this exchange of IM's to suggest that Ms. Campbell asked Respondent for this identifying information to be incorporated into a letter that Ms. Campbell was typing for Judge Stotler. Two days later Ms. Campbell faxed to Respondent what has been referred to throughout this case as the Stotler letter. After receiving this fax on March 24, 2021, at 11:01:40, Respondent sent an IM to Ms. Campbell noting "there is a typo on page 2, first paragraph" and the next IM from Respondent sent eleven seconds later states "in the parenthesis, it should be 1956." (JA at 42). The final version of the Stotler letter was dated March 25, 2021, and sent to all members of this Court, certain legislative leaders, employees in this Court's Administrative office, and to Respondent. Respondent recalled seeing this letter after it was delivered to her office.

So far, Respondent had not committed any crime or unethical act. All she had done was to review a letter written by Judge Stotler and sent an IM to Ms. Campbell regarding two mistakes she noticed in the letter. Reading a letter written by another judge is not a crime or an unethical act and,

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[1]From reviewing the digital record of the Joint Exhibits submitted by the parties below, although the pages are Bates numbered, the initial pages are not numbered and sometimes it is not clear what the actual exhibit number is. Therefore, in **RESPONDENT'S BRIEF**, citations will be made to "JA at" and then the Bates number will be noted.

quite frankly, is not a very significant event. However, things changed dramatically when Respondent was subpoenaed to testify as a witness in the investigation of Judge Stotler.

On January 31, 2022, almost eleven months after the IM's outlined above, the Special JDC went to Respondent's office purportedly to ask her questions about *ex parte* communication made by Judge Stotler. During this sworn statement, while Respondent did recall receiving the Stotler letter delivered to her office, she had no recollection that a couple of days prior to receiving the final Stotler letter, she actually had reviewed an earlier draft of it. Respondent had no reason to knowingly and intentionally lie about reviewing an earlier draft of the Stotler letter. However, this innocent lapse of memory during her first sworn statement when she was testifying as a witness rather than as a target morphed into the Investigative Panel issuing eight separate charges against Respondent.[2]

On March 22, 2023, a hearing was held in the Circuit Court of Monongalia County, and testimony was presented by Respondent, Ms. Campbell, Retired Judge Charles Parsons, and Victor Alan Riley.[3] In addition to the testimony, the parties presented the JHB with a Joint Exhibit Notebook, including joint stipulations of fact. After evaluating these witnesses and the documents admitted into evidence, the JHB issued a **RECOMMENDED DECISION** on May 25, 2023, holding that the Special JDC had failed to prove by clear and convincing evidence Charge Two,

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[2]Charge Three, Charge Four, Charge Five, Charge Six, and Charge Seven allege violations of Rule 2.16(A) "Cooperation with Disciplinary Authorities" and are based either upon answers Respondent provided during her first sworn statement or a statement in a letter signed by Respondent, Judge Griffin, and Judge Greenberg. Charge One and Charge Two are general charges that are violated only if one or more of the violations of Rule 2.16(A) charges was proven. Charge Eight alleges a violation of Rule 1.3 "Avoiding Abuse of the Prestige of Judicial Office."

[3]Citations to this Hearing Transcript will made to "Tr." and the page number.

Charge Three, Charge Five, Charge Six, and Charge Eight. As to Charge One, Charge Four, and Charge Seven, the JHB found those allegations had been proven and recommended that Respondent be reprimanded and ordered to pay the costs of the proceeding.[4]

Respondent filed her acceptance of the Hearing Board's recommendations dismissing five of the eight charges, but objected to the recommendations regarding the three charges allegedly proven. Although the Special JDC only objected to the recommended sanction, in its brief, the Special JDC seeks to relitigate all eight charges, including the ones rejected by the JHB.[5] Because the Special JDC and Respondent timely filed their objections to the JHB's recommendations, this appeal and argument were ordered by the Court.

II. Assignments of error

A.

Whether Respondent should be exonerated of all charges involving alleged violations of Rule 2.16(A) where:

1. The JHB specifically found there was no clear and convincing evidence that Respondent was intentionally dishonest;

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[4]Charge One generally alleges a violation of Rule 1.1 "Compliance With the Law." This charge allegedly was violated based upon Respondent's alleged violation of Rule 2.16(A) "Cooperation with Disciplinary Authorities" in either Charge Four, where Respondent had a lapse in memory during her first sworn statement and simply did not recall that a few days prior to receiving the Stotler letter, she had seen an earlier draft and noted two errors, and/or Charge Seven where Respondent signed at letter with two other Family Court Judges, who have never been charged for sending this same letter.

[5]Under Rule 4.11 of the West Virginia Rules of Judicial Disciplinary Procedure, this Court has never issued a decision regarding the required specificity of any objection filed in response to a JHB's recommended order. The Rule simply says "any objection to the report of the Judicial Hearing Board shall constitute commencement of proceedings to disposition before the Supreme Court of Appeals." The Court may want to use this decision to explain whether an objection only to the JHB's recommended sanction permits the objecting party then to relitigate all of the charges recommended for dismissal rather than simply arguing about the sanction.

2. The case law requires proof that a judge knowingly and willfully lie to sustain an allegation that the judge failed to be candid and honest;

3. A mere lapse in memory by a judge cannot be the basis for proving a lack of candor or honesty?

B.

Whether Respondent should be exonerated of all charges?

III. Statement of the case

A. Respondent Judge Deanna Rock's testimony

1. Background

Prior to becoming a lawyer, Respondent was employed as a registered nurse in Pennsylvania and Maryland. After getting married and having a son, Respondent stayed home for several years until she decided to pursue a law degree. (Tr. 86-87). She was accepted by the WVU College of Law, where Respondent commuted back and forth each day from her home in Frostburg, Maryland. (Tr. 87-88). Once she had her law degree, Respondent was employed by a law firm in Cumberland, Maryland focusing on family law, personal injury, workers' compensation, and bankruptcy. (Tr. 88). After working as a solo practitioner for about a year and a half, Respondent ran for the Family Court Judge seat and was elected to serve in the Twenty-Third Family Court Circuit (Hampshire, Mineral and Morgan Counties) in May 2016, and took office on January 3, 2017. (Tr. 88-89; Joint Stipulation of Fact No. 3). Respondent testified that Judge Stotler is a colleague and a friend and that prior to becoming a Family Court Judge, Respondent had appeared before Judge Stotler. (Tr. 25-26).

Respondent wanted to become a Family Court Judge to be a positive force for broken families. (Tr. 89). When she became a Family Court Judge, Respondent familiarized herself with

the Judicial Code of Conduct and has strived to abide by those rules. (Tr. 90). Respondent served as the President of the West Virginia Family Court Judicial Association from January 1, 2020, until May 11, 2021. (Joint Stipulation of Fact No. 6).

Respondent has never received any discipline as a lawyer in West Virginia, Maryland, or Pennsylvania. (Tr. 83-84). Other than the present matter, Respondent has never before been charged with any disciplinary matter as a judge. (Tr. 84). Respondent also has never been disciplined when she was employed as a registered nurse. (Tr. 84).

2. Respondent's first sworn statement

Virtually all of the charges issued against Respondent relate to answers she provided under oath during her first sworn statement given on January 31,2022. (JA at 255). Prior to giving this sworn statement, Respondent reached out to the Special JDC to find out what judge was the target of the questioning. In fact, Respondent and the Special JDC and her staff exchanged multiple emails back and forth where Respondent was seeking some information regarding the substance of her scheduled sworn statement. (JA at 213-43; Tr. 92). All of Respondent's requests for information went unanswered.

Once Respondent learned from the subpoena that the statement was regarding Judge Stotler, Judge Stotler provided her with a copy of his complaint and Respondent and her counsel reviewed her obligations as a witness under Rule 2.2 of the West Virginia Rules of Judicial Disciplinary Procedure and Rule 2.9 of the West Virginia Code of Judicial Conduct addressing *ex parte* communications. Respondent also explained at the time of her first sworn statement, she did not have the benefit of reviewing the relevant IM's, emails, and faxes. If she had reviewed those documents prior to her first sworn statement, Respondent would have realized that she had seen an earlier version of the Judge Stotler letter prior to receiving it in the mail. (Tr. 50-52).

During the questioning, Respondent's counsel, consistent with Rule 2.2 and Respondent's role as a witness as opposed to a target, noted an objection to questions posed that went beyond the topics raised in the complaint filed against Judge Stotler. Respondent was given a continuing objection to the remaining questions during the first sworn statement. (JA at 330-31).

Respondent made a point of hiring counsel, John Athey, to represent her in this sworn statement because in the seminar she and others had just given in the prior conference, they all recommended that judges should retain counsel in connection with Judicial Investigation Commission (JIC) proceedings. (Tr. 104). Respondent explained that she fully understood that when she testified under oath, that was a vow to tell the truth to the best of her ability based upon her memory at that time. (Tr. 106). When she took the oath before her first sworn statement, Respondent took the oath very seriously. In fact, as a Family Court Judge, Respondent administers the oath to the people who appear before her many times a day. Respondent already has concerns that some of the people who appear before her may have heard about the false news story that she was charged with conspiracy to commit perjury. These charges have impacted her deeply. (Tr. 108-09).

The only exhibits attached to her first sworn statement are her subpoena; acknowledgment of receipt of the subpoena; the March 25, 2021 Judge Stotler letter with multiple interlineations; the April 30, 2021 letter from Respondent, Judge Mary Ellen Griffith, and Judge David P. Greenberg to Judge Alan D. Moats, Chairperson of the JIC; the April 27, 2021 letter from Ms. Tarr to Respondent, Judge Griffith, and Judge Greenberg; the April 23, 2021 letter from Respondent, Judge Griffith, and Judge Greenberg to Ms. Tarr requesting an advisory opinion on the authority of the JIC to issue "warning" letters; and the April 6, 2021 letter from Respondent, Judge Griffith, and Judge Greenberg to Lisa Tackett. (JA at 390-405).

While there is no explanation in the record as to why Respondent was not afforded the opportunity to review the relevant IM's and other documents attached to the written complaint, the record does show that the "Dear Chief Justice Jenkins" email and document was accessed by somebody on April 12, 2021, which is prior to the taking of the statements from Respondent, Judge Stotler, and Joy Renee Campbell, Judge Stotler's Case Coordinator. (JA at 419).

3. Respondent corrects the record after reviewing all relevant documents

When Respondent received the initial written complaint in March, 2022, that was the first time she had seen a copy of her first sworn statement, which she was never given a chance to review, although she twice had requested that opportunity; the printout from her computer showing a document entitled "Dear Chief Justice Jenkins"; the one-sided IM's showing only messages from Respondent; and the April 6, 2021 emails from Respondent to Judge Stotler.[6] (JA at 247; Tr. 94-99).

After reviewing the complaint, Respondent obtained copies of both sides of the IM's with Ms. Campbell, which were attached to her answer. (JA at 435-59). Instead of sticking with all of her answers given in her first sworn statement, Respondent continued to be honest and candid by freely acknowledging that after reviewing the additional documents attached to the complaint as well

[6]While the West Virginia Rules of Civil Procedure are incorporated into Rules 2.9 and 2.10 of the West Virginia Rules of Judicial Disciplinary Procedure, these Rules are not referenced in Rule 2.2, which authorizes investigations and obtaining testimony. Under Rule 30(e) of the West Virginia Rules of Civil Procedure, every deponent has the absolute right to review the deposition transcript before it is finalized "to review the transcript or recording and, if there are any changes inform or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." Unfortunately, judges and lawyers, whose ethics are being challenged, are not afforded this same right to review sworn statements provided to disciplinary counsel. The end result is such an unreviewed and uncorrected sworn statement by a judge or lawyer can result in the issuance of a written ethics complaint, which is what occurred in the present case, whereas in a civil case, if any errors are noted, they easily are corrected.

as the complete IM's with Ms. Campbell, Respondent's recollection had been refreshed and she corrected some of the answers given. (Tr. 110).

During her first sworn statement, Respondent was not shown the various IM's between Respondent and Ms. Campbell. (JA at 30-44). Had Respondent been shown these IM's, her memory about reviewing an earlier version of the Judge Stotler letter would have been refreshed, she would have recalled pointing out a typo and providing the year to be put inside the parenthesis, and this entire ethics matter could have been avoided. (Tr. 93). Because these IM's were attached to the complaint filed against Respondent, she then was able to explain in her response that these IM's had refreshed her recollection regarding her review of the Judge Stotler letter prior to it being mailed. (Tr. 93). When Respondent was required to provide a second sworn statement, she remained honest and candid by providing answers that were consistent with her written answer as corrected and refreshed by reviewing the IM's and additional documents. (JA at 464-576).[7]

4. JIC issues "warning" letters

When the ethics charges were filed against Family Court Judge Louise Goldston[8] regarding a home view she had conducted, Respondent, who was then the President of the Family Court Judicial Association, was concerned about the impact Judge Goldston's case might have on all

[7]In the Special JDC's brief at 7, it is asserted, "Despite Respondent's, FDC Stotler's and Ms. Campbell's prior sworn testimony to the contrary, Respondent has since stipulated that the fax was the "Stotler letter.'" In her first sworn statement, Respondent was never asked specifically whether or not an earlier draft of the Stotler letter had been faxed to her. In fact, when Respondent gave her first sworn statement, she simply had no recollection of seeing a draft of the Stotler letter a couple of days prior to seeing it when it was delivered to her office. However, by the time Respondent agreed to Joint Stipulation of Fact No. 22, in which she acknowledges receiving a faxed version of the Stotler letter a few days before it was sent, Respondent had reviewed IM's and other documents that had refreshed her recollection.

[8]*Matter of Goldston*, 246 W.Va. 61, 866 S.E.2d 126 (2021).

judges because while there is a statute governing jury views, there is no statute authorizing bench views. (Tr. 27). Respondent did speak about this issue with Judge Charles Carl, who then was the President of the West Virginia Judicial Association. While he shared some of Respondent's concerns, ultimately the West Virginia Judicial Association chose not to get involved as an amicus in the Judge Goldston matter. (Tr. 27-28).

Respondent, Judge Greenberg, and several other Family Court Judges informally worked together on doing legal research while the charges against Judge Goldston were pending. They offered to do some legal research in an effort to lessen Judge Goldston's legal bill. This group never had any direct contact with Judge Goldston's lawyer. (Tr. 99). To communicate with each other, this informal group used their personal home email addresses. (Tr. 100). Thus, while Respondent did conduct some legal research on issues raised in Judge Goldston's case, she did not give her any advice and did not draft a line in any of her documents. (Tr. 61).

On October 14 or 15, 2020, Respondent, Judge Griffith, and Judge Greenberg wrote separate letters of support for Judge Goldston and mailed them to Deputy Counsel for the JIC Brian J. Lanham dated October 22, 2020. (JA at 10-14). Prior to sending the letters supporting Judge Goldston, Respondent, Judge Griffith, and Judge Greenberg had reviewed the applicable Code of Judicial Conduct and did not find any rule that prohibited judges from filing character references. Sending a letter is not providing testimony, which is prohibited by Rule 3.3 of the Code of Judicial Conduct. (Tr. 111-12; Joint Stipulation of Fact No. 12).

On or about October 21, 2020, the JIC issued JIC Advisory Opinion 2020-25, signed by the Honorable Judge Alan D. Moats, Chairperson of the JIC, advising that letters of support written by a judge in support of any litigant is improper. (JA at 15-17). On October 22, 2020, Mr. Lanham sent

separate "warning" letters to Respondent, Judge Griffith, and Judge Greenberg explaining that these letters of support were deemed by the JIC to violate several rules of the Code of Judicial Conduct.[9] However, instead of taking any more formal action, the JIC decided to issue a "warning" letter signed by Mr. Lanham. (JA at 18-23). Mr. Lanham advised Respondent that she should advise other judges not to send any similar letters of support and she did. (Tr. 66).

The "warning" letters did not identify any procedure available to Respondent to challenge or object to the "warning" nor did the letters explain what the legal basis was for issuing such a warning. "Warning" letters are not identified as one of the permissible sanctions under Rule 4.12 of the West Virginia Rules of Judicial Disciplinary Procedure. Respondent researched this issue and was unable to find any legal authority for the issuance of a "warning" letter to a judge, which letter could not be challenged. (Tr. 113). Respondent explained that she and Judge Griffith and Judge Greenberg were frustrated by these "warning" letters, which appeared to be some form of discipline. (Tr. 121-22).

Because Respondent, Judge Griffith, and Judge Greenberg were not aware of any legal authority supporting the issuance of a "warning" letter and there was no procedure identified for challenging the same, these three judges signed off on a letter dated April 6, 2021 and mailed to Lisa Tackett, who is employed by the Administrative Office of this Court, asking for guidance. (JA at

[9]The Special JDC asserts in its brief that it "is evident that the letter was sent with the direction and authority of the Judicial Investigation Commission." (Special JDC Brief at 5). Respondent respectfully disagrees with this characterization because there is no language in the letter asserting the JIC approved it and in the multiple attempts by Respondent, Judge Griffith, and Judge Greenberg seeking answers regarding the basis for these "warning" letters, nobody ever accepted responsibility for issuing these warnings nor did anyone explain the legal basis for these letters.

74-77).[10] These three judges also sent a letter dated April 23, 2021, to JDC Teresa Tarr, seeking an advisory opinion addressing the authority of the JIC to issue a "warning" letter. (JA at 78-80). Once again, the Special JDC mischaracterizes this letter as part of the campaign these three judges had against the JDC (Special JDC brief at 11) when, in reality, these three judges wanted a definitive answer regarding these warning letters.

On May 3, 2021, Respondent sent an email to Judge Moats, Chairperson of the JIC, with a letter dated April 30, 2021 attached written to Judge Moats and signed by Respondent, Judge Griffith, and Judge Greenberg. Also attached to this email was a copy of the April 6,2021 letter they had sent to Ms. Tackett as well as the April 27, 2021 letter from Ms. Tarr to these three judges explaining she and Mr. Lanham were disqualifying themselves from "handling any new complaints involving Judge Stotler or any other Judge who may have helped in the submission of Judge Stotler's 3/25/2021 letter." (JA at 83-87). Respondent was upset about Ms. Tarr's implication that Respondent and these two other judges somehow had helped Judge Stotler write his letter. (Tr. 70). Respondent and these two other judges legitimately were upset because a few weeks prior to April 27, 2021, the Stotler letter had been published in the media and there was a lot of controversy surrounding it. Thus, any association with the Stotler letter was perceived as possibly bringing other

[10]In the Special JDC's brief at 10, it is asserted that the allegations about the JDC's conduct included in the April 6, 2021 letter to Ms. Tackett signed Respondent and two other judges are "patently false." At the time this letter was written to the present, Respondent and the two other judges who signed off on this letter continue to believe the assertions made in the letter are true and to date, no person involved in this process has ever provided an explanation as to the authority for issuing a warning letter or whether a judge who receives a warning letter had any ability to challenge the same. Also, the letter to Ms. Tackett was not a further campaign against the JDC, but rather was another sincere attempt by these three judges to get a straight answer about the legal significance of a warning letter.

judges into this maelstrom.[11] That is why Respondent had such a strong reaction when Ms. Tarr implicated that somehow Respondent had been responsible for contributing to the substance of the Stotler letter.[12]

In a letter dated June 28, 2021, Judge Moats responded to the request from Respondent, Judge Griffith, and Judge Greenberg that their request for an informal opinion was considered by the JIC and was rejected because the request did not comply with the requirements of Rule 2.13 of the West Virginia Rules of Disciplinary Procedure. (JA at 148). Judge Moats thanked these three judges for the inquiry and did not make any comment suggesting that he thought the letter somehow was inappropriate or an abuse of their office.

Despite their multiple requests to various individuals, these three judges never received a definitive response explaining the authority of the JIC or Mr. Lanham to issue a "warning" letter. (Tr. 73-74). Respondent denied that sending the letter to Judge Moats, as the Chairperson of the JIC, inquiring about the authority to issue a "warning" letter was an inappropriate use of her office. (Tr. 76). Respondent acknowledged she was annoyed by the implications made by Ms. Tarr and was concerned about the "warning" letter, particularly because she was planning to apply for a position in the Intermediate Court of Appeals. Judge Greenberg was very concerned because he was close

[11]In her second sworn statement, Respondent testified that once the Stotler letter was made public, there was a buzz about the letter and it apparently had ruffled some feathers. (JA at 538).

[12]The Special JDC's citation of the "Resolution of the West Virginia Family Judicial Association May 13, 2021" (Special JDC brief at 13) is irrelevant to the allegations made against Respondent, who was not the author of the Resolution. The Resolution was based upon anecdotal evidence presented during that conferences and speaks volumes about the concerns that many Family Court Judges have with the JDC and the way the JDC investigates and prosecutes ethics cases. The perception that these Family Court Judges have of the JDC, regardless of whether their views are accurate or not, is a larger problem that this Court and the JDC may want to address in the future so that any perceived biases are dispelled.

to retirement and he had never been disciplined. (Tr. 77-78). In the letter to Judge Moats, these three judges did request that Ms. Tarr be recused from all future cases involving these judges. (Tr. 80-81).

5. Respondent's limited involvement with the Judge Stotler letter

Respondent acknowledged that the March 18 version of the Judge Stotler letter was saved on her computer, but she explained her computer automatically saved this document and gave it the title "Dear Chief Justice Jenkins," which is not something that she affirmatively saved to her computer.[13] (Tr. 35). The March 18 version of the Judge Stotler letter is different than the final March 25 letter Judge Stotler mailed. (Tr. 38-39). Thus, while Respondent agreed to Joint Stipulation of Fact No. 20, which addresses what was found on her office computer, she had no knowledge that this document was on her computer when she was questioned in her first sworn statement. (Tr. 114). Similarly, when she agreed to Joint Stipulation of Fact No. 21 about what appears on her computer, Respondent had no knowledge of this document at the time of her first sworn statement. (Tr. 115).

In the Joint Exhibit Notebook (JA 30 through 44) are IM's between Respondent and Ms. Campbell. There is no mention in the IM's sent on March 19, 2021, about Ms. Campbell emailing

[13]The Special JDC asserts "The forensic data from Respondent's court issued computer clearly proves the first draft of the Stotler letter **was created** on Respondent's computer on Friday, March 19, 2021, at 3:31 pm." (Emphasis added). (Special JDC brief at 16-17). At best, the forensic data shows a document received on Respondent's computer was opened at 3:31.00 and modified at 3:31.00, which suggests only that an email with a document attached had been opened for a short time. It is listed as a download on Respondent's computer, as opposed to a Word document that she created. Furthermore, the forensic data specifically states, "This file came from another computer and might be blocked to help protect this computer." (JA at 26). Ultimately, counsel for Respondent will leave the full import of this forensic data to others who are more knowledgeable. However, Respondent respectfully submits that this forensic data does not "clearly prove" that the Stotler letter was created on Respondent's computer.

to Respondent a version of the Judge Stotler letter. (JA at 32-36). On March 22, 2021, Ms. Campbell sends an IM to Respondent asking Respondent for her title and the title for Keith Hoover. (JA at 39-40). From this IM, there is no indication that Ms. Campbell was asking this information in connection with the Judge Stotler letter. In fact, Respondent testified that she had no idea that Ms. Campbell was asking for about the titles for her and Mr. Hoover in connection with the Judge Stotler letter. (Tr. 43,115). After being asked about this IM, Respondent agreed that the March 18 version of the Judge Stotler letter did not list Respondent or Mr. Hoover, but that both are listed in the final March 25 letter. (Tr. 42). The earlier discussion in the IM's between Respondent and Ms. Campbell on March 22, 2021, related to some orders in a couple of cases. (Tr. 43).

The IM's between Respondent and Ms. Campbell on March 24, 2021, beginning at 10:00 a.m., relate to the Judge Stotler letter being faxed to Respondent. (JA at 40-42). After advising Ms. Campbell that one page was missing, the letter was refaxed to Respondent and Respondent explained in an IM that there was a typo on page two and that the year in parenthesis should be 1956. (Tr. 45-46; JA at 42). Ms. Campbell corrected these two minor errors in the final version of the Stotler letter. Although Respondent proofread this faxed version of the Judge Stotler letter, she did not help draft the letter and never spoke to Judge Stotler before he mailed out the letter. Proofreading is different than drafting or editing.[14] (Tr. 47, 119-20). In her first sworn statement, Respondent testified that she was surprised when she received the letter in the mail because Judge

[14]In the Special JDC's brief at 17, the Special JDC asserts that "forensic evidence clearly demonstrates" that Respondent spoke with Judge Stotler about the contents of his letter prior to him mailing it out. There is absolutely no forensic or other evidence supporting this assertion. The testimony from Respondent and Ms. Campbell is they communicated through IM's and faxes. There is no testimonial or forensic evidence of Respondent having any conversation with Judge Stotler about the contents of his letter prior to March 25, 2021.

Stotler did not have reputation for speaking out and Respondent was surprised he had taken this action. (Tr. 48).[15]

In the first sworn statement, Respondent stated that when she received the Judge Stotler letter in the mail, that was the first time she had seen or heard about the contents of this letter. (Tr. 48; JA at 320). At the time of the first sworn statement, Respondent had no recollection of these IM's with Ms. Campbell or of seeing an earlier draft of the Judge Stotler letter. (Tr. 116). Respondent maintained that the answers she gave during her first sworn statement were candid and honest, based upon her memory at that time. In her second sworn statement, Respondent explained the Judge Stotler letter was not particularly impactful or significant to her. (JA at 537-39).

The March 25, 2021 Judge Stotler letter was faxed by some unknown person to Chris Dickerson, a reporter for the West Virginia Record, who published a story on this letter on April 2, 2021. (Tr. 54; JA at 392-94). The Special JDC does not suggest that Respondent directly emailed the Stotler letter to Mr. Dickerson. (Special JDC brief at 18). Once the Stotler letter was reported

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[15]In her first sworn statement, Respondent actually was asked, "Do you know **why** you were CC'd on this letter?" to which Respondent replied, "I do not." (Emphasis added). (JA at 316). However, in the Special JDC's brief at 16, this same quote is presented as "....do you know **what** you're CC'd on this letter?" To this day, Respondent does not know **why** Judge Stotler copied her on his letter, other than the fact that she was the President of the Family Court Judicial Association at the time. Also, it should be noted that the version of the Stotler letter Respondent saw a few days before it was mailed out did not have her name listed as one of the recipients copied on the letter. (JA at 27-29).

Similarly, the Special JDC's brief at 16, further accuses Respondent of failing to be candid or truthful when she testified that when she read the Stotler letter delivered to her office, that was the first time she had seen or heard about the contents of the letter. Because Respondent simply did not recall seeing a draft of the Stotler letter a few days before receiving the final version, this testimony merely is an example of a lapse of memory. Furthermore, the Special JDC never provided clear and convincing evidence proving that for some unknown reason, Respondent at the time of her first sworn statement decided to knowingly and intentionally lie under oath for a minor matter where she had no reason for doing so.

in the media, it was evident this letter was seen as controversial and that it would be the focus of investigation. The fax stamp visible at the top of the page shows "Stotler/Rock" indicating that at some point this letter had been faxed from Respondent's office fax machine. Respondent freely acknowledged that she had faxed a copy of this letter to some other Family Court Judges, who also had received "warning" letters. (Tr. 55). Included in the record are copies of this letter faxed by Respondent to Judge Greenberg and Judge Griffith. (JA at 59-64; Tr. 118). Respondent denied being the person who faxed the Judge Stotler letter to Mr. Dickerson. (Tr. 117).

6. Emails with Judge Goldston's objections attached

In her first sworn statement, Respondent denied playing any role in drafting Judge Goldston's objections to her JHB's recommendations and did not recall whether she had reviewed Judge Goldston's objections prior to Judge Goldston filing them. (Tr. 57; JA at 311-12). To the extent that there are two April 6, 2021 emails from Respondent's home computer to Judge Stotler's office email address where these objections had been forwarded, Respondent testified they were forwarded by mistake. (Tr. 57; JA at 68-73). Respondent had no memory of intentionally forwarding these emails to Judge Stotler and she had no reason to do so. Judge Stotler never requested Respondent to provide Judge Goldston's objections. Judge Stotler would have received the objections through this Court. (Tr. 61, 119).

Respondent explained her intent was to forward the objections to Judge Greenberg, but apparently when she was typing his email address and typed the letter "G" in, the email self-populated with Judge Glen Stotler.[16] (Tr. 58-59). Respondent explained that as this group of judges

[16]The court reporter has Respondent's testimony was that she had typed "G-N" when actually Respondent testified she typed the letter "G in."

and others exchanged emails, sometimes an email was not being received. As a result, Respondent sometimes would forward emails she had received either when someone sent a text explaining a particular email had not been received or, more generally, in an effort to make sure each of the emails sent had been received by everyone. (Tr. 59-60, 100-01). Respondent never intentionally sent any Judge Goldston documents to Judge Stotler because that would not have been appropriate. (Tr. 61). Judge Stotler never asked Respondent for any documents in the Judge Goldston. All of those documents would have been sent to Judge Stotler by this Court, so there was no reason for him to ask Respondent for these documents. (Tr. 119; JA at 497-99).

Respondent denied having any reason to send any documents to Judge Stotler about the Judge Goldston case and explained she knew nothing about these two emails until she reviewed the complaint filed against her. (Tr. 59-60). Judge Stotler was never involved in this informal group of Family Court Judges and others providing legal research for Judge Goldston. (Tr. 101). Other than these two emails, there was no evidence presented of any other emails or IM's sent to Judge Stotler by Respondent relating to the Judge Goldston case.

B. Joy Renee Campbell's testimony

Joy Renee Campbell is the family case coordinator for Judge Stotler and has served in that position for about twelve years. During the week of March 19, 2021, Ginger Johnson, the only other employee in Judge Stotler's office, was absent due to medical reasons. (Tr. 169). On November 15, 2021, about two months prior to Respondent giving her first sworn statement, Ms. Campbell gave a sworn statement to the Special JDC. (JA at 149-209). Prior to giving this statement, Ms. Campbell did not do anything in preparation and assumed the statement would be addressing the Judge Stotler letter. (Tr. 171). Once she was placed under oath, Ms. Campbell testified truthfully

to the best of her ability and based upon her memory at that time. (Tr. 173). During her sworn statement, the Special JDC never presented Ms. Campbell with copies of the IM's between Respondent and Ms. Campbell in March, 2021.

In her sworn statement, Ms. Campbell testified that no other person, besides maybe Judge Stotler's wife, had reviewed the Judge Stotler letter before it was mailed. (JA at 174). Ms. Campbell explained she may have discussed the Judge Stotler letter with Ms. Johnson. (JA at 178).

Ms. Campbell denied ever speaking with Respondent about the Judge Stotler letter and further denied speaking with anyone in Respondent's office about this letter. (JA at 182). When she typed the letter, she did not give the letter to anyone other than Judge Stotler. Ms. Campbell further denied taking any corrections to this letter from anyone other than Judge Stotler. Finally, Ms. Campbell denied ever receiving any edits to this letter from anyone other than Judge Stotler. (JA at 207-08). At the time she gave these answers, Ms. Campbell believed her responses were accurate to the best of her memory. (Tr. 178). Thus, both Respondent and Ms. Campbell simply did not recall having any interaction at all in connection with the Judge Stotler letter prior to it being finalized and mailed.[17]

Subsequent to giving this statement, Ms. Campbell reviewed the IM's between Respondent and herself during the relevant time period of March 2021. (Tr. 178). After reviewing the IM's between Respondent and herself, Ms. Campbell testified that she did not know these IM's continued

[17]The Special JDC describes Ms. Campbell's testimony as being false, without ever acknowledging the undisputed fact that neither Respondent nor Ms. Campbell had any recollection when they provided their first sworn statements that a few days before the March 25, 2021 Stotler letter was finalized and mailed, Respondent and Ms. Campbell had exchange IM's and a draft of the letter had been faxed to Respondent. Just as Respondent had no particular reason to lie about reviewing an earlier draft of the Stotler letter, neither did Ms. Campbell have any motivation to deny that Respondent had seen an earlier draft.

to exist once they were sent and she had not reviewed these IM's prior to giving her sworn statement. (Tr. 173). The first time Ms. Campbell reviewed these IM's was just a few days prior to this hearing. (Tr. 181). When asked to examine the printout from Respondent's computer showing that a document saved as "Dear Chief Justice Jenkins" had been sent to Respondent, Ms. Campbell acknowledged she is the only person who could have sent that earlier version of the Judge Stotler letter. However, she had no memory of sending it and she was unable to find any email from that time period when this email was sent by her. (Tr. 181-82; JA at 24-26). Furthermore, there is no reference in any of these IM's in March, 2021, where Ms. Campbell mentioned that she had emailed a version of the Judge Stotler letter on March 18 or 19, 2021. (Tr. 183).

One of the March 22 IM's from Ms. Campbell to Respondent sought to make sure the titles for Respondent and Mr. Hoover were correct on the bottom of the Judge Stotler letter. (Tr. 184; JA at 39-40). However, from the IM, there is no indication that Ms. Campbell was seeking this information for the Judge Stotler letter. (Tr. 188).

After reviewing the IM's between Respondent and Ms. Campbell that occurred on March 22, 2021, Ms. Campbell testified those IM's refreshed her memory that she had faxed a version of the Judge Stotler letter to Respondent prior to the final version of the letter being mailed. (Tr. 184-86; JA at 39-42). If she had been shown these IM's during her sworn statement, her answers would have been different and more accurate. (Tr. 186). Ms. Campbell denied deliberately and intentionally lying under oath during her sworn statement. (Tr. 187). Ms. Campbell further denied that she ever had a discussion with Respondent where they both agreed to deliberately lie under oath during their sworn statements. (Tr. 187).[18]

[18]Retired Judge Charles E. Parsons and lawyer Victor Alan Riley were the final witnesses. They testified to Respondent's good reputation for honesty and integrity. (JA at 161-63, 165-66).

IV. Summary of the argument

A violation of Rule 2.16(A) requires proof of more than a lapse of memory or mere negligence. *Matter of Ferguson*, 242 W.Va. 691, 841 S.E.2d 887 (2020), and *In the Matter of: Williams*, ___ W.Va. ___, 887 S.E.2d 231 (2023), establish that Rule 2.16(A) can be violated by a judge who intentionally lies to the JDC, but a mere mistake is insufficient to sustain a violation of this rule. Although Rule 2.16(A) does not include the word "knowingly" or "intentionally," a higher level of mental culpability can be read into this rule based upon the commonly accepted definitions of "candid" and "honest."

The duty of a judge to be candid and honest with judicial disciplinary agencies requires a judge to be truthful and to refrain from being dishonest and making deliberately false statements to the Board and its agents. Candid is defined as sincere honesty without any deception or duplicity. A judge does not violate Rule 2.16(A) when the judge unintentionally makes a false or misleading statement. To constitute judicial misconduct, lack of candor must be knowing and willful. If a judge provides an inaccurate or false statement under oath, that does not constitute misconduct unless when making the statement judge did not believe it to be true.

The JHB found there was no clear and convincing evidence that the Respondent was intentionally dishonest, but somehow the JHB found Respondent she was less than candid. Therein lies the key to this case. If, as the JHB found, Respondent was not knowingly lying during her first sworn statement when she had no recollection of having seen an earlier draft of the Stotler letter, then how can she be found by clear and convincing evidence of failing to be candid?

Respondent was never intentionally deceitful. At the time she was asked these questions about the Judge Stotler letter, Respondent answered as completely and honestly as her memory

permitted at that time. Respondent did not benefit in any way by failing to recall seeing the Judge Stotler letter prior to receiving it in the mail and certainly reviewing such a letter was not a violation any statute or ethics rule. What occurred during the first sworn statement was a lapse of memory rather than an intentional lie. Reviewing a draft of the Judge Stotler letter was not a crime or unethical. Respondent could not imagine any reason why a judge under these facts would have lied deliberately about seeing a draft of a letter. Furthermore, the fact that neither Respondent nor Ms. Campbell recalled having any interaction with each other regarding the Judge Stotler letter prior to it being mailed and Judge Stotler and Ms. Campbell did not recall faxing the letter to Respondent supports the conclusion that all of them were telling the truth at the time they gave their sworn statements.

There is no evidence in this record of Respondent, Judge Griffith, or Judge Greenberg "drafting," "submitting," "writing" "sending" or otherwise had any association with Judge Stotler's March 25, 2021 letter. While the JHB engages in a discussion of parsing words, it is the JHB that is parsing the word "association" and concluding this statement lacked candor, even if there is no evidence that Judge Griffin or Judge Greenberg knew anything about the Stotler letter prior to it being mailed. How can these three judges stating in a letter to Judge Moats that they had no association with the Judge Stotler letter somehow be twisted into supporting a Rule 2.16(A) violation against Respondent?

Throughout the **RECOMMENDED DECISION**, the JHB gave substantial credence to Respondent's testimony and found her to be persuasive. Even though this Court makes an independent review of the record in judicial disciplinary cases, this Court will defer to the Board's credibility determinations and resolution of conflicting evidence.

V. Statement regarding oral argument and decision

The Court already has determined that Rule 19 oral argument has been ordered in this case. Because the Court has never issued a judicial ethics opinion addressing whether proving a violation of Rule 2.16(A) by clear and convincing requires evidence that a judge knowingly and deliberately lied or failed to be candid with disciplinary authorities or whether a mere lapse in memory can sustain such a charge, a written decision by a Justice would be appropriate to provide this needed guidance.

VI. Argument

A. Proving a violation of Rule 2.16(A) requires clear and convincing evidence that the judge knowingly and willfully lied or failed to be candid

In its recommended order, the JHB did not address specifically a critical legal issue raised by the facts in this case: Can a judge be held liable for violating Rule 2.16(A) based upon a mere lapse of memory or does there have to be clear and convincing evidence that the judge lied or failed to be candid to sustain this charge?[19] Although this issue was thoroughly briefed by both parties, the JHB makes no mention of this issue in its recommended order.

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[19]The Special JDC has the burden of proving the allegations in the Statement of Charges filed against Respondent by clear and convincing evidence. Rule 4.5, West Virginia Rules of Judicial Disciplinary Procedure; Syllabus Point 3, *Goldston*; Syllabus Point 2, *Matter of Ferguson*, 242 W.Va. 691, 841 S.E.2d 887 (2020); Syllabus Point 4, *In Re Pauley*, 173 W.Va. 228, 235, 314 S.E.2d 391, 399 (1983); Syllabus Point 1, *Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994); Syllabus Point 1, *In re Starcher*, 202 W.Va. 55, 501 S.E.2d 772 (1998).

Clear and convincing proof is "the highest possible standard of civil proof defined as `that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.'" *Wheeling Dollar & Savings Trust Co. v. Singer*, 162 W.Va. 502, 510, 250 S.E.2d 369, 374 (1979)(citations omitted).

Respondent's failure to recall certain faxes, emails, and IM's that she saw almost eleven months prior to giving her first sworn statement forms the basis for Charges Three through Seven, where it is alleged Respondent violated Rule 2.16(A) "Cooperation with Disciplinary Authorities." In fact, more charges have been alleged against Respondent, who merely was a witness in the Judge Stotler investigation, than were filed against Judge Stotler.

Rule 2.16(A) provides, "A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies." One of the legal questions raised in this case is what level of mental culpability must the Special JDC prove by clear and convincing evidence to establish these violations? Prior to the hearing, in discussions with counsel for Respondent, the Special JDC suggested that a judge may be liable for violating Rule 2.16(A) if the judge unintentionally provides an incorrect answer under oath, based upon the judge's memory at the time.

So, according to the Special JDC, a judge who testifies under oath in a judicial disciplinary investigation to an incorrect date or fails to recall an innocuous fact may be sanctioned under Rule 2.16(A). While nonlawyer deponents regularly are deposed and given the opportunity to correct any errors in their deposition transcript, the Special JDC asserts not only are judges and lawyers prohibited from reviewing and correcting their sworn statements, they also can suffer serious professional consequences for any erroneous answers provided.

Counsel for Respondent maintained, consistent with the case law cited below, that a violation of Rule 2.16(A) requires proof of more than a lapse of memory or mere negligence. To date, this Court has issued two decisions where a judge was accused of violating Rule 2.16(A). In *Matter of Ferguson*, 242 W.Va. 691, 700, 841 S.E.2d 887, 896 (2020), this Court concluded the magistrate violated Rule 2.16(A), when "**he lied to the JDC during his sworn statement** when he denied

acting in this disrespectful and coercive manner. Such behavior by a judicial official is wholly unacceptable, especially when it occurs in the context of a law enforcement matter." (Emphasis added). Clearly *Ferguson* involved a knowing and intentional falsehood uttered by the magistrate in an effort to benefit himself.

In *In the Matter of: Williams*, ___ W.Va. ___, 887 S.E.2d 231 (2023), this Court found that several alleged violations of Rule 2.16(A) had not been proven by clear and convincing evidence. In upholding the JHB's conclusion that an alleged violation of Rule 2.16(A) relating to a second Wal-Mart incident, this Court explained a mere mistake is insufficient to prove a violation of this rule:

> Similarly, we agree with the JHB that Respondent did not lack candor by failing to disclose the second Wal-Mart incident. JDC's argument in this respect is that Respondent knew JDC was "interested" in the first Wal-Mart incident because it had asked him about it and if the second incident was no big deal, why not disclose it? **This argument presupposes something to hide. Respondent made a mistake, and everyone involved knew it was a simple mistake. Of a 168-page transcript of his interview with JDC, Respondent was asked just four questions about the 2019 Wal-Mart incident. To say that the 2019 Wal-Mart incident was on JDC's radar is fair, but it was barely a blip in the overall scheme such that Respondent did not lack candor for failing to disclose a second incident. That is particularly evident given that Prosecutor See and Chief Riggleman were also aware that JDC was "interested" in the 2019 Wal-Mart incident, and it did not occur to either party to disclose the second incident to JDC either.** For those reasons, we do not find clear and convincing evidence that Respondent lacked candor with respect to the Wal-Mart incident. (Emphasis added). 887 S.E.2d at 250.

Ferguson and *Williams* establish that Rule 2.16(A) can be violated by a judge who intentionally lies to the JDC, but a mere mistake is insufficient to sustain a violation of this rule. Although Rule 2.16(A) does not include the word "knowingly" or "intentionally," a higher level of

mental culpability can be read into this rule based upon the commonly accepted definitions of "candid" and "honest." This precise issue was addressed in *In re: Conduct of Karasov*, 805 N.W.2d 255, 268-69 (Minn. 2011), where the Minnesota Supreme explained what has to be proven to establish a violation of Rule 2.16(A):

> A duty to be candid and honest with judicial disciplinary agencies **requires a judge to be truthful and to refrain from being dishonest and making deliberately false statements to the Board and its agents.** *See In re King*, 857 So.2d 432, 449 (La.2003) ("As recognized by other jurisdictions, [h]onesty is a minimum qualification expected of every judge." (citation omitted) (internal quotation marks omitted)); Webster's Third New Int'l Dictionary, 325, 1086 (1961) (defining "candid" as "indicating or suggesting sincere honesty and absence of deception and duplicity" and defining "honest" as "free from fraud or deception: legitimate, truthful"). This duty also includes a duty not to make material omissions during a disciplinary investigation. *See Adams v. Comm'n on Judicial Performance*, 10 Cal.4th 866, 42 Cal.Rptr.2d 606, 897 P.2d 544, 568 (1995) (disciplining a judge for making false statements and material omissions during a judicial disciplinary investigation); *see also Heidbreder v. Carton*, 645 N.W.2d 355, 367 (Minn.2002) ("A misrepresentation may be made by an affirmative statement that is itself false or by concealing or not disclosing certain facts that render facts disclosed misleading."). (Emphasis added).

Similarly, in *In re Kroger*, 167 Vt. 1, 7-8, 702 A.2d 64, 68-69 (1997), the Vermont Supreme Court explained that unintentionally false statements made by a judge in a judicial disciplinary proceeding is not an ethics violation:

> Although the standard is admittedly high, **judges do not violate the Code when they unintentionally make false or misleading statements-that is, when they make mistakes.** *See In re Davey,* 645 So.2d 398, 406-07 (Fla.1994) (**to constitute judicial misconduct, lack of candor must be knowing and willful; giving inaccurate or false statement under oath not misconduct unless when making statement judge did not believe it to be true**); *In re Richter,* 409 N.Y.S.2d 1013, 1016-17 (Ct.Jud.1977) (charge that judge gave false testimony to judicial conduct commission not proven where statements were not intentionally or willfully false; mistake in

> testimony does not constitute false swearing). The question before us, therefore, is whether respondent knowingly made false, deceptive and misleading statements under oath at the VACJ hearings. Respondent does not dispute that such conduct, if proven, is an appropriate basis for discipline. See, e.g., *in Re fowler,* 602 So.2d 510, 511 (Fla.1992) (judge convicted of giving false statements to police violated code of judicial conduct; lying is serious offense that affects integrity of judicial system as well as public confidence in both judicial process and particular judge); *In re Perry,* 53 A.D.2d 882, 385 N.Y.S.2d 589, 590 (1976) (giving of false testimony by member of judiciary is inexcusable, as judicial officers have responsibility to seek out truth and evaluate credibility of others). (Emphasis added).

Thus, Rule 2.16(A) requires proof by clear and convincing that a judge, in responding to questions posed by disciplinary counsel, deliberately made false statements. In other words, a mere lapse in memory or a mistake or a "negligent" incorrect statement is not sufficient to sustain this charge.

In *Inquiry Concerning Davey*, 645 So.2d 398, 406-07 (1994), the Florida Supreme Court explained to prove that a judge failed to be candid, this failure has to be knowingly and willingly:

> **[T]he lack of candor must be knowing and willful**. *See, e.g., In re Berkowitz,* 522 So.2d 843 (Fla.1988). It is not enough that the Commission finds a particular judge's version of events unworthy of belief, or finds the testimony of another witness more credible or logical. If such were the case, then every judge who unsuccessfully defends against a charge of misconduct would be open to a charge of lack of candor. **Rather than showing simply that a judge made an inaccurate or false statement under oath, the Commission must affirmatively show that the judge made a false statement that he or she did not believe to be true.** (Emphasis added).

Because judges are lawyers, judges also must comply with the Code of Professional Conduct. Often in judicial disciplinary cases, references sometimes are made to the Code of Professional Conduct. For example, in *Williams*, 887 S.E.2d at 249, this Court held that one of the Rule 2.16(A) allegations proven by clear and convincing evidence also violated Rule 8.4 of the Code of Professional Conduct.

Some of the Rules of Professional Conduct require proof that the lawyer knowingly violated the standard. Rule 4.1 of the Rules of Professional Conduct entitled "Truthfulness in Statements to Other" specifically requires that a lawyer shall not "knowingly" make false statements or fail to disclose a material fact. Rule 3.3 of the Rules of Professional Conduct entitled "Candor Toward the Tribunal" specifically prohibits a lawyer from "knowingly" commit the various acts listed thereunder.

However, other Rules included in the Code of Professional Conduct are silent with respect to whether there has to be proof of a knowing or intentional violation of the standard. Several courts have addressed the issue of "misrepresentation" and "dishonesty" in applying Rule 8.4(c) of the Code of Professional Conduct or its predecessor DR 1-102(A)(4), which provides it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In contrast to Rules 3.3 and 4.1 cited above, these rules are silent on what level of mental culpability is required to prove a violation.

The Pennsylvania Supreme Court in *Office of Disciplinary Counsel v. Anonymous Attorney*, 552 Pa. 223, 233, 714 A.2d 402, 407 (1998), reviewed decisions from other jurisdictions analyzing Rule 8.4(c), and concluded a negligent misrepresentation is insufficient to prove a violation of this rule:

> It is evident from our review of other jurisdictions' decisions that our sister states have required a showing of some level of mental culpability, beyond mere negligence, on the part of the accused attorney before an attorney's violation of either DR 1-102(A)(4) or Rule 8.4(c) for a misrepresentation is made out.
>
> * * *
>
> Thus, we hold that **a culpable mental state greater than negligence is necessary to establish a *prima facie* violation of Rule 8.4(c).**

> **This requirement is met where the misrepresentation is knowingly made, or where it is made with reckless ignorance of the truth or falsity thereof.** We agree with the *Rader* court that no actual knowledge or intent to deceive on the part of the Respondent is necessary to establish a *prima facie* violation; the element of scienter is made out if Respondent's conduct was reckless, to the extent that he can be deemed to have knowingly made the misrepresentation. Thus, for the purpose of establishing a prima facia case, recklessness may be described as the deliberate closing of one's eyes to facts that one had a duty to see or stating as fact, things of which one was ignorant. (Emphasis added)(Footnote omitted).

See also People v. Rader, 822 P.2d 950, 953 (Colo. 1992)(en banc)("Under certain circumstances, an attorney's conduct can be so careless or reckless that it must be deemed to be knowing and will constitute a violation of a specific disciplinary rule. *State ex rel. Nebraska State Bar Ass'n v. Holscher,* 193 Neb. 729, 230 N.W.2d 75, 79 (1975)....We conclude that the hearing board properly found that the respondent made a number of representations with at least a reckless disregard for their truth or falsity and that such conduct violated DR 1–102(A)(4)."); *Iowa Supreme Court Attorney Disciplinary Board v. Kress*, 747 N.W.2d 530, 538 (Iowa 2008)(This court has held that intent is a required element for misrepresentation under DR 1–102(A)(4). *Iowa Supreme Ct. Bd. of Prof'l Ethics & Conduct v. Moorman,* 683 N.W.2d 549, 553 (Iowa 2004). We believe there is also an intent requirement for fraud, dishonesty, and deceit under DR 1–102(A)(4). *Att'y Grievance Comm'n of Maryland v. Clements,* 319 Md. 289, 572 A.2d 174, 179 (1990)."); *In re Simpson*, 650 P.2d 1223, 1227 (1982)("We agree that DR 1-102(A)(4) is restricted to intentional acts of misconduct. *See In re Stump*, 621 P.2d at 264, 266-68; *Buchanan v. State*, 554 P.2d 1153, 1162 (Alaska 1976). Accordingly, we conclude that a misrepresentation which is determined to be the result of gross negligence does not constitute a violation of DR 1-102(A)(4).").

B. The Special JDC failed to prove by clear and convincing evidence that Respondent knowingly and willfully failed to be candid about seeing the Stotler letter a couple of days prior to receiving the final version in her office

The JHB recommended that the evidence presented was sufficient to prove Charge One, Charge Four, and Charge Seven. While noting that this standard "goes beyond technical truthfulness," the JHB provided an extensive quote regarding lack of candor from *In re Ethics Investigation of Allegations Raised by UDF*, 2023 WL 3327251 (N.D.Tex. 2/6/2023), which is a United States Magistrate's recommended order investigating allegations of improper conduct on the part of federal prosecutors. While this decision is not particularly applicable to the facts in the present case, it is noted that this Magistrate, in defining lack of candor, did explain that "a lawyer's duty not to allow a tribunal to be misled by false statements, either of law or of fact, **that a lawyer knows to be false.**" (JHB **RECOMMENDED DECISION** at 25). Thus, this definition of a lawyer's duty of candor is very similar to the foregoing cases cited by Respondent, where to prove lack of candor, there has be to evidence that the judge or lawyer knew the statement to be false at that time.

To demonstrate that the JHB failed to require the Special JDC to meet the required burden of proof with respect to Charge One, Charge Four, and Charge Seven, Respondent will first address these three charges.

1. Charge One: Rule 1.1 "Compliance with the law"

The JHB, with one judge dissenting, found that Charge One was proven because the Special JDC had proven two of the alleged violations of Rule 2.16(A). (JHB **RECOMMENDED DECISION** at 1). Charge One is a general charge that is established only if the Special JDC had proven by clear and convincing evidence that Respondent violated Rule 2.16(A) as alleged in

Charges Three through Seven. In other words, it is not an independent charge, but rather is a charge that additionally is violated in the event the Special JDC proves any of the Rule 2.16(A) charges. Because the JHB found the Special JHB failed to prove Charge Two, Charge Three, Charge Five, Charge Six, and Charge Eight, Respondent will address how the evidence was insufficient as a matter of law to prove Charge Four and Charge Seven.

2. Charge Four: Rule 2.16(A) "Cooperation with Disciplinary Authorities"

The JHB, with one judge dissenting, found that Respondent lacked candor regarding her knowledge of the Stotler letter as alleged in Charge Four. (JHB **RECOMMENDED DECISION** at 2). Charge Four alleges a violation of Rule 2.16(A) "Cooperation with Disciplinary Authorities" in connection with her first sworn statement and her answers regarding the Judge Stotler letter. Specifically, this charge alleges "Despite receiving and reviewing a copy of the first version `Stotler Letter' on or about March 19, 2021, on or about January 31, 2022, Respondent testified under oath that prior to her receipt of the March 25, 2021 letter she had not previously seen or heard about the contents of the `Stotler Letter.'"

Somehow the JHB found "it is not credible that [Respondent] forgot that she had seen and reviewed the Stotler letter, indicating `the letter looks good,' and discredits her testimony that it was `inconsequential' within the context of substantial consternation regarding the imposition of discipline on Judge Shuck, the pendency of proceedings against Judge Goldston, the potential impact of the resolution of Judge Goldston's case on the authority of Family Court Judges to conduct bench views, and the eventual adoption of a resolution by the West Virginia Family Judicial Association accusing Judicial Disciplinary Counsel of prosecutorial misconduct, dishonesty, and demanding the termination of their employment." (JHB **RECOMMENDED DECISION** at 23). After making these findings, the JHB then concludes, "The Board **does not find clear and convincing evidence**

that the Respondent was intentionally dishonest but finds clear and convincing evidence that she was less than candid." (*Id.*). Therein lies the key to this case. If, as the JHB found, Respondent was not knowingly lying during her first sworn statement when she had no recollection of having seen an earlier draft of the Stotler letter, then how can she be found by clear and convincing evidence of failing to be candid?

Respondent denied violating Rule 2.16(A) in this context, based upon the testimony stated above as well as in her sworn written answer. Respondent was never intentionally deceitful. (Tr. 127). At the time she was asked these questions about the Judge Stotler letter, Respondent answered as completely and honestly as her memory permitted at that time. Respondent did not benefit in any way by failing to recall seeing the Judge Stotler letter prior to receiving it in the mail and certainly reviewing such a letter was not a violation any statute or ethics rule. (Tr. 127-28). What occurred during the first sworn statement was a lapse of memory rather than an intentional lie. (Tr. 128). Reviewing a draft of the Judge Stotler letter was not a crime or unethical. (Tr. 129). Respondent could not imagine any reason why a judge under these facts would have lied deliberately about seeing a draft of a letter. (Tr. 130). Merely reading an early draft of the Judge Stotler letter was not a crime nor was it a violation of the Judicial Code of Conduct. Furthermore, keep in mind that when Respondent reviewed the earlier draft, it was only a few days prior to receiving the final Stotler letter in her office. The fact that Respondent has not been blessed with an eidetic memory permitting her to have perfect recall of every email and letter she has ever seen in her life and further to note the precise date and time when such items were reviewed should not be used as a basis for sanctioning her lapse of memory.

During her first sworn statement, Respondent was not provided a copy of the relevant IM's between Respondent and Ms. Campbell, which would have refreshed her recollection. In fact, when

Respondent did review of copy of one side of these IM's that were attached to the Special JDC's written complaint, Respondent explained in her answer, her second sworn statement, and her testimony in this hearing that while she did not recall during her first sworn statement seeing an earlier draft of the Judge Stotler letter, the IM's and other related documents refreshed her recollection that she had, in fact, seen an earlier draft of this letter. Thus, once Respondent reviewed documents showing that she had, in fact, reviewed an earlier draft of the Stotler letter, she did not hesitate to clear up the record on this point.

A mere lapse in memory is not sufficient to sustain a charge under Rule 2.16(A). Additionally, the JHB completely ignored the undisputed fact that when Ms. Campbell was asked in her first sworn statement about whether or not she had provided a version of the Judge Stotler letter to Respondent prior to it being finalized and mailed, she similarly had no recollection of having any such communications with Respondent. (JA at 182, 207-08; Tr. 174, 178). Furthermore, the Special JDC acknowledged on the record that in their sworn statements, neither Judge Stotler nor Ms. Campbell had any recollection that a version of the Judge Stotler letter had been faxed to Respondent on March 24, 2021. (Tr. 45). The fact that neither Respondent nor Ms. Campbell recalled having any interaction with each other regarding the Judge Stotler letter prior to it being mailed and Judge Stotler and Ms. Campbell did not recall faxing the letter to Respondent supports the conclusion that all of them were telling the truth at the time they gave their sworn statements.

It is not clear how the various events cited by the JHB–imposition of discipline on Judge Shuck, pending discipline against Judge Goldston, etc.–somehow demonstrates that when Respondent was asked about seeing the Judge Stotler letter prior to receiving it in her office, her denial was somehow not candid. Those other events cited by the JHB have nothing to do with Respondent simply forgetting about seeing an earlier draft of the Stotler letter. Respondent

respectfully asks this Court to apply a knowing and willful standard discussed above, to hold that Charge Four was not proven, and to exonerate Respondent on this issue.[20]

3. Charge Seven: Rule 2.16(A) "Cooperation with Disciplinary Authorities"

The JHB, with one dissenting judge, found that Respondent lacked candor certain statements made in the letter signed by Respondent and two other judges as alleged in Charge Seven. (JHB **RECOMMENDED DECISION** at 3). In reaching this decision, the JHB stated this Charge was sustained for the same reasons supporting Charge Four. Therefore, in evaluating whether Charge Seven was proven, Respondent respectfully incorporates herein all of the arguments made above in response to Charge Four.

The JHB found this Charge was not substantively redundant "as it is a separate occasion where **Respondent misrepresented** her involvement in the Stotler letter." (Emphasis added). (JHB **RECOMMENDED DECISION** at 23). Once again this Court is faced with the JHB making a recommendation that Respondent "misrepresented" facts when earlier in its **RECOMMENDED DECISION**, the JHB specifically noted Respondent had not been intentionally dishonest. Furthermore, the JHB overlooked the fact that the letter was not from Respondent, but rather was

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[20]In the Special JDC's Brief at 35, the Special JDC comments that Respondent has never expressed remorse for her actions in this case. Remorse in a judicial ethics case can be a mitigating factor where a judge has violated one or more ethics rules. However, as noted by the Florida Supreme Court in *Davey*, 645 So.2d at 405, where a judge has not committed any ethical violation, candor does not require the judge to admit to some wrongdoing when none was committed:

> Simply because a judge refuses to admit wrongdoing or express remorse before the Commission, however, does not mean that the judge exhibited lack of candor. **Every judge who believes himself or herself truly innocent of misconduct has a right-indeed, an obligation-to express that innocence to the Commission, for the Commission above all is interested in seeking the truth.** (Emphasis added).

signed by Respondent, Judge Griffith, and Judge Greenberg. There is absolutely no evidence in this record of Judge Griffith or Judge Greenberg having any prior knowledge of the Stotler letter.

Before getting to the merits of this Charge, it is puzzling that Respondent has been singled out for punishment for signing off on a letter also signed by two other Family Court Judges, who have not been charged with this identical conduct. Seeking to punish Respondent for statements asserted in this joint group letter implicates Respondent's First Amendment right to free speech. The JHB did not address this constitutional issue. This Court has recognized the interaction between the judicial ethics rules and the First Amendment in Syllabus Point 2 of *Matter of Hey*, 192 W.Va. 221, 452 S.E.2d 24 (1994):

> The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests.

Consequently, any attempt to restrict the content of a judge's speech must be very narrowly construed in order for such restrictions to survive the freedom of speech afforded by the First Amendment. *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002); *Williams-Yulee v. The Florida Bar*, ___ U.S. ___, 135 S.Ct. 1656, 1665, 191 L.Ed.2d 570, ___ (2015); *Williams*.

Charge Seven alleges a violation of Rule 2.16(A) "Cooperation with Disciplinary Authorities" in connection with her first sworn statement and her answers regarding the Judge Stotler letter. Specifically, this charge alleges, "Despite her involvement with the drafting of the `Stotler Letter,' by letter dated April 30, 2021, Respondent (and two other FCJs) not only accused JDC of

being biased and im**partial** (sic),[21] but specifically represented to the Chairperson of the Judicial Investigation Commission that `..there is NO association **between the three of us and the writing or sending of Judge Stotler's letter.**'" (Emphasis added).

The context for mailing the April 30, 2021 letter to Judge Moats was for these three judges, including Respondent, to ask once again for the legal authority supporting the issuance of warning letters to judges. It also is critical to keep in mind that this letter is from Respondent, Judge Griffith, and Judge Greenberg. Therefore, the letter must be read in that context. In the second paragraph, the letter states "there is a strong and unfounded implication that each of us were involved in the **drafting** and the **submission** of the" Stotler letter. (JA at 84). In the third paragraph, the letter states that the implication from Ms. Tarr's letter is "misplaced, inappropriate, insulting, biased, prejudicial, and sadly reproducing the very issue was have with the `warning' letters about which we inquired." (*Id.*). In the fourth paragraph, the letter states that the earlier letter to Ms. Tackett, where these three judges made a reference to the Stotler letter, "in no way implies that any of us were involved with the concept or writing of Judge Stotler's letter. Neither is any content of his letter called into our concerns. We collectively saw Judge Stotler's letter as a segue to our inquiry about our warning letters." The line that the JHB found to be sanctionable, at least as to Respondent, is the final line in the fourth paragraph, which reads in full, "Other than Judge Stotler's letter serving as a

[21]The JHB did not comment on this part of the letter accusing the JDC of failing to be impartial. The record reflects that Ms. Tarr disqualified herself and Mr. Lanham from participating in any matters involving these three judges "for the time being." (JA at 87). Ms. Tarr specifically states they are disqualified from any matter involving "Judge Stotler or any other Judge who may have helped in the submission of Judge Stotler's 3/25/2021 letter. (*Id.).* The factual reasons for the JDC disqualifying themselves from participating in any matters involving these three judges is unknown because there are no specific reasons listed in her letter, other than Ms. Tarr's implication that Respondent, Judge Griffith, and Judge Greenberg helped Judge Stotler in the submission of his letter. Whatever reasons were included in the letter Ms. Tarr sent to Judge Moats about this disqualification are not in the record.

springboard for our inquiry, there is NO association between the **three of us** and the writing or sending of Judge Stotler's letter." (Emphasis added). (*Id.*).

The JHB focused on the part of the letter where these three judges asserted they had no association with the Stotler letter. There is no evidence in this record of Respondent, Judge Griffith, or Judge Greenberg "drafting," "submitting," "writing" "sending" or otherwise had any association with Judge Stotler's March 25, 2021 letter. While the JHB engages in a discussion of parsing words, it is the JHB that is parsing the word "association" and concluding this statement lacked candor, even if there is no evidence that Judge Griffin or Judge Greenberg knew anything about the Stotler letter prior to it being mailed. How can these three judges stating in a letter to Judge Moats that they had no association with the Judge Stotler letter somehow be twisted into supporting a Rule 2.16(A) violation against Respondent?

Respondent respectfully asks this Court to apply a knowing and willful standard discussed above, to hold that Charge Seven was not proven, and to exonerate Respondent on this issue.

C. Because the JHB found Respondent to be credible, this Court should accept the JHB's recommendations that the remaining charges were not proven and should be dismissed

The JHB found Respondent to be credible and, as a result, recommended the dismissal of most of the charges.[22] Specifically, the JHB rejected Charge Two by concluding none of Respondent's actions reasonably eroded public confidence in the judiciary. Similarly, Charge Three was rejected because the JHB credited Respondent's testimony that the two emails had been sent to

[22]While the JHB "does not find clear and convincing evidence that the Respondent was intentionally dishonest," ultimately the JHB found that Charge One, Charge Four, and Charge Seven were proven. Respondent respectfully submits, as explained above, the JHB failed to apply the appropriate legal standard in concluding that Respondent lacked candor when there was no evidence establishing that Respondent knowingly and willfully lied under oath about failing to recall seeing a draft of the Stotler letter prior to receiving it delivered to her office.

Judge Stotler inadvertently. (JHB **RECOMMENDED DECISION** at 22). Charge Five was rejected because the JHB credited Respondent's testimony that she had not discussed the letter with Judge Stotler before it was sent. Charge Six was dismissed by the JHB because the JHB credited Respondent's testimony that she did not draft, edit, or revise the Stotler letter. (JHB **RECOMMENDED DECISION** at 23). Finally, the JHB rejected Charge Eight because the request for the recusal of JDC arose from her judicial office and not from personal or economic interests separate from her judicial office. (JHB **RECOMMENDED DECISION** at 24).

Throughout the **RECOMMENDED DECISION**, the JHB gave substantial credence to Respondent's testimony and found her to be persuasive. In *Ferguson*, 242 W.Va. at 698-99,841 S.E.2d at 894-95, this Court noted the deference given to credibility findings made by the JHB:

> Even though we make an independent review of the record in judicial disciplinary cases, **on this issue we will defer to the Board's credibility determinations and resolution of conflicting evidence.** *See e.g., Sims v. Miller*, 227 W.Va. 395, 402, 709 S.E.2d 750, 757 (2011) ("the hearing examiner who observed the witness testimony is in the best position to make credibility judgments."); *Dale v. Veltri*, 230 W.Va. 598, 604, 741 S.E.2d 823, 829 (2013) (noting that "[t]he hearing examiner was in a position to observe the demeanor of the witness, noted the obvious difference between the allegations ..., and resolved the conflict" in the evidence). (Emphasis added).

Respondent respectfully asks the Court to accept the credibility findings made by the JHB and to adopt these recommendations by the JHB to dismiss Charge Two, Charge Three, Charge Five, Charge Six, and Charge Eight.

VII. Conclusion

For the foregoing reasons, Respondent Deanna R. Rock respectfully asks this Court to issue a decision holding that a violation of Rule 2.16(A) requires clear and convincing evidence that the judge knowingly and willfully lied or was not candid, that none of the eight charges filed against

Respondent were proven, and that Respondent is exonerated of all charges. Further, Respondent seeks such additional relief as this Court deems appropriate.

HONORABLE DEANNA R. ROCK, Respondent,

–By Counsel–

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN THE MATTER OF: **JIC COMPLAINT NO. 38-2022**
SUPREME COURT NO. 22-862

HONORABLE DEANNA R. ROCK,
FAMILY COURT JUDGE of the
TWENTY-THIRD FAMILY COURT CIRCUIT

CERTIFICATE OF SERVICE

I Lonnie C. Simmons do hereby certify that a copy of the foregoing **RESPONDENT'S BRIEF** was served electronically on September 6, 2023, through the File & Serve Xpress system.

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. I.D. No. 3406)