

COMMONWEALTH OF PENNSYLVANIA
COURT OF JUDICIAL DISCIPLINE

IN RE: :
 :
James M. DeLeon :
Supervising Judge, Criminal Division: No. 1 JD 06 :
Philadelphia Municipal Court :
Philadelphia County :

BEFORE: Honorable Richard A. Sprague, P.J.
Honorable Joseph A. Halsey
Honorable Robert L. Capoferri
Honorable Lawrence J. O’Toole
Honorable John L. Musmanno

DISSENTING OPINION
BY JUDGE O’TOOLE

FILED: July 27, 2006

I dissent from the Court’s decision to dismiss the Complaint in this case because I disagree that prejudice to the Respondent should be “presumed,” and because I believe the Court’s finding that actual prejudice was established in this case, was improvidently made. Put another way, I believe that a finding of actual prejudice is essential to support dismissal of the charges for violation of Judicial Conduct Board Rule 31 and I believe that that finding should only be made – can only properly and fairly be made – in the context of the totality of the evidence, and should not be made, as it was in this case in a separate proceeding held preliminary to the trial. Moreover, I disagree with the Court’s finding that actual prejudice was established.

I am also troubled by this Court’s interpretation of Board Rule 31 by which it “writes in” a requirement that the Board proceed with “due diligence” and “writes out” the exception contained in subsection (C) of Rule 31 which permits the investigation to be extended beyond the 180 day limit set out in subsection (A) of Rule 31. Thus, it

seems to me, the Court is rewriting Rule 31, and I dissent because I believe that to be outside of our constitutional function.

I will discuss the last point first.

I. INTERPRETATION OF RULE 31.

Judicial Conduct Board Rule 31 provides in pertinent part:

RULE 31. DISPOSITION OF COMPLAINT.

(A) Except as provided in paragraph (C), within 180 days of the Board's receipt of the Judicial Officer's written response pursuant to Rule 30(B)(2)(c) or written response to any subsequent letter requesting information by the Board, the Board shall:

(1) dismiss the complaint upon a finding that there is no existing probable cause to file formal charges;

(2) dismiss the complaint with the issuance of a letter of counsel;

* * * * *

(3) authorize the filing of formal charges with the Court of Judicial Discipline.

* * * * *

(C) Exceptions.

(1) The Board may continue a full investigation of a matter beyond the 180-day period set forth in paragraph (A) upon a good faith belief that further investigation is necessary.

(2) The Board may defer disposition of a complaint pursuant to paragraph (A) upon discovery or receipt of additional, corollary, or cognate allegations which may necessitate an investigation.

(3) The receipt of the Judicial Officer's written response to any Rule 30(B) notice or supplemental or investigatory letter is a necessary prerequisite to the tolling and calculation of the 180-day period set forth in paragraph (A). Thus, the 180-day time period is wholly inapplicable if the Judicial Officer fails to file a written

response and the investigation will continue to conclusion (emphasis added).

As can be seen, the Board did not include the words “due diligence” in the rule. The Court, however, declaring that “it is a given” that the Board “conduct its investigations with some expedition,” concludes that compliance with Rule 31 requires that it proceed with “due diligence.”¹ While the requirement of subsection (A) that the Board finish its investigations in 180 days may support the idea that the Board wished that its investigations be conducted with “some expedition”; the requirement of “due diligence” is a different and separate idea, and the Board did not include it in the rule. It could have; but it didn’t. This Court now does. In doing so, I think we exceed our authority.

Next, the Court uses the “due diligence” requirement which it has engrafted on the rule to nullify the exception of subsection (C) by which the Board excepted itself from compliance with the 180 day requirement if it had “a good faith belief that further investigation is necessary.” The Court concedes that each time the Board extended the investigation it, in fact, had a good faith belief that further investigation was necessary, and thus the condition specified by the plain language of subsection (C)(1) was met. Nevertheless, employing the bootstrapped “due diligence” requirement, the Court declares that the Board’s [admitted] “good faith belief” was “contrived” and thus invalid to extend the investigation.² No consideration is given to the possibility that the Board, having placed itself on a tight schedule to begin with, determined that if extensions needed to be had in order to execute its constitutional mandate, they should be had.

¹ Majority Opinion, pp. 6-7.

² Majority Opinion, p. 8.

The Court appears to justify its action on the basis of what it determines the Board was trying to accomplish when it put Rule 31 in place. But the Court nullifies what the Board was trying to accomplish by subsection (C)(1) when the Board provided that an extension should be had whenever it needed to be had. It must be remembered that this is the Board's rule: the Board wrote the rule and if the Board wanted to "effectively cancel the 180 day rule"³ that is the Board's prerogative.⁴

The Court says that if Rule 31(C)(1) is to be interpreted to permit extensions whenever necessary that will "render nugatory the purpose, the intention, and the policy out of which [Rule 31] arose."⁵ But that is only if the Court's version of the purpose, intention, and policy of the rule is the same as the Board's. We don't know that; and I am unwilling to join in the order dismissing these charges for non-compliance with Rule 31 when it is clear – and admitted – that the Board was compliant with the plain language of the rule. In my view, the Court is rewriting the rule to say what the Court thinks it should say so that it will serve the purpose the Court thinks it should be serving. As stated earlier, I believe that is not our constitutional function and I must respectfully dissent.⁶

³ Majority Opinion, p. 8.

⁴ The Board was not obliged to adopt this rule in the first place; and it is, of course, free to change it or eliminate it.

⁵ Majority Opinion, p. 8.

⁶ I am not unmindful that, at the hearing in this case, counsel for the Board conceded that there had been a violation of Rule 31 (N.T. 13-14). There is no doubt, however, that this Court is not bound by an opinion of Board counsel on the question whether there has been compliance or non-compliance with one of the Board's rules. This is a matter for this Court to determine. This is our constitutional mandate. The majority opinion pertinently cites the holding of our Supreme Court in In re Hasay, 546 Pa. 481, 495, 686 A.2d 809, 817 (1996):

II. PRESUMPTION OF PREJUDICE.

As stated earlier, I disagree with the majority's decision that prejudice to the Respondent should be presumed. The reasons for my disagreement are as follows.

There are two situations in which the courts of this Commonwealth have considered whether a presumption of prejudice is satisfactory to justify dismissal of a case. One is on the civil side on a motion for non pros. The other is on the criminal side where dismissal of the charges is sought for violation of a defendant's constitutional right to a speedy trial. Neither the civil cases nor the criminal cases provide support for the introduction of a presumption of prejudice in cases in this Court on Motions to Dismiss For Non-Compliance With Board Rule 31.

In civil cases, the Supreme Court of Pennsylvania has definitively ruled that prejudice may not be presumed to support a judgment of non pros. It is instructive, I think, to examine the road the Supreme Court traveled in coming to that decision.

We therefore hold that the rules of the Court of Judicial Discipline properly include reference to the board's compliance with its rules as an issue subject to the review of the court.

This mandate to review is not circumscribed – compliance or non-compliance is the question. And this Court has just as much right to find that the Board did comply with its rules in a case where the Board says it didn't as it does to find that the Board did not comply with its rules in a case where the Board says it did. Indeed, it is more than our right – it is our duty. As we said, following Hasay:

We therefore find that reviewing the Board's compliance with its Rule 15 is a matter within our purview – indeed, it is our duty

In re Cicchetti, 697 A.2d 297, 308 (Pa.Ct.Jud.Disc. 1997).

This duty, then, is not discharged if the Court considers itself "bound" by the opinion of a party and for that reason does not itself review the question of compliance or non-compliance; nor is it discharged if the Court "defers" to the opinion of a party and for that reason does not itself review the question of compliance or non-compliance.

For many years the law of Pennsylvania on the subject was as had been laid down by the Supreme Court in James Brothers Co. v. Union Banking and Trust Co., 432 Pa. 129, 247 A.2d 587 (1968) where the Court said:

A Court may properly enter a judgment of non pros when a party to the proceeding has shown a want of due diligence in failing to proceed with reasonable promptitude, and there has been no compelling reason for the delay, and the delay has caused some prejudice to the adverse party

Id. at 132, 247 A.2d at 589.

Twenty-four years later, in Penn Piping, Inc. v. Insurance Company of North America, 529 Pa. 350, 603 A.2d 1006 (1992) the Supreme Court, Zappala, J., dissenting, reversed the Superior Court which, following James, had held that, in order to support a non pros, actual prejudice had to be shown. The Supreme Court reversed that holding and declared:

[W]e now hold that in cases involving a delay for a period of two years or more, the delay will be presumed prejudicial for purposes of any proceeding to dismiss for lack of activity on the docket (emphasis added).

Id. at 356, 603 A.2d at 1009.

In 1998, the Supreme Court, unanimous now, decided the case of Jacobs v. Halloran, 551 Pa. 350, 710 A.2d 1098 (1998) and reversed the holding of Penn Piping set out above, stating:

This appeal raises significant issues regarding the standard applicable to the dismissal of a case for inactivity pursuant to a defendant's motion for non pros. For the reasons set forth herein, we hold that the equitable principles underlying the entry of a judgment of non pros must be recognized and the presumption of prejudice first enunciated in Penn Piping, Inc. v. Insurance Company of North America, 529 Pa. 350, 603 A.2d 1006 (1992), must be abandoned (emphasis added).

Id. at 352, 710 A.2d at 1099-1100.

Thus, the Court returned the law to what it had been under James, supra, and considered that action to be important enough to warrant reversing its prior holding. Thus, the majority's decision to employ a presumption of prejudice in this case finds no support in the law of Pennsylvania governing dismissal of civil cases for lack of activity.

The criminal cases are different; for one thing, they involve a constitutional right⁷ and different forces are in play. These forces are identified by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) where the Court pointed out that:

[T]here is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. . . . Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.

Id. at 519-20, 92 S.Ct. at 2186-87, 33 L.Ed.2d 110-11. The Court pointed out other considerations which underlie the speedy trial right:

If an accused cannot make bail, he is generally confined . . . [which] contributes to the overcrowding and generally deplorable state of those institutions. [And] lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." . . . [And] lengthy pretrial detention is costly. . . . [And] society loses wages which might have been earned, and it must often support the families of incarcerated breadwinners.

⁷ This right is the right to a "speedy trial" guaranteed by the Sixth Amendment of the United States Constitution, and by Article I, Section 9 of the Pennsylvania Constitution.

Id. at 520-21, 92 S.Ct. at 2187, 33 L.Ed.2d at 111.

Review of these considerations which bear on, and account for, the right to a speedy criminal trial, quickly reveals that none are germane to proceedings instituted by the Judicial Conduct Board under the 1993 amendments to Article V of the Pennsylvania Constitution; nor do they provide a rationale for “speedy investigations” by the Judicial Conduct Board; nor do they provide a rationale for dismissal of charges for “violation” of Judicial Conduct Board Rule 31 in the absence of a showing of actual prejudice.

In Barker v. Wingo, the Supreme Court adopted a “balancing test” to be used in the federal courts for determining whether the right to a speedy trial was infringed in any case; but allowed that:

Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervising powers which establishes a fixed time period within which cases must normally be brought.

Barker v. Wingo, supra, at 530 n.29, 92 S.Ct. at 2192 n.29, 33 L.Ed.2d at 115 n.29. The majority points out that, pursuant to that footnote, the Supreme Court of Pennsylvania promulgated Rule 600(A)(2) and (3) of the Pennsylvania Rules of Criminal Procedure which establish the presently existing 180 and 365 days rules for incarcerated and unincarcerated defendants respectively. These rules provide that incarcerated defendants shall be admitted to bail after the expiration of 180 days and charges against all defendants shall be dismissed after the expiration of 365 days. Inasmuch as Rule 600 is a “presumptive rule,” such as referred to in Barker, supra – meaning that it is “presumed” that a defendant’s right to a speedy trial has been denied after the specified time – the majority appears to take that rule as support for its decision that prejudice should be “presumed” in some cases in this Court.

The connection is not there. Respectfully, I point out that Rule 600 was ordained for use in criminal cases only, to protect a constitutional right, and was based upon all the elements referred to in Barker which bear on the necessity for “speedy trials” in criminal cases. These elements do not bear on the necessity for “speedy trials” in cases in this Court which have to do with the preservation of the integrity of our judicial system.

With no intention of diminishing the benefits of examining the law of Pennsylvania in civil and criminal cases, I point out that proceedings in this Court are neither “civil” or “criminal” (nor “quasi-criminal,” for that matter) – they are sui generis.

The Pennsylvania Supreme Court has characterized these proceedings as “quasi-criminal”; but that leaves unanswered the question: are they “criminal” enough to require the adoption of a presumption of prejudice requiring the dismissal of charges for non-compliance with Board Rule 31? For example, in Matter of Chiovero, 524 Pa. 181, 570 A.2d 57 (1990) the Pennsylvania Supreme Court said:

Proceedings held before the Board [JIRB] have been held to be quasi-criminal in nature, Matter of Dandridge, 462 Pa. 67, 337 A.2d 885 (1975), and we have never held that a respondent-jurist before the Board is not clothed with the fundamental constitutional rights available to criminal defendants (emphasis added).

Id. at 189, 570 A.2d at 61.

But, in Dandridge, supra, the Supreme Court said:

A disciplinary proceeding such as this is constitutionally labeled as “quasi-criminal.” . . . There is no requirement however to grant the full panoply of constitutional rights available to a criminal defendant (emphasis added).

Id. at 74, 337 A.2d at 889.

A more meaningful approach to determination of the character of these proceedings is that taken by the Supreme Court in Office of Disciplinary Counsel v. Campbell, 463 Pa. 472, 345 A.2d 616 (1975), and In re Berlant, 458 Pa. 439, 328 A.2d 471 (1974). In Campbell the Court adopted the reasoning of the 7th Circuit in In re Echeles, 430 F.2d 347 (7th Cir. 1970), quoting from the opinion in that case as follows:

[D]isbarment and suspension proceedings are neither civil nor criminal in nature but are special proceedings, sui generis, . . . They are not for the purpose of punishment, but rather . . . to protect the courts and the public from the official ministrations of persons unfit to practice.

Id. at 349.

In In re Berlant, supra, the Supreme Court similarly observed:

Disciplinary proceedings are not criminal in nature; hence, the reasonable doubt standard need not apply. Moreover, the sanctions arising from such proceedings – censure, suspension, or disbarment – are not primarily designed for their punitive effects, but for their positive effect of protecting the public and the integrity of the courts from unfit lawyers.

Id. at 441, 328 A.2d at 473.

I am hard put to appreciate the urgency of constructing a presumption of prejudice in cases brought before this Court for alleged violations of Board Rule 31. The majority's attention to the interests of judicial officers under investigation is certainly understandable, and appropriate in all circumstances; but we must also be cognizant of the constitutional duties of the Judicial Conduct Board. I think both interests are better served by requiring a showing of actual prejudice.

As I said, I see no urgency for creating a presumption of prejudice in this case for the reasons set out above; however, in addition, I am afraid some undesirable side-effects will follow if we do. These include:

1. Difficulty in managing cases where prejudice is presumed. Justice Zappala called attention to this in the Jacobs opinion when he wrote of the difficulties experienced by the courts during the six years of the regnancy of the Penn Piping rule which had established a presumption of prejudice in civil cases where non pros was sought for lack of activity. The Justice wrote:

[A]s a result of defining a period after which prejudice is automatically presumed, the practical application of this equitable doctrine has become enigmatic. There has been a lack of consistency in the lower courts as to whether the presumption is rebuttable and, if so, what type of evidence is required. This indicates to us that the application of the presumption has proved to be unworkable.

Jacobs v. Halloran, supra, at 358, 710 A.2d at 1102-03.

2. Engagement of the Court's time and resources contending with such esoteric concepts as "excludable time," "excusable delay" and, "run dates" ("mechanical run date," "adjusted run date") a labor which the trial and appellate courts of this Commonwealth regularly perform in applying and implementing Rule 600 of the Pennsylvania Criminal Rules of Procedure. See, e.g., Commonwealth v. DeBlase, 542 Pa. 22, 665 A.2d 427 (1995); Commonwealth v. Malgieri, 989 A.2d 604 (Pa. Super. 2005); Commonwealth v. Murray, 879 A.2d 309 (Pa. Super. 2005); Commonwealth v. Hunt, 858 A.2d 1234 (Pa. Super. 2004) (en banc), appeal denied, 583 Pa. 659 (2005); Commonwealth v. Corbin, 390 Pa. Super. 243, 568 A.2d 635 (1990).

3. Engagement of the Court's time and resources in overseeing the investigations of the Judicial Conduct Board to assure that the Board has conducted them with "due diligence." This will necessitate evidentiary hearings such as are the everyday occupation of the Courts of Common Pleas in their endeavors to correctly apply Rule

600. In addition to DiBlase, Malgieri, Murray, Hunt and Corbin, cited above, see, also, Commonwealth v. Meadius, 582 Pa. 174, 870 A.2d 802 (2005).

4. The proliferation of motions alleging non-compliance with the Judicial Conduct Board's Rule 31. The filing of the majority opinion will introduce the [justifiable] perception that, in a given case, the necessity to establish actual prejudice may be dispensed with. We can only expect that that [justifiable] perception will lead to the filing of Rule 31 motions in the hope that each particular case is such "a given case."

For these reasons, whatever is accomplished by the majority's decision to presume prejudice here, I see as coming at a high price – a price which I believe this Court should not – and need not – pay. The interests of judicial officers who see themselves prejudiced by lengthy investigations, are fully protected by the equitable doctrine of laches.⁸

⁸ Laches will remain an issue in this case if this Court were to dismiss the Motion To Dismiss For Non-Compliance With Rule 31. See, Weinberg v. State Board of Examiners of Public Accountants, 509 Pa. 143, 501 A.2d 239 (1985); Shah v. State Board of Medicine, 139 Pa. Cmwlth. 783, 589 A.2d 783 (1991); Lyness v. State Board of Medicine, 127 Pa. Cmwlth. 225, 561 A.2d 362 (1989).

These cases all stand for the proposition that:

The equitable defense of laches is available against the Commonwealth in an administrative disciplinary proceeding by a licensing board. However, the court "will require a stronger showing by a defendant who attempts to apply the doctrine against the Commonwealth than by one who would apply it against an individual." (emphasis added).

This is another reason why I cannot join with the majority, for its dismissal for non-compliance with Board Rule 31 dispenses with the benefit to which other Commonwealth agencies are entitled, i.e., the requirement of a "stronger showing" of lack of diligence on the part of the agency. This creates an illogical and unnecessary disparity between the Judicial Conduct Board and all other Commonwealth agencies. I do not believe the drafters of the 1993 amendments to Article V intended that judicial officers charged with crimes or other violations of the Code of Judicial Conduct or of the Constitution should have an advantage over physicians and accountants in defending against such charges. There is little question in my mind that our Supreme Court would be dissatisfied with a scheme where the Judicial Conduct Board, established by the Constitution, was to be treated with less deference than other agencies which owe their existence, not to a constitutional enactment, but to a legislative enactment.

Shah, supra, at 128-29, 589 A.2d at 800, citing Weinberg, supra, at 150, 501 A.2d at 243, and Lyness, supra, at 240, 561 A.2d at 369-70.

I mention one other point.

I call attention to Judicial Conduct Board Rule of Procedure No. 2(C). That rule provides in pertinent part:

RULE 2. RULES OF CONSTRUCTION.⁹

(A) As used in these rules, unless the context otherwise requires:

* * * * *

(C) An error or defect of procedure shall not confer any substantive rights on any party.

Since we are here engaged in reviewing and interpreting a Board rule, it is often useful – and always advisable – to see if there are other rules which shine light on, e.g., its intended application (broad or narrow), or the consequences of a violation. Thus, it is appropriate to give attention to Rule 2.

If there was an “error or defect” here, i.e., if there was a non-compliance with Rule 31 of the Judicial Conduct Board’s Rules of Procedure, it was an “error or defect of procedure” and the plain words of the Judicial Conduct Board, author of Rule 2, specify that such an error or defect “shall not confer any substantive rights on any party.” It seems to me that dismissal of the charges is vindication of a substantive right. If Rule 2(C) is not meant to be applied in the event of the Board’s non-compliance with the procedure it prescribed for itself in Rule 31 – to limit the consequences thereof, I cannot imagine when it would ever apply. Such an interpretation of Rule 2(C) would be at variance, then, with those basic rules of construction which instruct courts to presume

⁹ These Rules of Construction are obviously intended for general application, i.e., to govern the construction of all the Board’s Rules of Procedure, including Rule 31.

that the author of a rule does not intend a result which is absurd or unreasonable, and does intend that the entire rule be effective.¹⁰

The majority ignores this rule. By doing so, the majority is again rewriting the Board's rules; but this time it is not merely adding or subtracting words, it is subtracting an entire rule. This is outside of our constitutional authority and for this additional reason, I must, respectfully, dissent.

III. THE HEARING AND THE EVIDENCE.

A. The Hearing

The hearing on the question of prejudice was conducted on May 22, 2006. Respondent was the only witness, and his testimony essentially consisted in his identification of three individuals, now deceased, who, Respondent said, knew that he, Respondent, did not know that the so-called "Minority Committee"¹¹ was raising money for Respondent in violation of Canon 7 and that Respondent did not know that his name was associated with the "Minority Committee." (N.T. 80-117).

The assignment of this Court if this case ever went to trial would be to determine whether the Judicial Conduct Board had carried out its constitutional assignment of establishing, by clear and convincing evidence, that the conduct of Respondent was, as charged in the Complaint, a violation of Canon 7. At the trial, Respondent would present his defense. At that time, he could (and presumably would) present testimony that his ability to present a defense was actually prejudiced by the Board's non-compliance with

¹⁰ See 1 Pa.C.S.A. §1922(1) and (2) and Rossi v. Commonwealth, 580 Pa. 238, 860 A.2d 64 (2004).

¹¹ Alleged by the Judicial Conduct Board to have been a bogus committee – a "front" – organized solely to "get around" the provisions of Canon 7 of the Code of Judicial Conduct which prescribe the earliest time a judicial candidate may raise campaign funds.

Rule 31.¹² I think it fair to say that at the trial the testimony on this point would be the same as was presented at the hearing of May 22, 2006.¹³ I believe that it is only then that this Court can conduct a realistic evaluation of Respondent's evidence so as to enable it to make an adequately informed decision on the question of actual prejudice.¹⁴ I believe it is only then, when the Court has received all of the Board's evidence and all of the Respondent's evidence, that the Court can tell whether the prejudice to Respondent was such that compels dismissal of the case.

If some may argue the point, I daresay there can be no argument that it would be better to decide the question against the background, and in the context of, all of the evidence. Once again, I fail to see the compulsion to decide the question preliminarily.

B. The Evidence

The Respondent was the only witness, and I must say, that I regard his testimony largely, if not wholly, inadmissible. If it is admissible, then it commands a large measure of skepticism. Moreover, coming, as it did, at a preliminary hearing, it was realistically guaranteed that the Board would be hard put to rebut it, or even challenge it.¹⁵

As stated earlier, Respondent's evidence consisted in Respondent's testimony of what was in the mind, first of all, of Mr. McIntosh (now dead), on certain subjects,

¹² This testimony would also be pertinent to the defense of laches.

¹³ At the trial the Respondent might even present more – and better – evidence.

¹⁴ When laches is the issue, the issue is joined at, and resolved after, trial. See, e.g., Weinberg, Shah, and Lyness, supra.

¹⁵ The three individuals whose deaths deprived the Respondent of the supposed benefit of their testimony, thus causing the prejudice he here alleges, were never identified by Respondent as witnesses who could provide any information relating to the Board's investigation. (N.T. 72-74).

including, most prominently, on the subject of what was in Respondent's mind on certain subjects. For example, Respondent was questioned by his counsel:

Q. Would Mr. McIntosh have been in a position to testify as to whether or not you had intent to circumvent the law and to receive fund-raising illegally in the year 2002 through the Minorities Committee?

A. Mr. McIntosh would have been very aware to testify as to any of these allegations as to this respect. (N.T. 83-84).

Q. Judge DeLeon, during that time period, did you and Mr. McIntosh discuss any activities between you and the Minority Committee?

A. No, not at all.

Q. Was he aware, though, in terms of your involvement or lack of involvement with the Minority Committee?

A Yes. (N.T. 92).

The questions arise: (a) How is Mr. McIntosh competent to testify as to what was in DeLeon's mind regarding an "intent to circumvent the law?" Did DeLeon tell him: "I don't intend to violate the law?" (b) How would DeLeon know what McIntosh was "aware of"? – especially that McIntosh was aware that DeLeon had a "lack of involvement" with the Minorities Committee? Did DeLeon tell him: "I'm not involved with the Minorities Committee?" Remember that DeLeon is claiming that he [DeLeon] knew nothing about the Committee, even of its existence, until after the first fund raiser in July 2002. (Complaint paragraph 20). (N.T. 108).

Respondent was then asked:

Q. Could he have confirmed your testimony that you were not involved with the Minority Committee in terms of raising money or hoping to raise money?

A. Yes, he could. He could do so through his testimony as well as the testimony of two other people that he spoke to.

Because of the fact that it was a statewide race, I had a campaign manager from Western Pennsylvania named Arky Turricelli (sic) and I also had a campaign manager in Central Pennsylvania named Jena East.

Both of them had conversation on the phone with Mr. McIntosh (N.T. 92-93).

Here, Respondent is testifying that he (Respondent) knew that Mr. McIntosh knew what Respondent was doing and what Respondent was “hoping” – and that Mr. McIntosh knew it because of what other people told him. It seems to me that this is classic hearsay. See, Pa. Rules of Evidence, Rule 801.

Similarly, with respect to Jena East,¹⁶ another of the deceased witnesses, Respondent testified that he was prejudiced because she could have and would have testified that:

A. . . . And she had a lot she could tell this Court as to my demeanor during the year 2002, as to what she knew about me in the year 2002, and also my demeanor in 2001 and 2003.

She could vouch for me as to everything that I’m saying as being true, that I did not know that my name had anything to do with that Minority Committee, and that we were totally surprised when it came out that it did. (N.T. 97).

As in the case of Mr. McIntosh, Respondent’s testimony is that he knew that she knew that he did not know that his name had anything to do with the Minority Committee. As in the case of Mr. McIntosh, this is an amazing accomplishment, but it is not admissible.

One more example. Respondent testified that his prejudice resulted from the deaths of three witnesses – Mr. McIntosh, Ms. East and one Arky Turrizis.¹⁷ According to Respondent, Mr. Turrizis would have testified:

¹⁶ Respondent’s Harrisburg campaign manager.

- A. . . . And in 2002, during some of these events, people did offer money for my campaign. And Arky, if he was here – he is now deceased – he would say that we never received a single penny, that we told the people we cannot raise money in the year 2002, that we could only start raising money in the year 2003. (N.T. 94).

The question here is the worth of this testimony and concomitantly the prejudice (if any) Respondent suffers by his inability to produce the witness now, after his death, and place his testimony in the record. Consider that, at the trial of this case, the Judicial Conduct Board, according to the allegations of the Complaint, would be placing in evidence public records and other documents establishing:

1. that during 2002¹⁸ the Minorities Committee – actually the “Committee for Minorities on the Supreme Court” did receive campaign funds. (Complaint paragraphs 15-36). We can expect that the bank records and checks would be placed in the record.

2. that on June 21, 2002 a Political Committee Registration Statement dated May 30, 2002, was filed with the Department of State, Bureau of Commissions, Elections and Legislation on behalf of the “Committee for Minorities on the Supreme Court” and that document contained a page entitled “Authorization for a Political Committee to Receive Funds on Behalf of a Candidate” listing Respondent as the candidate authorizing the receipt of funds and containing a signature which spells “James M. DeLeon.” (Complaint paragraph 14). We can expect that this official public record would be placed in the record.

¹⁷ Respondent’s Western Pennsylvania campaign manager.

¹⁸ 2002 is the year of interest in this case because any funds raised during that year would have been raised earlier than permitted by Canon 7.

3. that the above Registration Statement was prepared and filed by Linda Carter, Respondent's longtime personal secretary. (Complaint paragraph 10). We can expect that this official public record would be placed in the record.

4. that the said Registration Statement listed Arian DeLeon, Respondent's daughter, as Chairman of the Committee. (Complaint paragraph 11). We can expect that this official public record would be placed in the record.

5. that the said Registration Statement listed Jermaine DeLeon, Respondent's son, as Treasurer of the Committee. (Complaint paragraph 12). We can expect that this official public record would be placed in the record.

6. that on June 17, 2002 Respondent's son opened a checking account at PNC Bank for the Minorities Committee and made an initial deposit of \$2,600. (Complaint paragraph 15). We can expect that PNC Bank records and the checks would be placed in the record.

7. that numerous checks deposited in the Minorities Committee bank account were payable to Respondent personally as well as to the "DeLeon Committee." (Complaint paragraph 28). We can expect that the PNC Bank records and the checks would be placed in the record.

The point is that, even if Messrs. McIntosh and Turrizis and Ms. East were alive and available at the trial, and even if their testimony that Respondent knew nothing about the Minorities Committee would have been admissible, the Court would assess that testimony under a much brighter light than was possible at the preliminary hearing of May 22, 2006: it would assess that testimony in the context of all of the evidence, including that of the Judicial Conduct Board. At such a trial, if Judge DeLeon's defense

was – as he has certainly indicated it would be – that he didn't know anything about the Minorities Committee, in the face of the documentary evidence set out above, it is entirely likely the testimony of Mr. McIntosh, Ms. East and Mr. Turrizis would not even be offered. If there is truth to that, then there is no prejudice to Respondent caused by the present unavailability of these witnesses.

Furthermore, I am at a loss to see how Respondent is prejudiced by the loss of the testimony of Mr. Turrizis, the Western Pennsylvanian, testifying from Pittsburgh, that “we never received a single penny” – in a bank account in Philadelphia – about which there is no evidence Turrizis had anything to do with, or even knew about.

It is my conclusion that Respondent did not establish actual prejudice, and I respectfully dissent from the majority's finding that he did.