

IN THE SUPREME COURT FOR THE STATE OF OREGON
INQUIRY CONCERNING A JUDGE

Re: The Honorable Vance D. Day,
Respondent.

Commission on Judicial Fitness and Disability
12139, 1486

Commission on Judicial Fitness and Disability
12139

S063844

The Honorable Vance D. Day's Opening Brief

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THE HONORABLE VANCE DAY’S OPENING BRIEF
STATEMENT OF THE CASE

I. Nature of the Action and Relief Sought

This case is before this Court on direct *de novo* review following a record-making hearing before, and subsequent sanction recommendation of, the Oregon Commission on Judicial Fitness and Disability (Commission). The Commission issued an “Opinion” which recommended a sanction of termination. ER 64-111. Judge Day seeks a dismissal of the multi-count Complaint against him for the reasons forth below, or alternatively, a lesser sanction.

II. Statutory Basis of Appellate Jurisdiction

This Court has original jurisdiction over judicial conduct complaints pursuant to ORAP 11.27(2)(b), ORS 1.430 and *Or Const, Art VII* (Amended) §8 (Art VII §8).¹ While the record-making function is delegated to the Commission,

¹ Article VII §8 provides in pertinent part:

“(1) In the manner provided by law***, a judge of any court may be removed or suspended from his judicial office by the Supreme Court, or censured by the Supreme Court, for:

“*****

“(b) Wilful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;

“(c) Wilful or persistent failure to perform judicial duties; or

“ *****.”

“(e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court.”

this Court has the sole authority to find facts and otherwise adjudicate this judicial conduct complaint. ORS 1.415- 1.430.

III. Standard of Review

This Court reviews *de novo* the Commission's recommendations and the record developed below. *In re Schenck*, 318 Or 402, 405, 870 P2d 185 (1994). That review requires "clear and convincing evidence of a wilful violation." *Id.* The Commission bears the burden of affirmatively proving a willful violation and proving its recommendation to this Court under the "clear and convincing evidence" standard. *In re Miller*, 358 Or 741, 744, 370 P3d 1241 (2016).

IV. Introduction and Summary of Argument

Judge Day is a Marion County Circuit Court judge, who was appointed to the bench in 2011, and successfully ran for election in 2012. In October 2012, he began presiding over the court's Veteran Treatment Docket (VTD), and a year later, with the receipt of grant funding, which he helped to secure, the VTD transitioned into a distinct Veterans Treatment Court (VTC).

Judge Day is overwhelmingly viewed as an honest, fair, and hardworking judge with a genuine interest in helping the veterans who appeared before him, and deep reverence for individuals who serve our country and put their lives on the line for liberty. He is a dedicated family man who has been married for over

30 years and is the father of three adult children, all of whom live in or near the Salem area.

In August 2014, Judge Day self-reported to the Commission regarding an incident where a veteran in the VTC program handled a gun owned by Judge Day's son. Judge Day admitted to using poor judgment in this incident and more generally to boundary issues in his relationship with a VTC participant, Brian Shehan. Nonetheless, there were no willful ethics violations.

As explained in detail below, the inexperienced investigator hired by the Commission impermissibly expanded the scope of the investigation beyond her charge, to include multiple matters unrelated to the self-report or to Judge Day's fitness to serve as a judge and as to which there was no complainant. Following this investigation, the Commission charged Judge Day with 13 violations of Oregon's Code of Judicial Conduct (OCJC), including the revival of a previously dismissed charge. ER 66-111.

After a nine-day hearing that commenced on November 9, 2015, during which Judge Day was at a severe disadvantage due to rulings of the Commission and this Court detailed below, the Commission dismissed five counts, recommended that this Court find Judge Day in willful violation of OCJC Rules under the eight remaining Counts, and recommended that this Court impose the

most severe possible sanction—removal of Judge Day from his judicial position.
ER 65.

Prominent among the Commission's avalanche of charges unrelated to the gun-handling incident or to Judge Day's fitness to hold office, is the Commission's conclusion that he discriminated against same-sex couples by refusing to perform same-sex weddings. A review of the facts, however, will demonstrate that, while Judge Day is a devout Christian who believes that marriage should be confined to the union of a man and a woman, he never actually refused to perform a same-sex wedding. Instead, his staff turned down one same-sex couple due to an actual conflict in his schedule, after which Judge Day decided not to perform any weddings as means of avoiding an activity that would offend his deeply held religious convictions without discriminating against same-sex couples. Judge Day's judicial position does not require him to perform weddings. There is no evidence that he ever actually discriminated against gays or lesbians.

The Commission also charged Judge Day with violations of the OCJC relating to court-house art work, both the display of artwork of elected political figures and historical war memorabilia of Oregon veterans, offending certain judges.

In a one-sided 48- page opinion citing almost no evidence, the Commission chose to accept the credibility of witnesses who were proven untruthful in the hearing, and rejected Judge Day's word on many of the issues. In its stretch to find credibility issues with Judge Day, the Commission concluded he willfully lied on issues of opinion, and issues on which there were different recollections, some years before the hearing. The Commissions' recommended findings of violations on charges not even asserted in the Complaint, which Judge Day had no chance to defend. The Commission accepted evidence and made multiple findings of bad acts as to Judge Day that were irrelevant to the charges, and which he had no chance to defend.

There are many constitutional infirmities with the rules and process surrounding this judicial conduct inquiry. Even if the evidence were deemed to support one or more of the charges by clear and convincing evidence of willful intent, the process and its application to Judge Day was unconstitutional, and the complaint should be dismissed.

The law requires this Court to review the evidence *de novo*. A fresh, objective look at the evidence is particularly necessary here, in light of the Commission's unsupported and intemperate "Opinion", in order to determine whether clear and convincing evidence makes it highly probable that Judge Day willfully violated the cited OCJC rules. Such an examination will demonstrate

conclusively that the Commission cannot prove its charges and that no sanction is appropriate.

V. Significant Appellate Rulings - ORAP 5.40(11)

Prior to the hearing, on October 29, 2015, Judge Day filed a petition for writ of mandamus, requesting that this Court direct the Commission to vacate its orders denying Judge Day's discovery requests, and allow his requests seeking: (1) an inspection of material witness Christina Brown's cell phone, which contained material impeachment evidence, and (2) the production of emails and instant messages from October 17, 2012 to the present, stored on government computers in Marion County, referencing Judge Day in either the subject line or body of the emails. Judge Day argued that denial of the discovery violated the Commission's statutory authority under ORS 1.415(2), and its own rules, which specify procedural safeguards of his right to present evidence and cross-examine witnesses, and denied him due process. On November 3, 2015, this Court denied mandamus relief because the Court "may receive additional evidence" pursuant to ORS 1.430, and "[b]ecause relator is entitled to post-hearing review in this court, relator has a remedy in the ordinary course of law ***." ER 62-63.

Brown, whose cell phone evidence was sought in the mandamus proceeding, is employed by members of the Oregon Supreme Court. Judge Day's

motion to screen her from any form of participation in this proceeding was filed on February 3, 2016, and granted on February 5, 2016.

On March 18, 2016, Judge Day filed a motion in this Court to strike, supplement and correct the record, and to revise the briefing schedule prescribed by ORAP 11.27 to require the Commission to file the opening brief. ER 112-180. The motion asserted that the Commission exceeded its statutory authority in assuming an adjudicatory role, and asked this Court to strike the Opinion as written because it far exceeded the Commission's limited statutory role to create a record. ER 135. The motion included a request to strike the "Findings of Fact," and "findings" of judicial rule violations. *Id.* The motion further asked that the Court strike the telephonic testimony and witness statement of Brian Shehan, a material adverse witness whose testimony forms the basis for the Commission's recommendations on Counts 3, 4, and 6, because Judge Day was denied an adequate opportunity to examine Shehan either in-person at the hearing, with exhibits available for cross-examination, or in a pre-hearing deposition. ER 137-141.

Judge Day also moved to strike the Commission's evidentiary findings not relevant to the conduct charged in the Complaint, and recommendations based on charges not included in the Complaint. ER 142-155. He further moved for permission to supplement the record with evidence, in accordance with ORAP

11.27 (2)(b (ii), including the videotaped deposition of Shehan, and for production of Brown's cell phone and emails stored on government computers/servers used in Marion County with Judge Day either in the body or subject of the email or instant message and for Shehan's medical records. ER 156-161. A reply brief was filed on these issues as well. ER 181.

On May 17, 2016, this Court granted the motion in part, ordering a follow-up deposition of Shehan, limited to cross-examination on designated exhibits, denying the motion to revise the briefing schedule, and denying the balance of the motion without prejudice. ER 233-34.

Thereafter, Judge Day's defense team expended significant time and resources to secure the permitted testimony from Shehan, including requesting multiple follow-up rulings from this Court. Shehan, nonetheless, successfully evaded service, and, further, failed to appear at the time and place where Sheehan's attorney had agreed to make him available for a deposition at Judge Day's expense.

On September 6, 2016, Judge Day moved once again to strike Shehan's pre-hearing witness interview and hearing testimony from the record because Judge Day had been denied due process, *i.e.*, a fair and adequate opportunity to confront Shehan about the accusations or to impeach Shehan's credibility with

exhibits, and because the fact-finder had not been able to visually assess the witness. ER 235-266.

This Court denied that motion on September 27, 2016, holding that no due process violation had occurred, but allowing respondent to raise issues about the weight or credibility of the evidence below in his brief. ER 267.

On November 18, 2016, Judge Day moved to hold this proceeding in abeyance during the pendency of two felony and two misdemeanor criminal charges initiated against him on November 17, 2016. The criminal charges were brought well after the operative events, and arise from the facts at issue in the gun-related charges in Complaint Counts 3 and 4. This Court denied the motion on November 29, 2016. ER 269.

VI. Statement of Facts

A. The Commission Proceeding

1. Events Leading to Judge Day's Self-Report

This proceeding originated with an August 2014 self-report from Judge Day to the Commission, Exs 94, 604, explaining that he had recently learned that a participant in Marion County's VTC, Shehan, had contacted Judge James Rhoades, the then-presiding Marion County Circuit Court judge, with concerns about an interaction he had had with Judge Day eight months earlier. Ex 94.

The January 2014, incident occurred while Judge Day and his son, Justin, were at Shehan's rural residence to fix a broken pellet stove which had left Shehan without heat. *Id.*, Tr 1109. During the visit, and unbeknownst to Judge Day, Justin brought out an unloaded gun from his truck to show Shehan. Tr 1109, 2316. Judge Day did not partake in the interaction, but he did see Shehan handle the gun. Tr 417. At the time, Judge Day did not think about Shehan's felony status, under which he was prohibited from handling guns. Tr 2276. To participate in the VTC, Shehan had pled guilty to a felony DUII that was stipulated to be retroactively modified to a Class A misdemeanor upon the expiration of his probation. Tr 404-05; Exs 500-502, 504.

When Elan Lambert, a VTC staff member, heard about the gun incident from Megan Curry, Judge Day's judicial clerk, in January 2014, Tr 700-01, 943, 958, 1043; Ex 71 at 55, she contacted Shehan ("Tiny" as she calls him), and told him she was coming to his house that night. Tr 1043-45. After confronting Shehan, she spoke with Judge Day and reminded him about Shehan's felony status. Tr 1158; 2320-21. Judge Day acknowledged that he had seen Shehan handle Justin's gun. Tr 1159, 2321. He felt "absolutely foolish" and "frankly a bit afraid" because he realized during the conversation that Shehan was still a felon, and that handling a gun could be "really bad" for Shehan. Tr 2321.

Judge Day then informed the VTC prosecutor who handled Shehan's case, Bryan Orrio, Shehan's criminal defense attorney, Daniel Wren, and Shehan's probation officer, Austin Herman. Tr 1415, 1423, 1455-56, 1901-02, 2321; Ex 609 at Ex 7 (DAY06402, DAY06404). Judge Day understood that Shehan would not suffer any adverse legal effect because of the incident. *Id.*

Lambert told Judge Rhoades about the gun-handling incident eight months later, during a period when she had become a vocal critic of Judge Day behind his back. Tr 700-01, 954, 956-57. In mid-August 2014, Judge Rhoades spoke with Shehan by telephone, a contact facilitated by Lambert. Ex 71 at 55.

Judge Rhoades confronted Judge Day about Shehan's gun-handling story during a meeting with Judge Penn on August 21, 2014. Tr 1050. Judge Day acknowledged his lapse in judgment and "immediately offered to self-report" the matter to the Commission. Tr 1069, 2275. Judge Rhoades found Judge Day to be open, forthright, and positive during the discussion. Tr 713. While the Commission later found fault even with the specificity of the report, Judge Penn specifically advised Judge Day to keep his self-report general. Tr 1069-71, 1080. During the meeting, Judge Day also requested that Judge Rhoades provide Shehan with information explaining how to report his concerns to the Commission. Tr 712; Ex 94. Shehan did not report a complaint to the Commission. ER 73.

On September 5, 2014, the Commission notified Judge Day that an investigation into his self-report would begin under Complaint No. 14-86. Ex 604.

2. The Commission's Two-Part Investigation

The Commission engaged Karen Saul, a retired lawyer and farmer, to conduct the investigation into the matter raised by Judge Day's self-report. Tr 67, 86-88, 92. Saul did not have an investigator's license and had never conducted a judicial investigation. *Id.* At the beginning of her engagement, the Commission provided Saul with a short witness list. Tr 91-2, 173. Upon completion of her limited investigation into Complaint No. 14-86, the Commission hired Saul to re-investigate a formally dismissed 2012 complaint, Complaint No. 12-139. Tr 92; Ex 608.

a. Part One: Courthouse Community Interviews

Saul investigated Judge Day's self-report, Complaint No. 14-86, by interviewing nine Marion County Courthouse community members between November 19, 2014 and December 12, 2014. Ex 71. Her first interview was with Judge Rhoades, who shared a litany of criticisms and concerns that she, and reportedly others, had concerning Judge Day. *Id.* at 54-67. This interview essentially created the roadmap for Saul's remaining eight interviews. Ex 71. Judge Rhoades not only discussed what she had heard about the gun-handling

incident, she also raised unrelated topics including: Judge Day's display of historical wall hangings on the fourth floor of the courthouse, Shehan's complaints of unwanted attention; and various personal complaints that Judge Day's three staff members shared with Judge Rhoades and others in the few months preceding the interview. *Id.* at 54-62. Most of the information Judge Rhoades shared with Saul came from one telephone conversation with Shehan in August of 2014, a few conversations with Judge Day, and numerous informal conversations with Judge Day's three staff members — Christine Brown, Megan Curry, and Elan Lambert. *Id.*

Unbeknownst to Saul, in the months preceding her interviews, a perfect storm had begun developing amidst the small group of individuals on her witness list, with Judge Day at the center. In addition to the circulating rumors about the gun-handling incident, Tr 1072, 1361, 1455-56; Ex 71 at 35, critics of Judge Day's wall hangings surfaced after Judge Pelligrini expressed her disapproval at an August 2014 judges' meeting, Tr 109, 1285, and Judge Day's staff had become increasingly outspoken about their unfavorable views of Judge Day. Tr 688-90.

Judge Day's three staff members had become burned-out by their jobs or disgruntled for various reasons, and they regularly shared their complaints with each other and others in the courthouse community, including Judge Rhoades. Tr 790, 802-03, 871, 954-56, 957, 973, 1072-73, 1315. Judge Day's staff vented to

Judge Rhoades through texts, instant messaging, and in person, whenever she happened to be “stopping by” their office, Tr 689-90, 698, but neither they, nor Judge Rhoades shared their concerns with Judge Day. Tr 694, 698, 803, 947, 960, 971, 972-73, 1179.

As to the gun-handling incident, Judge Rhoades reported to Saul that Shehan used Curry and Lambert as “sounding boards” for his complaints about Judge Day. Ex 71 at 54. Saul’s interview summary does not mention Judge Rhoades’ concern that Lambert and Shehan’s gun-handling stories were inconsistent and could not be reconciled. Tr 670, 702. Saul’s summary also does not report that after Judge Rhoades spoke with Shehan, she contacted his probation officer, Austin Herman, and learned that Herman had previously learned about the gun-handling incident and was not “bothered” by it and did not intend to take any action. Ex 71 at 54-67; Tr 707. Saul did not interview Herman to learn what he knew about the incident or to discover why the incident did not concern him. Ex 71. Saul’s summary is also silent about Judge Rhoades’ belief that some of the complaints about Judge Day came from people who were biased against him. *Id.*; Tr 720.

Following Judge Rhoades’ interview, Saul interviewed Judge Day’s most vocal critics: Lambert, Curry, Brown, and Shehan. Ex 71 at 9, 16, 40, 63. Saul interviewed Shehan by telephone. *Id.* at 63. She knew that Shehan suffered from

post-traumatic stress disorder (PTSD) and a traumatic brain injury (TBI). Tr 75. She did not conduct her interviews under oath, and she just “assumed that [the witnesses] were being truthful[.]” Tr 182.

Saul reported accusations from these witnesses ranging from subjective personal opinions to damaging character attacks, describing Judge Day as rude, inflexible and unfair, disrespectful to veterans, partisan and biased, lacking follow-through on commitments, and even claiming that Judge Day could not be trusted, that he lied, and that he cheated on his wife. Ex 71 at 9-15, 16-22, 40-47; Tr 182-83, 844, 1252. Shehan complained that Judge Day’s words, actions, and attention annoyed him and made him feel uncomfortable. Ex 71 at 63-67. Saul reported these accusations and criticisms without concern about whether they were accurate or well-founded, and did not believe it was her job to further investigate the accusations. Tr 176-77, 179, 182-83, 185-86. The Commission did not ask Saul to conduct any follow-up investigation, simply accepting the veracity of the complaints and the credibility of the witnesses. Tr 186-87.

Finally, Saul interviewed Judges Penn, Dickey, and Prall and, lastly, Judge Day. Ex 71 at 23, 35, 48, 50. At this time, Judge Penn was the Deputy Presiding Judge, and he had attended the August 21, 2014, meeting with Judge Rhoades and Judge Day concerning the gun-handling incident. *Id.* at 35. Judge Prall served as the back-up VTC presiding judge, and she was assigned Shehan’s case in August,

2014. *Id.* at 50. Judge Dickey is married to Judge Rhoades, and he spoke with Judge Day about the gun-handling incident after Judge Day reported the matter to the Commission. *Id.* at 35; Ex 94; Tr 612-13.

Saul completed her investigation into Judge Day's self-report in less than a month. Tr 197-98. She primarily restricted her interviews to the small group of individuals identified on the Commission's witness list even though she received and reported accusations against Judge Day that expanded beyond the self-reported gun-handling incident. Tr 91, 173, 174, 179. She chose not to interview Judge Day's judicial colleagues who had known and worked with him for years because she assumed that they did not have any relevant information. Tr 91, 175, 179. She did not interview Judges Hart or Abar, both of whom had known Judge Day for 17 years or more, or retired Judge Graves, who had known Judge Day for over 30 years. Tr 140, 436, 442, 1083. Because Saul did not interview these judges and others, including Judge Tripp, Tr 105, she was unable to report that Judge Day's colleagues overwhelmingly view Judge Day positively as an honest, hardworking, caring judge who does not lie or discriminate against gay and lesbian individuals. Tr 114-16, 120-21, 142, 162, 459, 1084-85, 1088.

Saul also chose not to interview any VTC team members other than Lambert, Tr 200, and did not report to the Commission that Lambert was the only VTC team member who was critical of Judge Day's management of the VTC. Tr

1351, 1370, 1442, 1444, 1467-68, 1548, 1579, 1594, 1605, 1608, 1618, 1694, 1697, 1711, 1826-27, 1841, 1843, 1930, 2049, 2054. She did not report that, contrary to Lambert's opinion, VTC team members and participants appreciated Judge Day's casual courtroom demeanor and viewed his joking, sarcasm, and occasional use of colorful language as an effective approach in the VTC context. Tr 1410-11, 1453, 1553, 1720, 1998, 2050. Saul did not report that Lambert wanted to control the VTC treatment team, and that when the team disagreed with her, she became emotional, irrational, and even nasty and vindictive at times. Tr 1918, 2249.

Saul chose not to interview any VTC participants other than Sheehan. Ex 71. She viewed a few tape recordings of VTC proceedings and formed her own opinion as to what she observed, without educating herself about the VTC's unique approach or its mission. Tr 202-03. Saul did not learn that other VTC participants appreciated Judge Day's manner of presiding over the VTC and found Judge Day's display of historical wall hangings to be inspirational and respectful. Tr 877, 1451, 1893, 1988. She did not report that the use of challenge coins, reciting the pledge of allegiance, and other patriotic and military customs used by Judge Day were recognized techniques recommended by out-of-state VTC trainings to honor veterans and cultivate a sense of community. Tr 1355-56, 1367,

1358, 1449-50, 1551, 1573, 1577, 1594-95, 1599, 1605, 1619-20, 1696, 1715, 1719, 1835, 1836, 1837.

Saul did not interview any of Judge Day's family members. Ex 71. She did not interview Justin Day, even though she learned that he drove Judge Day to Shehan's house and was directly involved in the gun-handling incident. Ex 71 at 26, 66. She did not interview Judge Day's son-in-law, Donald Mansell, even though she learned that Mansell was present when Shehan claimed to have handled a gun while working at Mansell's house. Ex 71 at 25, 64. Had she done so, she would have learned that Mansell had information that conflicted with Shehan's recollection and was consistent with Judge Day's recollection. Tr 1502-04.

Saul did not talk with individuals who were likely to have objective information about the criticisms made by Judge Day's staff and by Shehan, Ex 71, such as Marion County Trial Court Administrator, Dianne Morse, who had direct knowledge about Judge Day's staffs' accusations of working overtime and without breaks. Tr 188, 956. She did not speak with Chris Wilson, who worked directly with Lambert on her VTC evaluator services contract through the Marion County Sheriff's Office and had information proving that Lambert's accusation that Judge Day was responsible for delaying the process and leaving her without

pay for months was false, in light of Judge Day's efforts to assist her. Tr 1297, 1300, 1303-05; Ex 71.

Saul did not contact anyone who attended a wedding ceremony, at which Shehan claimed that Judge Day had improperly revealed and exploited his Navy SEAL experience even though, had she done so, she would have learned that the attendees' recollections conflicted with his accusations. Tr 1394-1393; Ex 71.

Finally, despite her awareness of the seriousness of Brown's accusations that Judge Day, as a married person and a sitting judge, was pursuing a married woman and posting on a dating website, Saul chose to accept the accusations at face value, deciding that they did not merit further investigation. Tr 183, 1866.

In short, Saul limited her investigation into Complaint 14-86 to interviewing the individuals on the Commission's witness list and turning the witness statements over to the Commission's Executive Director. Tr 69, 179-80. No follow-up investigation was requested or provided. Tr 180, 184, 186-87. This one-sided investigative approach placed a significant burden on Judge Day to disprove the unvetted allegations. Tr 1753-54, 1756.

In the end, the Commission recommended dismissal of many of its charges levied against Judge Day. Further, the evidence he produced in his defense (but not mentioned in the Commission's "Opinion") shows that the reported accusations were overwhelmingly unfounded and amount to critical personal

opinions of a few who do not represent the prevailing view of Judge Day or the truth about the matters with which he is charged.

**b. Part Two: Revived Dismissed Complaint No. 12-139
Concerning 2012 Soccer Games**

While not pursuing any follow-up investigation into the multitude of accusations reported by Saul in her investigation of the original Complaint, the Commission chose to further engage Saul to re-investigate a 2012 soccer-referee complaint that the Commission had formally dismissed in February 2013. Tr 92; Ex 608. Unlike her investigation of active Complaint No. 14-86, Saul did not limit her investigation of dismissed Complaint No. 12-139 to the two-person witness list the Commission provided her. Tr 174-75. Instead, she interviewed seven witnesses, almost as many as she interviewed to investigate the active matter. Ex 71. Judge Day was not among those interviewed, and did not have an opportunity to suggest witnesses who would have supported his account of the events.

3. The Commission's Complaint against Judge Day

In March 2015, the Commission issued a Formal Notice under Commission Rule of Procedure (CR) 7 d, advising Judge Day that a complaint would be filed against him. Ex 603. In June 2015, the Commission filed its 13-count Complaint under CR 8 c, alleging violations of OCJC Rules 2.1(A), (C), (D), Rule 3.3(B), and Rule 3.7(B), and seeking his removal pursuant to Art VII, §8 (1) of the

Oregon Constitution. CR 8 c requires the Commission to specify “the charges against the judge and the alleged facts upon which such charges are based[.]” ER 1-21.

The Complaint asserted the following charges:

Count 1: Relating to dismissed Complaint No. 12-139, alleging that Judge Day intimidated a soccer referee on October 17, 2012. ER 1-2;

Count 2: Relating to dismissed Complaint No. 12-139, alleging that Judge Day made a false statement to the Commission regarding an incident following a November 7, 2012 soccer game. ER 3-4;

Count 3: Relating to Complaint No. 14-86, alleging that Judge Day gave permission to Shehan, a VTC participant convicted of a felony DUII, to handle a loaded gun in November 2013, while working at Judge Day’s daughter’s house. ER 4-5;

Count 4: Alleging that Judge Day gave permission to Shehan to handle a gun that Justin Day brought to Shehan’s house on January 12, 2014. ER 6-7;

Count 5: Alleging that Judge Day made false statements to the Commission denying that Justin Day brought a gun to Shehan’s house and denying that he told Shehan that he “waived” the statutory prohibition against felons handling a firearm, and alleging that Judge Day made a false statement to

Judge Rhoades and Judge Penn that he did not know that Shehan was a felon. ER 7-8;

Count 6: Alleging that Judge Day “singled” Shehan “out for attention and improperly imposed himself onto” Shehan, including requiring Shehan to attend a wedding ceremony performed by Judge Day, requiring Shehan stand next to him at the ceremony and introducing Shehan to the wedding attendees as a Navy SEAL. ER 8-10;

Count 7: Alleging Judge Day engaged in improper conduct while presiding over the VTC, including ordering Shehan to read the book *Fearless*, forcing VTC participants to watch a video in the courtroom that exacerbated PTSD symptoms in some of them, and using language such as “Raggedy Asses” when speaking with the VTC participants, and telling his staff “numerous times” that he is the judge and can do whatever he wants. ER-10-11;

Count 8: Alleging that Judge Day made false statements in his August 23, 2014, letter to the Commission, including stating that he had reassigned Shehan’s case to Judge Prall, and that he volunteered to report himself to the Commission. ER 12-13;

Count 9: Alleging that Judge Day engaged in improper conduct with regard to wall hangings displayed on the fourth floor of the Marion County courthouse, including “collecting” money from lawyers to sponsor veteran-related wall

hangings, expressing that he had permission to hang the pictures, identifying the wall-hanging sponsors, including attorneys appearing in the courthouse before Judge Day, and hanging a picture that included Adolf Hitler in the scene without permission. ER 13;

Count 10: Alleging that Judge Day hung pictures in his judicial assistant's work area despite knowing that she did not want the items hung there, and upon discovering that the judicial assistant unilaterally removed the pictures while he was on vacation, told the judicial assistant that he is a "benevolent dictator," that she "works at his pleasure," and asked whether she had become a circuit court judge while he was away on vacation. ER 15-16;

Count 11: Alleging that Judge Day engaged in poor treatment of his staff. ER 16-18;

Count 12: Alleging that Judge Day "screened and ordered his court staff to screen wedding applicants to ensure that they were not same-sex applicants" because he refused to marry same-sex couples. ER 18-19;

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Count 13: Alleging that Judge Day hung pictures of select past U.S. presidents in his courtroom's jury room. ER 19-20.²

The Complaint was never amended by the Commission, and stands as the complete set of charges asserted against Judge Day. CR 10 b.

4. The Pre-Hearing Discovery Process

The individuals who complained about Judge Day to the Commission's investigator for the most part had not shared their concerns with Judge Day. Thus, the Commission was privy to opinions and criticisms of Judge Day that he had never heard, making discovery particularly important to Judge Day's defense. The Commission controlled access to witnesses and discovery, prepping Brown before hearing testimony, Tr 844, and, as set forth below and in Judge Day's mandamus petition, limiting access to Shehan before hearing and denying Judge Day's request for access to witness Brown's cell phone and electronic discovery from Marion County witnesses.

5. The Commission Hearing

As authorized by ORS 1.420(3) and CR12, the Commission held a record-making hearing from November 9 through November 20, 2015. The Commission

² Only Count 4 arises from Judge Day's self-report. ER 14-17. Two arise from the revived 2012 soccer-referee complaint that had been formally dismissed in February 2013 (Counts 1 and 2), Exs 608, 655, and the remaining ten Counts arise from the report provided by Saul to the Commission regarding her free-ranging investigation, which went well beyond Judge Day's self-report. ER 1-21.

called 17 individuals, including Saul, and Judge Day called 43 witnesses, including 41 individuals not interviewed by the Commission's investigator. Ex 71. Closing arguments were submitted in writing. Exs 143, 657.

The following significant procedural and evidentiary events meriting the Court's attention occurred during the hearing:

- Commission members were given the opportunity to, and often did, ask questions directly of the witnesses after counsel's examination of the witness was complete. Tr. 207. Judge Day's counsel was not permitted to ask follow-up questions of the witnesses concerning the matters addressed by Commission Members' questions. Tr 210-11, ER 199-200.
- As explained and documented in detail in Judge Day's motions to strike Shehan's testimony filed in this court, ER 137-41,191, which are incorporated herein by this reference due to their length, he did not have an adequate opportunity to cross-examine Shehan in person and using exhibits at the hearing itself, or at a post-hearing deposition thereafter. The Commission, nonetheless, gave great weight to Shehan's telephonic testimony, finding it the "most credible source" of information, even when it conflicted with the testimony of Judge Day and other witnesses, and when they did not have the ability to view his demeanor. ER 75.

- The Commission heard testimony and received evidence on claims not charged in the Complaint, including a newly asserted claim by Curry that Judge Day had recently, inappropriately touched her at the courthouse. ER 144-52, 200-05.
- Both the Commission, and this Court in ruling on Judge Day’s pre-hearing mandamus petition and post-decision motion, denied Judge Day access to critical impeachment evidence—Brown’s cell phone, and the Commission further denied Judge Day access to the Court witness’s electronic data and Shehan’s medical records. Tr 846-56; ER 156-160, 209-212, 233.

B. Facts Developed at Commission Hearing

Judge Day presents the following factual overview to provide the Court with contextual information necessary for a fair evaluation of the claims against him, including evidence omitted by the Commission’s “Opinion.” Further facts are included in the specific arguments on the individual Counts.

1. 2012 Soccer Games: Dismissed Case No. 12-139 (Counts 1 and 2)

Judge Day regularly attended his son’s soccer games at Chemeketa Community College, supporting the team in a positive manner. Tr 2072. After each game, Judge Day typically approached the teams’ bench. *Id*; Tr 1637. It was not unusual for Judge Day to stop at the referees’ table, located adjacent to the

player's bench, to thank the referees for their good work. Tr 1647, 1649, 1652; Ex 99.

On October 17, 2012, Judge Day attended a soccer match during which his son, Daniel, sustained a concussion due to player contact that took Daniel out of the game. ER 1, ¶ 2; Tr 522, 2069. By all accounts, the game was unusually aggressive (seven yellow cards were issued) and not well-officiated as far as managing player safety. Tr 541, 520, 577, 1633. Judge Day had watched the center referee officiate previous games and had formed the opinion that the referee did not manage player safety well. ER 302. After the game, Judge Day approached the referees' table to obtain information so that he could register a complaint with a higher officiating authority. *Id.* He filed a complaint with the Oregon Referee Committee later that day. ER 306. The evidence shows that Judge Day's complaint was appropriate, and the Commission has not charged otherwise. Tr 1662. Judge Day's complaint listed his personal information and did not identify him as a judicial official. ER 306.

The post-game interaction between Judge Day and the center referee, Andrew Deuker, was the focus of a complaint that Deuker was encouraged by Soccer Board member Mike Allen to file with the Commission on October 18, 2012. Tr 515; Ex 96. Specifically, Deuker complained that during the interaction, Judge Day presented his judicial business card to intimidate him. *Id.*

After a subsequent game on November 7, 2012, Judge Day was grabbed from behind by a man who was unknown to him as he walked onto the field and headed toward the referee's table to thank the officials. Tr 568; ER 304. After being yelled at to get the "hell" off the field, Tr 556, Judge Day left the area without thanking the officials as he had wanted to do. Tr 568.

The Commission initiated a proceeding, identified as Case No. 12-139, and conducted an investigation pursuant to Commission Rule of Procedure (CR) 7. Ex 606. The Commission wrote Judge Day asking that he explain why he had identified himself as a Circuit Court Judge to the soccer official on October 17, 2012. Ex 607. Judge Day explained both the interaction with Deuker on October 17, 2012, and the physical contact by the unknown man at the November 7, 2012 soccer game. *Id.*

In February, 2013, the Commission determined that contrary to Deuker's complaint, Judge Day presented his business card as requested and "was not trying to use his position to intimidate the officials or for any other reason." Ex 655 at 2. The Commission also determined that, at the later game, Judge Day was grabbed from behind when he was trying to thank the officials. *Id.* The Commission specifically found that Judge Day's "recitation of the events rings more true * * * than those of the complainant,s" and that a likely explanation for Deuker's complaint was that he was "using the approach that the best defense is a

good offense since the judge threatened to file a complaint against him.” *Id.* The Commission concluded that Judge Day had not used his judicial position “inappropriately or unethically,” and that he had acted inappropriately in a public place. *Id.*

By letter dated February 18, 2013, the Commission informed Judge Day that, after reviewing his January 31, 2013 letter and “other materials available to it,” the Commission “concluded that the complaint should be dismissed.” ER 299

2. Expressions of Discontent and Spreading of Rumors by Judge Day’s Three Staff Members Behind His Back

Christine Brown, Megan Curry, and Elan Lambert all worked with Judge Day for several years prior to this proceeding. Tr 783, 935-36, 1023-24. Judge Day supervised their day-to-work, and Trial Court Administrators, Diane Morse and Paula Myers, functioned as their OJD supervisors. Tr 806, 967, 1026; Ex 514. Despite their friendly and positive interactions with Judge Day, Tr 2247; Exs 518, 563, 567, 572, 580, Judge Day’s staff grew increasingly displeased and, by August 2014, routinely gossiped and emailed amongst themselves and with others in the courthouse community behind his back. Tr 805, 954-56, 971, 2247. Megan Curry testified that there was building courthouse gossip about Judge Day during the summer of 2104, that lots of people on staff were talking about him and sharing stories and saying bad things about him. Tr 953-54.

Christine Brown began working as Judge Day's judicial assistant in November 2011. Tr 783. For the first few months, she elected to work "longer hours," Tr 805, regularly working until 6:00 or 6:30 p.m., because she wanted to "catch up" and get her work done. Tr 860. OJD has a "flex-time" system to account for time worked through lunch and after hours. Tr 806. Brown did not formally record her flex-time. Tr 806, 815. Instead, she tracked her hours on a daily basis on her personal calendar. Tr 814. No one else tracked her hours. Tr 812, 814-15. Brown also relied on an informal process of texting Judge Day to request time off, which Judge Day accommodated even when she made last-minute requests. Tr 808, 810; Ex 571, 573-584, 587.

Brown submitted time sheets based on her informal method of tracking her flexible work hour, and Judge Day authorized them on an honor-system basis, accommodating her flexible working hours and approving her informal time-keeping. Tr 812-13.

Brown disliked Judge Day's choice of historical artwork in the office. Tr 826; Ex 95. She did not like looking at pictures of past presidents—not because they were partisan— but because they reminded her of history class. Tr 825-26. Rather than explaining her personal preference and asking Judge Day if she could remove the pictures, Brown unilaterally removed some pictures while Judge Day was on vacation. Tr 796, 827. Brown's work area was visible to the public

behind a half door, and she hung pictures in her area without getting prior permission from anyone. Tr 824.

Over time, Brown no longer liked working with Judge Day. Tr 834-35. Her discontent escalated in the summer of 2014. Tr 804-05. She gossiped about Judge Day behind his back with Curry, Lambert, Shehan, Judge Rhoades, and others. Tr 789-90, 801-03. Among other accusations, Brown told people that Judge Day lied and that he was trying to cheat on his wife based on a dating website posting that she erroneously concluded belonged to Judge Day. Tr 801-02, 844. Judge Day proved Brown's rumor false, proving at hearing that the posting was not his. Tr 1756-1781; ER 84. The Commission had a twisted view of this compelling impeachment evidence, finding it was not relevant, but noting its significance to be that Brown and Curry "were truthful regarding what they viewed on the website." ER 85 n 17.

Megan Curry began working for Judge Day as his judicial clerk in December 2012. Tr 935. At first she was happy at work, but by late spring of 2014, little things began bothering her, and her discontent began to build. Tr 972. By the time of her interview with the Commission's investigator, she was "burned out" on her job. Tr 973. She felt uncomfortable with Judge Day's courtroom banter, yet she acknowledged that several judges for whom she had previously worked engaged in similar banter that did not bother her. Tr 952-53. Curry also

complained about her work hours, Tr 943, but she admitted that Judge Day had only once denied her request for a break, and that was because it conflicted with a scheduled matter before the court. Tr 1008.

Curry befriended Shehan while he was a VTC participant, and he vented to her about his gripes with Judge Day and Lambert. Tr 940, 959, 980. Shehan first told Curry about the gun-handling incident with Judge Day and Justin Day. Tr 940. Curry never told Judge Day about any of Shehan's complaints or concerns. Tr 984. However, knowing that Lambert did not like Judge Day, Curry chose to tell Lambert about Shehan's gun-handling story. Tr 958.

Curry was socializing with Brown at a bar when Brown found the www.farmersonly.com posting she thought belonged to Judge Day. Tr 998. Curry understood the serious and damaging nature of Brown's supposition that Judge Day was trying to cheat on his wife, yet she spread rumors of it without determining whether the post belonged to Judge Day. Tr 1000-01.

The Commission ignored the relevance of Brown and Curry's disregard for the truth of the rumor they spread as it reflected on the rest of their testimony adverse to Judge Day.

At the hearing in this matter, Curry alleged for the first time that Judge Day inappropriately touched her while she was assisting jurors in the hallway outside Judge Burton's courtroom. Tr 931. Judge Day testified he made no such

inappropriate physical contact with Curry, Tr 616, 2184. He proved Curry's allegation false, and therefore her credibility to be lacking, through the Marion County Courthouse video displaying the time and location of the alleged incident, which revealed it did not occur. Tr 2181-84, 2335-42.

Curry believes Judge Day is a hardworking judge who has a genuine interest in helping veterans. Tr 963. She was not a fan of Judge Day's military wall hangings, but did not personally find them offensive. Tr 965. According to Curry, Judge Day's wall hangings were considered by many to be a "mini museum" that attracted visitors to the fourth floor of the courthouse for the sole purpose of viewing the pictures. Tr 964-65.

Lambert transitioned from volunteering for Marion County's VTC to becoming a part-time OJD employee as the VTC coordinator in mid-October, 2013. Tr 367, 1023-24, 1194; Ex 522. At the same time, and with the help of Judge Day, she also agreed to a part-time contractual position as the VTC evaluator, knowing that there would be a delay in receiving payment under her contract. Tr 2207; Ex 542. Lambert had no prior experience working with a VTC team. Tr 1195. She had served in the Navy for a short while from 1974-75, but left because of sexual abuse by fellow service men. Tr 1016, 1190. Lambert has

PTSD, dissociative identity disorder (DID), depression, and a 50-percent disability rating by veterans' standards.³ Tr 1191-92.

At the end of the first pay period for Lambert's OJD position, there was a "misunderstanding" in the Trial Court Administrator's office about the amount of hours authorized for Lambert's October time because she started the position mid-month rather than on the first of the month. Tr 2207; Ex 524. Lambert complained to Judge Day and threatened to take another job, but Judge Day helped to resolve the confusion, and the problem was fixed immediately. Tr 1023, 1206, 2208; Exs 523, 524. Judge Day even assisted Lambert to increase her pay, based on her preference not to receive medical benefits. Exs 526, 528.

Lambert's VTC evaluator position was funded by a separate, "reimbursement" federal grant that required administration through a sponsoring government agency. Tr 1298, 1300-01. Despite Judge Day's efforts, finding a sponsoring agency was difficult and took time. Tr 371, 2209; Ex 519 at 2.

³ Of significance to Lambert's credibility, the American Psychiatric Association (2013) *Diagnostic and Statistical Manual on Mental Disorders (5th Ed.)* (DSM-5) includes the following diagnostic criteria for DIS: A disruption of identity characterized by two or more distinct personality states, marked discontinuity in sense of self, alterations in affect, behavior, consciousness, memory, perception, cognition, and/or sensory motor functioning, recurrent gaps in the recall of everyday events, important personal information, and/or traumatic events that are inconsistent with ordinary forgetting. The symptoms of DIS cause clinically significant distress or impairment in social, occupational, or other important areas of functioning*****." DSM -5 at 292 .

Eventually, the Marion County's Sheriff's Office agreed to create and administer Lambert's contract. Tr 371, 1298-1300; Ex 519 at 2.

The Sheriff's Office produced an initial draft of the contract to Lambert in January 2014. Tr 369, 1299; Ex 8. Negotiations with Lambert went back and forth, and extra time was spent explaining documentation that Lambert was unfamiliar with, and in assisting her through the process. Tr 1211, 1304-05; Exs 519, 615. Lambert's evaluator services contract was finalized in March 2013, Tr 1211, and she was fully paid retroactively for her services through a servicing invoice. Tr 1024, 1306.

By all accounts, except Lambert's, Judge Day stayed on top of the process, encouraging personnel to move it along and asking if any assistance was needed. Tr 1302-03. He was not responsible for causing any delay. Tr 1475, 1305, 1482, 2211; Exs 519 at 2, 532, 533; ER72, n 8. Nevertheless, Lambert blamed Judge Day and told the Commission's investigator that she "was ready to file a wage claim" and that Judge Day deceived her about the contract and "let the contract languish." Tr 2208-09; Ex 71 at 40-41. The Commission did not investigate this claim, but charged Judge Day in Count 11 with intentionally violating ethical rules based the claim. ER 32-33.

Judge Day proved Lambert to be both biased and not credible, and Count 11 to be false. Count 11 the claim was dismissed. ER 72, n 8.

As a VTC team member, Lambert became enamored with Shehan and routinely reached out to him, including unannounced visits to his farmhouse, driving him to a VA appointment, and even inviting him to present at a law-enforcement training program in which she was involved. Tr 959, 1043, 1219; Exs 123-24. Lambert became vocal during VTC sessions, praising Shehan, encouraging him to maintain contact with her just to let her know how things were going, and even speaking in open court of his connection with a famous Navy SEAL, Marcus Luttrell, and his meeting with the Texas Governor. Exs 124,125, 127, 128.

Over the latter part of 2013 and throughout 2014, conflict developed between Lambert and the VTC team. Tr 1918, 2248-49. Lambert wanted greater control over team decisions and had begun advocating for certain veterans, believing that her experience with PTSD, DID, and her short service in the military qualified her to know what was best for VTC participants. Tr 1016, 1190-92.

Lambert became critical of Judge Day's management of the VTC, believing that he cared more about his own image than he did the needs of the veterans and that he disregarded team input and issued orders contrary to team decisions. Tr 1029, 1034. She felt that Judge Day did not understand military culture or how to properly interact with veterans, Tr 1185, that his language was derogatory, and

that he employed tactics and observed military customs that were not helpful to the VTC veterans. Tr 1035, 1184. Lambert was the only VTC team member who held these critical opinions of Judge Day. Tr 1440, 1444, 1467, 1711, 1832. The testimonies of VTC team members and participants, as well as video clips of VTC sessions, undermine her personal opinions, which others uniformly did not share. Tr 1353-54, 1450, 1466, 1471-72, 1548, 1551,1553, 1573, 1575-77, 1579, 1594-95, 1597, 1605-08, 1614, 1618-22, 1694-97, 1718-20, 1835-38, 2049-51, 2054; Ex 71 at 41-74, *compare* Exs 118-130.

By the summer of 2014, Lambert routinely complained about Judge Day behind his back. Tr 957, 2248. In addition to her false claim that Judge Day was to blame for delaying her VTC evaluator contract, Lambert falsely claimed to Investigator Saul, and later testified under oath, that a married professional woman had recently told her that she felt pursued by Judge Day. Tr 1252; Ex 71, p 45. Judge Day proved Lambert's claim false. The woman Lambert referred to, Dr. DeAnn Smetana, Director of Psychological Health for the Oregon Air National Guard, Tr 1253, 1399, testified that she never said any such thing to Lambert, and that she was highly offended when she learned Lambert had made these false remarks. Tr 1402- 1404.

Despite Lambert's uniquely-held personal opinions and her unfounded accusations about Judge Day, she acknowledges that Judge Day cares about veterans and passionately tries to make their lives better. Tr 1239.

3. The Veterans Treatment Court

Of course, none of the above testimony regarding the VTC is relevant to Judge Day's self-report. Indeed, the Commission concedes that "it is not the purpose of this proceeding to evaluate Marion County's Veteran's Treatment Court (VTC), its practices, the best practices in any other treatment court, or the effectiveness of treatment courts," ER 99, yet many of the Commission's recommended findings and accusations against Judge Day implicate his performance of his judicial duties in his role as presiding judge of Marion County's VTC. Thus, a fair description of the unique aspects of the VTC model and Marion County's VTC program is important to provide necessary context.

Beginning in 2010, Marion County Circuit Court Judge Ochoa spearheaded informal efforts to improve Marion County's response to veterans' needs in the criminal justice system by forming the Veterans Treatment Docket (VTD). Tr 1705, 1873, 2041. Over the course of several years, a volunteer work group, which included Judge Day, explored transitioning the VTD into a distinct VTC. Tr 1873-74. Lack of funding presented the primary obstacle. *Id.*, Tr 366-67, 1204, 2042.

In 2013, Judge Day led the pursuit of a federal grant from the Bureau of Justice Assistance to fund operations for Marion County's VTC. Tr 1204-05, 1874, 2098. The grant proposal was accepted, and Marion County's VTC became formalized in October 2013. Tr 2086; Ex 609 (DAY06371). The grant allowed OJD to hire Lambert as the VTC coordinator. Tr 2103; Ex 522.

Veteran treatment courts are a relatively new development nationally. Their purpose is to promote the successful reintegration into civilian society of veterans who commit offenses that share a nexus with their combat stress, and to reduce their recidivism rate into the criminal justice system. Ex 609 (DAY 06377-87); Tr 1341, 1409, 1875.

The VTC model is a unique, judicially-supervised, mentor-oriented program that includes collaboration among an interdisciplinary team of professionals to serve the individual needs of each veteran participant. Ex 609 at DAY06375, DAY06377-87; Tr 1972-74. VTC participants present after having committed a variety of offenses and with a variety of ailments. The VTC team oversees each participant's particularized needs, facilitates connections to health and support services, and monitors compliance with probation terms and treatment plans in the context of a caring community environment. Tr 414, 1341, 1410, 1545, 1714, 1820, 1976-77, 2050; Ex 609 (DAY06375).

Marion County's VTC team consists of a presiding judge, a Deputy District Attorney, two defense attorneys, a probation officer, the VTC coordinator evaluator, treatment professionals, VA Administration specialists, and a veteran mentor coordinator. Tr 341. The VTC is a post-adjudicative process whereby a selected participant enters into a contract, agrees to a plea, and, while on probation, works through a four-phase program, which is typically completed in 18 to 24 months. Ex 609 at DAY06368; Tr 341, 1408, 1707, 1829, 1881. A participant's progress through the four phases is determined by the team, through a collaborative decision-making process. Tr 1893. In instances when the treatment team disagrees how best to help a participant, the presiding judge must make a decision, which some members of the treatment team may not support. Ex 71 at 51.

The VTC's unique approach to addressing the needs of veteran participants distinguishes it in significant ways from a traditional criminal court. The foundational support system of the VTC is built on frequent contact and caring connections between participants and team members. Tr 444, 1092, 1714, 1829-31, 1896-97. The VTC approach seeks to eliminate barriers to veterans' success and to deter detrimental isolationist behavior by addressing the commonly used excuse that "no one understands me." Tr 1244-45, 1362, 1414, 1829-30, 1901; Ex 609 at DAY06375.

The atmosphere of the VTC is intentionally relaxed, with a crafted culture of informality, joking, and sarcasm. Tr 890, 1350, 1409-10, 1438, 1469, 1548, 1894. Colorful language is commonly used in VTC and, while these communication methods might be perceived as demeaning or inappropriate in a different context, in the VTC setting they are overwhelmingly considered positive tools for building community and camaraderie, and relaxing unproductive tension with the veterans. Tr 815, 962, 1409, 1930, 1994, 1981, 1998. This approach, known as “therapeutic irreverence,” interjects humor in order to activate a positive emotional connection through laughter. Tr 1993. It also reflects banter familiar to veterans and common to the military culture. Tr 1892, 1930.

Because of the non-prosecutorial nature of the VTC and the effort to build a supportive community around the participants, *ex-parte* contact is “a lot more likely” to occur than in the traditional court context. Tr 1926; Tr 1219-20, 1454, 1899, 2088, 2252. Where the boundaries lie in the VTC context between providing a supportive relationship that addresses the particular needs of each VTC participant, and maintaining traditional standards of formal protections afforded represented individuals, is not always clear and is major topic of discussion nationally. Tr 1928-29.

The Marion County VTC team and personnel received no training on protocols for the specialty court. Tr 962. It was a learn “as you go,” Tr 966-67,

experience, and team members felt they were largely “having to create the wheel” themselves. Tr 1926. Many members of the team attended outside trainings, including one in Irvine, California in July 2012, and a national convention in Washington D.C. in December 2013. Tr 362, 373, 962, 1712, 1871, 2045. These trainings suggested the benefits of observing military rituals and involving familiar customs in the VTC sessions, including reciting the pledge of allegiance, using challenge coins, and observing a “parade rest” stance. Tr 362. Use of these customs and rituals was not intended to demean or invoke negative associations; instead, the customs and rituals were intended to align with customary practices among veterans, and to symbolize honor, pride, and cherished service. Tr 1893, 1982, 1988-89.

Despite Lambert and Shehan’s opinion that Judge Day’s interest in, and devotion to, veterans and their military service was somehow phony or misguided because he had not himself served in the military, Judge Day has a heritage of service in his family, and those who hold no bias against Judge Day attest that his passion is genuine. Tr 1907, 1088; Ex 116. One need not be a veteran to respect the service of veterans and to want to help veterans succeed in civilian life. Tr 1990. Additionally, all veterans are not alike and, as is true with all people, what is annoying to one person is considered empathetic to another. Tr 1991.

Most of Marion County VTC procedures were modeled after Judge Wendy Lindley's VTC in Orange County, California. Tr 365. Despite the infancy of Marion County's VTC, during Judge Day's tenure as presiding judge, the recidivism rate was zero percent. Tr 1445.

At the Irvine VTC training, the team learned that most VTCs associate with a non-profit to support the funding of nonoperational expenses. Tr 373, 1197-98. In 2011, Lambert had started Partnership for Veterans at Risk (PVR), a small nonprofit, to provide training to law enforcement and the public about issues faced by veterans upon returning from military service. Tr 373, 1163-64. Lambert informed Judge Day that she wanted PVR to support Marion County's VTC program. Tr 373, 1197. Initially, Judge Day was concerned about the appearance of the VTC associating with an OJD employee's nonprofit, but he agreed to it because of the scarcity of alternative options. Tr 373-74. Faced with the same choice today, Judge Day would decline Lambert's request. Tr 374. Judge Day did decline a request to sit on PVR's board of directors. Tr 373.

At the outset of the association, PVR agreed to receive an anonymous \$10,000 gift based upon the 2014 "Marion County Veterans Treatment Court-community culture budget" for VTC expenses. Tr 1198-99; Ex 625 p.2. PVR-funded expenses included challenge coins, flags, historical memorabilia, military wall hangings, and t-shirts. Tr 1199-1202; Exs 77-82. As PVR's treasurer,

Lambert wrote checks that paid for these VTC expenses, including checks reimbursing Judge Day for budget related out-of-pocket expenses. Tr 388, 1164, 1204. Lambert believed the expenditures were appropriate and never told Judge Day otherwise. Tr 1200-04.

The first graduation of Marion County's VTC participants was celebrated in July 2014, Tr 2227; Exs 116, 651, and included invited media and dignitaries. Tr 2226; Ex 553. Despite her later criticisms to the Commission's investigator, Lambert played an enthusiastic role in planning the celebration and never mentioned to Judge Day that she had concerns that the event would be negative for the VTC participants. *Id.*, Tr 1234; Ex 552. The celebration also included inaugurating the "Heroes and Heritage Hall" intended to honor the military heritage of local veterans and to promote a connection and sense of shared community with current VTC participants. Tr 1893, 1988, 2229, 2258, 2263. Judge Rhoades supported the honorary wall hangings and suggested including Judge Miller, a former Marine, at the graduation. Tr 2229-31; Ex 554-555.

Although differences exist between VTC and Drug Treatment Court (DTC), the evidence shows that under Judge Graves, who presided over Marion County's DTC for 14 years, the DTC also used a 501(c)(3) organization for dedicated funds and it was not uncommon for Judge Graves to have out-of-court contact with DTC participants. Tr 436, 437, 443, 494; Ex 71 at 53.

4. Shehan's Participation in the VTC

Shehan is a disabled Navy SEAL who entered Marion County's VTC in June 2013, having pled guilty to a felony DUII conviction. Ex 118. The stipulated agreement between Deputy District Attorney Orrio and Steven Meyer, Shehan's criminal defense attorney at that time, provided for a presumptive 24-month probationary period, with reduction of the felony to a misdemeanor at the completion of probation, a 90-day jail sentence, PTSD and drug and alcohol treatment, and knee surgery. Exs 1,118. Orrio introduced Shehan to the VTC as having the most impressive military service he had ever seen. Tr 1899; Ex 118.

Shehan presented with very challenging needs, including PTSD, traumatic brain injury (TBI), substance abuse, and a debilitating knee injury. Tr 1240; Ex 118. He was suffering badly and was terribly isolated. Tr 1899. He lived on a war buddy's nonfunctioning farm outside of Salem, isolated in East Marion County, growing marijuana. Tr 1240; Ex 118. During his first VTC session, Shehan introduced himself using his military call name, "Tiny," and informed the team that he had no family or friends in the area and that he was "pretty isolated." Ex 118. Shehan was assigned a new VTC attorney, Daniel Wren; a probation officer, Austin Herman; and a VTC mentor. Ex 118. As a VTC participant, Shehan's contact with his probation officer and his mentor was ordered and regulated. Exs 118-130.

The VTC's primary concerns were getting Shehan to his treatment appointments and combating his isolation by encouraging contact with individuals in the VTC community. Tr 1901, 1243, 1245. Because he had lost his driver's license due to his conviction, and because he lived in rural Marion County, he needed transportation assistance from his home. ER 73-74. VTC team members, including Judge Day, connected with Shehan outside of court sessions, driving him to appointments and inviting him to participate in social outings. Tr 221-25, 980-82, 1220-25, 1899, 2088; Ex 71 p. 63, 65-66, Exs 507-08. Shehan was receptive to the socialization efforts, but at times he wanted to be left alone. Tr 1901.

During the later part of 2013 and into 2014, Shehan was going through a particularly tough time, Tr 983, and the VTC team was concerned about his safety and well-being due to cold weather and his lack of socialization. Tr 353, 357, 427. Around the holidays, the team was particularly concerned that Shehan might self-harm, so focused efforts were made to socialize with him. Tr 356-58, 2250. Justin Day invited Shehan for Thanksgiving dinner, but Shehan declined. Tr 345-46; Ex 588. Judge Ochoa invited Shehan, Lambert, and Orrio to Christmas Eve dinner at his home, which Shehan accepted. Tr 357, 2250. Judge Day invited Shehan for brunch the day after Christmas, which was also Judge Day's birthday. Tr 412, 2250; Ex 589.

At the time, Judge Day did not consider that his show of concern for Shehan might not be all positive for Shehan. Tr 2250. Judge Day was focused on the VTC training, which encouraged camaraderie and friendly encounters with the vets. Tr 2252. As Judge Prall explained to the Commission investigator, Judge Day's conduct, including his interactions with Shehan, "were based on good motives related to helping and honoring veterans." Ex 71 at 52. Judge Day realizes now that problems can arise with his approach. Tr 2253. In hindsight, Judge Day believes he should have refrained from reaching out to Shehan, and left that for other team members to handle. Tr 2251-52.

Judge Prall confirmed that the VTC team believed Shehan might be suicidal in December 2013, when she and other team members traveled to the National Conference in Washington D.C. Ex 71 at 52. According to Judge Prall, the group was encouraged to meet some of Shehan's Navy SEAL friends who were at the conference to talk about how the VTC could help Shehan with his particular needs. Ex 71 at 52.⁴ Judge Prall recalled that the entire VTC Marion County

⁴ On November 30, 2103, Shehan texted Judge Day, saying that Shehan "used to live in DC and have interesting friends there if you want a tour guide or protection." Judge Day responded, and Shehan provided the contact information for Navy SEAL Rob O'Neil. Judge Day did not seek out the information but responded to Shehan's suggestion." Ex 28, 588.

contingent was “star struck” after meeting Shehan’s Navy SEAL friends and hearing about their military service. Ex 71 at 53.

Whether VTC team members were “star struck” or impressed with Shehan’s service record, Shehan received fair treatment as a VTC participant. Tr 413, 1912-13; Exs 123-130. Like all VTC participants, Shehan proceeded through the program on a plan unique to his needs. Tr 1912, Exs 118-130. At Shehan’s second VTC appearance in July 2013, it was decided that his jail time would be delayed until sometime after he completed in-patient treatment at the VA in Vancouver, Washington. Ex 119. For the next several VTC sessions, Shehan appeared by telephone. Exs 120-122. Videos of the VTC sessions confirm Judge Prall’s insight that Judge Day and Shehan are pranksters, and Shehan enjoyed joking, using profanity, and colorful language like “by the skin of my nuts.” Ex 71 at 51; Exs 116-130.

During the July 26, 2013, VTC telephone session with Shehan, Judge Day asked whether Shehan had read the book “Fearless” by Adam Brown. Ex 120. At first Judge Day could not remember the name of the book or the author, but he described the content, and others in the courtroom knew the book. *Id.* Shehan responded that he was not much of a reader, but the author was a friend of his. *Id.* Judge Day offered to loan Shehan his copy of the book, explaining that he thought he would enjoy reading it. *Id.* Shehan did not indicate any concern about reading

the book. *Id.* Judge Day wrote in his order that Shehan should read the book, but he did not impose a time constraint. *Id.*, Ex 595.

Sometime shortly after that VTC session, Shehan's mentor mentioned to Judge Day that Shehan might be uncomfortable reading the book. Tr 601. Judge Day had not considered that the subject of the book might be too difficult for Shehan. Tr 596. Not all veterans are alike, and it is hard to know what any one person's triggers will be. Tr 1999. Judge Day told Shehan's mentor to tell Shehan that he should not read the book if it was too uncomfortable and not to worry about it. Tr 601. At the next VTC session, Shehan had read the book, and he enthusiastically reported that he had done so in one sitting, "cover to cover." Ex 122. Shehan also reported that he got a lot out of it and he thanked Judge Day for having him read it. *Id.*

Following his in-patient treatment in Vancouver, Shehan had surgery in Portland, Oregon. Ex 123. During the October 11, 2013 VTC session, Judge Day continued to encourage Shehan to reach out for support, and to seek assistance in relocating his residence and updating his VA claim for temporary disability. *Id.* Upon a request from Lambert that Shehan be permitted to participate in a law enforcement training she was involved in, Judge Day ordered Shehan to write down his reasons for wanting to be involved in the training. *Id.* Judge Day then approved the request. *Id.* Judge Day typically required VTC participants to write

a few paragraphs either as a low-level sanction for non-compliance or as a means of processing their intentions and plans. Tr 605-06.

In December 2013, Shehan was admitted to a privately funded treatment program at the Carrick Brain Center in Texas. Tr 1246-1247; Exs 124, 125. Judge Day approved Shehan's request for permission to extend his two-week stay at the facility to three weeks. *Id.* During Shehan's appearance by telephone, Lambert discussed a telephone call she had with Shehan the night before and she called out the fact that Shehan was meeting with the Texas governor and his famous friend, Marcus Luttrell. Ex 125.

At the January 24, 2014, VTC session, Shehan discussed his continuing knee problems, his desire to return to Carrick for further treatment, and the possibility of moving to Texas for work. Ex 126. Shehan also asked for permission to go pig hunting with a knife stating there would be no firearms. *Id.* The VTC team and also Judge Ochoa were present; there were no objections to the request and the team joked about it. *Id.*

At his next VTC appearance in February 2014, Shehan explained that his second treatment session at the Carrick Brain Center was more difficult, and that his parents, who lived in Chicago, were not well. Ex 127. He requested special permission to move to Texas because he had secured a security job there. Tr 1946, 2313; Ex 127. He could not leave Oregon with a felony conviction and the

security job required him to carry a gun. Tr 1946, 2313. The VTC team unanimously agreed that it was appropriate to reduce his felony to a misdemeanor at that time. Tr 1958. The team decision was made during a regular VTC team meeting; the gun-handling incident was not discussed and was not part of the decision. Tr 1958-59. At this session, the VTC approved Shehan's application for advancement into Phase 3 of the program. *Id.* Tr 2313. Judge Day signed a judgment *nunc pro tunc* reducing Shehan's felony to a misdemeanor as of June 28, 2013, as contemplated by Shehan's VTC participation contract. Tr 1960, 2091; Ex 510.

In April 2014, Shehan appeared for his VTC session by telephone. Ex 128. He planned to travel to Chicago to visit his father who was ill. *Id.* He reported that his job had gone great and that he and his girlfriend were moving to another area in Texas. *Id.*

Again appearing by telephone for his May 19, 2014, VTC session, Shehan, reported that his father had passed away. *Id.* He was very quiet, often silent, in response to Judge Day's questions. Ex 129. He explained that he was "still spinning," stated that he was "gonna kill things," and spoke of collecting his father's bullet factory so he could "kill more stuff." *Id.* Shehan had not been in

contact with his mentor, and he remained silent when Judge Day ordered increased contact with his mentor to three times a week. *Id.* Judge Day told Shehan that he had the court's sympathy. *Id.*

Shehan again appeared by phone for his August 8, 2014, VTC session. Ex 130. He had not been in contact with his mentor and had had only sporadic contact with Lambert. *Id.* Judge Day admonished Shehan, explaining that it appeared that he was not taking that aspect of the court-mandated program seriously. *Id.* He emphasized that contact was required because it was court-ordered. *Id.* Shehan remained silent when Judge Day asked about his noncompliance. *Id.* Judge Day ordered Shehan to write a paper explaining why mentor contact was important to him and how he planned to manage his efforts to maintain mentor contact. *Id.* Shehan became audibly agitated, and in a dark tone explained that being a pot farmer had dulled his skills and he was now working on sharpening them. *Id.*

At this time, Lambert told Judge Rhoades about the gun-handling incident that had occurred eight months earlier and she facilitated the telephone conversation between Shehan and Judge Rhoades. Tr 700-01; Ex 71 at 55.

Despite Shehan's complaints about Judge Day, he acknowledges gratitude for Judge Day's help, including repairs Judge Day made to his rural Oregon residence. Ex 71 at 63. Shehan testified that Judge Day was kind to him, and that

he knew that Judge Day and his family were trying to help him. Tr 1121, 1123.

By all accounts, Shehan's life improved upon his completion of the VTC program.

Tr 986-87, 1247.

5. Hanging of Military Pictures and "Heroes and Heritage Hall"

Since his judgeship began in 2011, Judge Day has hung pictures in areas of his courtroom and chambers on the fourth floor of the Marion County Court House. Tr 109, 2223; Exs 549-550. When Judge Day did not hang the wall hangings himself, the court administrator would pay Marion County to hang the wall art. Ex 549, 550. Judge Day's pictures reflect historical images consistent with his recognized established interest in history, particularly military history and war veterans, including his association with the Band of Brothers. Tr 117, 826, 1087; Ex 71 p. 52; Exs 600-602. Judge Day received no complaints that his pictures were partisan or lacked neutrality until nearly three years into his judgeship, when Judge Rhoades raised the issue with him in the summer of 2014. Tr 2264, 2269, 2271. Specifically, Judge Rhoades emailed Judge Day regarding pictures he had stored in his jury room. Tr 2237; Ex 564. Judge Day explained that the pictures were only stored there because he wanted to clean up his office for a visiting senior judge who was using it while Judge Day was on vacation. Tr

2248. The pictures were stored for five days. Tr 2239. Judge Day had no intent to convey partisanship by storing or hanging his artwork. Tr 2267.

In anticipation of the VTC's first graduation ceremony in July 2013, Judge Day created the "Hall of Heroes" gallery on the fourth floor of the Marion County courthouse to commemorate local veterans in leadership positions. Tr 821, 879, 2262-63; Ex 71 at 52, Ex116. Judge Day's intent was to inspire VTC participants and bring awareness to military veteran issues. Tr 821, 1893, 1988, 2263; Ex 116.

The Heroes and Heritage Hall displayed memorabilia from various military conflicts and received positive attention from the public. Tr 401; Ex 116.

Initially, courthouse community members were not concerned and even supported the commemoration. Tr 171, 876, 1234, 2231; Exs 555-57. Before hanging any of the pieces, Judge Day asked Judge Prall if she had any objection because some of the pieces would be hung in the lobby area between their courtrooms. Tr 876. Judge Prall supported Judge Day's plan and felt that the area was an appropriate place to recognize veterans. Tr 877. When Judge Prall overheard Judge Day's staff chattering negatively about one piece that Judge Day hung, Judge Prall explained Judge Day's plan to them and stated her approval. Tr 876-77.

Judge Day utilized memorabilia from his personal collection as well as items donated by the families of local war veterans to create the collection, and he used his personal funds and PVR funds from donations to frame many of the

pieces. Tr 388, 393-94, 819; Ex 90, 116. He responded to inquiries of interest in contributing to the project and he collected some of the donations, but he did not solicit any donations. Tr 607-08, 2318.

One piece in the collection that became a focal point of criticism was a collage honoring Dr. Kenneth Vollmar, a World War II veteran from Oregon, which contained, among other war images, a preserved cutting of an original 1936 painting of Adolf Hitler in the background. Tr 35; Ex 35, 100, 112, 116. The picture was discovered among Dr. Vollmar's war memorabilia. Ex 116. Contrary to the claims and later media reports that Judge Day hung the collage as a pro-Hitler statement, Judge Day included the picture among the artifacts contained in the collage for the purpose of honoring Dr. Vollmar and inspiring the memory of the forces of liberty that defeated fascism." Tr 877; Exs 100, 112. There is nothing pro-Hitler about the collage which caused a media frenzy. Ex 114, 624. In fact, the caption next to the collage recounted the horrific statistics related to those killed by the Nazi regime, and ended by stating: "And none of these monstrous figures even include civilian and military combat or war-deaths. This framing is designed to remind us all that American "Civilian Soldiers" triumphed over Nazi brutality and inhumanity- lest we forget our past and allow another to rise in his place." Ex. 633

When Judge Prall overheard Judge Day's staff gossiping about the picture, she explained what Judge Day had told her about the collage, and she talked with his staff who "took another look at the picture" and saw it differently. Tr 878. When Judge Rhoades asked Judge Day to remove the picture, he did; it hung on the courthouse wall for 7-10 days. Tr 384.

Judge Pelligrini first raised concern about a "perception of fairness" regarding the Heroes and Heritage Hall at a regular judges meeting, even though she and others had not heard any complaints. Tr 470, 472-73, 882, 1285. There was no suggestion that Judge Day had engaged in unethical conduct or violated the OCJC. Tr 474. Judge Day was not present at this meeting. Ex 560. He later offered to remove the pictures the judges found offensive. Tr 474. Thereafter, Judge Rhoades wrote a pre-emptive letter to the County Commissioners to "clarify the position of the Marion County Circuit Court bench with regard to displays in the public ways of the Courthouse." Ex 57 at 4.

Despite overwhelming consensus that no rules, guidelines, or procedures governed the hanging of pictures, Judge Day came under fire for hanging pictures without proper authorization or following a formalized process. Tr 108, 109, 163, 171, 465, 825, 1093. Additionally, in Judge Day's absence from the judges' meeting, concern was raised about an appearance of impropriety regarding the sponsorship of five of the pieces hanging in the Heroes and Heritage display. Tr

2204. When Judge Day learned of the judges' concern, he trimmed the sponsorship information from the pieces. Tr 2204. He had no intention to be inappropriate. Tr 2205.

During this time, Judge Tripp was "funning" with Judge Day, and she hung a historical poster of a gay-pride march that took place in Washington D.C. Tr 118; Exs 622-23. She and Judge Day were friendly and, in fact, once when she was sick, Judge Day came to her house and installed an air conditioner because no one else could figure out how to do it. Tr 116. As a lesbian, Judge Tripp never felt discriminated against by Judge Day in any of their interactions. Tr 115-16.

Judge Pelligrini was offended by the poster and she wanted all pictures removed from the fourth floor, calling it "wall wars." Tr 118-19, 121; Ex 560. Judge Pelligrini had come to the incorrect conclusion that Judge Day was involved in taking the gay-pride poster down, when in fact Judge Day had talked with Judge Tripp before she hung it and had supported her in hanging it. Tr 119-20. As Judge Tripp explained, Judge Day is a "good egg" and a "stand-up guy" and he kept his word that he would support the poster. Tr 120-21.

At the October 13, 2014 judges' meeting, Judge Day moved to start an Artworks Committee. Tr 2234-35; Ex 561. His intention was to form a judicial team to develop written policies and guidelines for courthouse wall hangings. *Id.*; Ex 562. Although Judge Rhoades appointed an Artworks Committee and

discussion continued, nothing ever formally materialized as of the time of the hearing on the complaints against Judge Day. Tr 2235.

Consistent with Judge Prall's explanation, the heart of the wall-hanging "controversy" is simply a matter of differing opinions on personal preferences; what one person finds offensive may be positive to another. Tr 120, 170-71, 826. Indeed, Judge Lipscomb had numerous dead, hunting-prey, mounted animals in his chambers and courtroom, and other judges had potentially offensive, controversial hangings. Tr 127, 822-23.

6. Judge Day's Decision Not to Perform Same-Sex Weddings

Officiating at wedding ceremonies is authorized by statute, but is not a required judicial duty. Tr 162, 829, ORS 106.120. Judges are permitted to refuse to perform weddings. Tr 162.

When Judge Day took the oath of office in 2011, same-sex marriages were not protected by law, and, in fact, were prohibited by the Oregon Constitution. On May 19, 2014, United States District Court Judge Michael McShane issued an opinion holding that section of the Oregon Constitution unconstitutional under the Equal Protection Clause of the United States Constitution. However, it wasn't until June 2015 that the United States Supreme Court decided *Obergefell v. Hodges*, 135 S Ct 2584 (2015), which conclusively determined that a state's

refusal to permit same sex marriages violates both equal protection and due process.

After Judge McShane issued his opinion in May 2014, no guidance was provided by the OJD, Marion County or the Marion County Circuit Judges Association. Tr 476, 829-30.

Following the McShane opinion, Curry and Brown raised the issue of performing same-sex weddings to Judge Day because they knew that Judge Day's sincerely-held religious beliefs would require him to change his office's response to applicants seeking his officiating services. Tr 828, 830, 832. Judge Day met with Curry and Brown to discuss to how requests by same-sex couples could be discreetly handled. Tr 830. Judge Day had no intent to outrage the public or offend same-sex couples. Exs 116, 117. He simply wanted to excuse himself from performing this voluntary service. *Id.*

The plan that Judge Day initially suggested in 2014 was that his staff respond to wedding inquiries by checking OJIN to determine the genders of the individuals requesting his service and, if they were the same gender, explain that Judge Day was not available. Tr 786, 830, 948. Brown testified that she checked OJIN on one occasion, Tr 785, and Curry testified that she never had the opportunity to do so. Tr 948-49. Brown further testified that the one time she

checked OJIN, Judge Day did not perform the wedding because he “truly wasn’t available, he was gone that week that they wanted to get married.” Tr 787.

Judge Day stopped performing all marriage ceremonies in the summer of 2014, shortly after the McShane opinion issued and nearly a year before *Obergefell*. Tr 975-76. Thus, his plan to avoid performing same-sex marriages, while continuing to perform marriages between men and women, was never acted on.

Same-sex marriage violates the tenets of Judge Day’s faith; his decision not to perform any weddings in order to avoid performing same-sex weddings was based on his religious convictions. Exs 116, 117. Judge Day respects the right of same-sex couples to be married and held no discriminatory intent in making his decision. *Id.* Both Brown and Curry understood that Judge Day’s request not to be scheduled to perform same-sex weddings was based on his religious beliefs and not on a discriminatory intent. Tr 829, 831, 949. Brown never witnessed Judge Day discriminate on the basis of sexual orientation in his courtroom or elsewhere. Tr 831. The evidence overwhelmingly demonstrates that Judge Day does not discriminate against gay and lesbian individuals. Tr 114, 116, 162.

In a meeting with Judge Day and Trial Court Administrators, Diane Morse and Paula Meyer, in the summer of 2014, Curry and Brown brought up their uncertainty about Judge Day’s solution to not performing same-sex weddings. Tr

975-76. Judge Day informed everyone that he had already decided to stop officiating at all weddings. Tr 977.

No one filed a complaint with the Commission and no same sex-couples were denied a wedding ceremony because of Judge Day's short-lived solution to the conflict between his religious beliefs and officiating at weddings. Tr 787.

C. The Commission's Recommendations (Presented as an "Opinion")

Pursuant to ORS 1.430 and ORAP 11.27 (2)(b)(i), the Commission is authorized to provide this Court with a recommendation of charges and sanctions against Judge Day. Here, the Commission designated its recommendations in this case as an "Opinion."

As is detailed below, the Commission's recommendations include new charges of OCJC violations and new allegations of factual matters not specified in the Complaint. The Commission provided 20 pages of "Findings of Fact" with only a single citation—an exhibit cited in a footnote—to the record of the Commission proceedings, ER 65-86 , and included a five-page "Analysis of Judge Day's Conduct," without a single citation to the record. ER 105-110.

The "Opinion" recommended dismissal of Counts 7, 8, 10, 11, and 13 for failure of clear and convincing evidence, but concluded that clear and convincing evidence existed to support the remaining eight charges. ER 65. Finally, while acknowledging that Judge Day "has no prior record of discipline" and "a good

reputation among his colleagues,” the Commission recommended that this Court sanction Judge Day by removing him from his judicial position. ER 111.

ARGUMENT

I. Judge Day’ s Preliminary Motions

A. Motion to Dismiss All Counts Except Count 4

Judge Day moves this Court to dismiss all Counts in the Complaint except Count 4 for the reason that the Commission lacked statutory authority to file, and jurisdiction to consider, the other Counts in its Complaint without first receiving a complaint from any person concerning the conduct of the Judge.

ORS 1.420(1) provides:

“Upon complaint from any person concerning the conduct of a judge***and after such investigation as the Commission on Judicial Fitness and Disability considers necessary, the Commission may do any of the following:

“(a) The Commission may hold a hearing pursuant to subsection (3) of this section to inquire into the conduct of the judge.”

The Complaint was filed after Judge Day self-reported the incident where Shehan was shown a gun by Judge Day’s son while Judge Day was present at Shehan’s home. Only one of the counts, Count 4, in the Complaint contains allegations concerning this incident. There are 12 additional counts in the Complaint, which appear to have been initiated by the Commission rather than “upon complaint from any person ***” concerning Judge Day. It appears that the

Commission effectively re-filed case No. 12-139, as Counts 1 and 2 in the current Complaint, on its own, without receiving a new complaint from any person. *See* Ex. 655. It also appears that the Commission initiated, on its own, based upon information provided by its investigator, 11 additional counts without receiving a complaint from any person. The Commission is without statutory authority to initiate complaints on its own and thereafter hold a hearing. This Court should only consider the allegations in Count 4 of the Complaint, and dismiss the balance of the Counts.

B. Alternative Motion to Dismiss Counts 1 and 2

Judge Day alternatively moves this Court to dismiss Counts 1 and 2 of the Commission's Complaint for the reason these soccer game charges were part of a prior Commission investigation that was formally dismissed previously, and may not be revived.

In June, 2015, the Commission filed its Complaint including Count 1 and 2 which arose from previously dismissed Complaint 12-139. Count 1 alleges that Judge Day engaged in improper conduct by "produc[ing] his business card which identified him as a circuit court judge" to a soccer official following his son's soccer game on October 17, 2012. ER 1. Count 2 alleges that Judge Day provided a false statement to the Commission in explanation to the allegation that after a game on November 7, 2012, Judge Day approached the soccer officials'

table. ER 3. Count 2 partly reproduces Judge Day's letter explanation on this point. *Id.* Not reproduced in Count 2, however, was Judge Day's explanation that he did not know the identity of the man who that initiated physical contact with him, but was later told that the man was some sort of self-proclaimed official. ER 304.

On January 7, 2013, the Commission advised Judge Day that it had received a complaint concerning his actions with respect to soccer officials at soccer games, and that it was conducting an investigation pursuant to its Rule of Procedure 7(b). The allegations then under investigation were summarized as follows:

“The complaint alleges that, on October 17, 2012, you demanded the name of a soccer official due to his failure to manage player safety at your son's soccer game. You told the official that you had watched his poor performance over the past year. You told the official that you were going to report him to higher authorities and then gave him your business card that identifies you as a Circuit Court Judge. In November 2102, you attempted to enter the officials' area despite lack of authorization to be there.”

Ex 606.

The Commission informed Judge Day that his “response to this inquiry will assist the Commission in evaluating the allegations of this complaint,” and advised him that the Commission would review his response “and all other materials available to it at its next regularly scheduled meeting on February 15,

2013.” *Id.* Judge Day timely responded with a thorough explanation of both alleged interactions in a January 31, 2013, letter, and included a copy of the complaint he had filed with the Oregon Referee Committee on October 17, 2012 .

Ex. 98

By letter dated February 18, 2013, Judge Day was informed that, after reviewing his letter and other materials available to it, the commission had concluded that the complaint should be dismissed. Ex 608. The letter did not qualify the dismissal by suggesting that the “soccer official” complaint could be subject to reconsideration at a later date. Indeed, the Commission’s Rules of Procedure do not provide for “reconsideration” of a dismissed complaint at any time, let alone two and a half years later. The formal dismissal of Commission “proceeding” in Case 12-139 under Rule 7 was final. Thus, the Commission’s attempt to revive the “soccer official” Complaint already deemed meritless in February 2013 is improper.

In response to Judge Day’s motion to dismiss these counts below, the Commission argued that revival of Counts 1 and 2 was permissible because the Commission did not dismiss Case No. 12-139 “with prejudice.” This argument is without merit. The Commission’s Rules provide no authority to dismiss a complaint without prejudice except in one identified circumstance. Rule 17(g) provides that the resignation or retirement of a judge during the pendency of

prosecution before the Commission requires dismissal “without prejudice, which means that it may be revived if the judge resumes a judgeship.” App 18. This rule demonstrates that the Commission’s Rules expressly set forth when revival of a dismissed case is permitted. There is no similar language for Rule 7(c) or (e) dismissals. App 10-11.

Further, the revival of the soccer-game claim is prohibited by claim preclusion, which applies to administrative proceedings. *Drews v. EBI Companies*, 310 Or 134, 142, 795 P2d 531 (1990), *In re Jordan*, 295 Or 142, 156, 665 P2d 341 (1983) (application to lawyer discipline process). Claim preclusion prevents a party who has prosecuted an action against a party through to a final resolution, from prosecuting another action against the same party, where the claim in the second action is one that is based on the same factual transaction at issue in the first, and seeks a remedy additional to, or alternative to, the one sought in the first action, and is of such a nature as could have been joined in the first action. *Id* at 140. Each of the elements set forth above applies here.

This Court has instructed that “the point at which finality attaches to an administrative proceeding for preclusion purposes will usually be governed by statutory provisions.” *Id* at 142-43. *Drews* continues: “the statutory scheme will usually spell out where a second proceeding is not precluded by finality of a first proceeding.” *Id*. Here, the Commission’s Rules spell out one instance when a

second proceeding on the same matter is not precluded by a dismissal of the first proceeding. OCJC Rule 17(g). Dismissals under OCJC Rule 7 are final.

The favorable resolution of the soccer-game allegations resulting from the formal dismissal of Case No. 12-139 in 2013 is final. There is no authority for reopening a case that was dismissed over two years ago for lack of sufficient cause to proceed. Counts 1 and 2 of the Complaint must be dismissed based on claim preclusion principles.

II. The Commission Has Not Met its Evidentiary Burden.

A. This Court Conducts a *De Novo* Review Under a Clear and Convincing Evidence Standard.

This Court reviews the evidence *de novo*. *Schenck*, 318 Or at 405. The Commission must establish a willful violation of the judicial code by clear and convincing evidence. *Id.*, CR 16. The “clear and convincing” standard of proof requires that the truth of the facts asserted is ‘highly probable.’ *In re Miller*, 358 Or at 744. “The evidence cannot be speculative or equivocal.” *State v. N.A.P.*, 216 Or App 432, 437, 173 P3d 1251 (2007)(internal citations omitted). The accused is entitled to a presumption of innocence. *Jordan*, 295 Or at 156.

A judge’s conduct is “willful” under Art VII §8, if the judge intended to cause a result or take any action contrary to an applicable rule and the judge is aware of circumstances that, in fact, make the rule applicable, whether or not the

judge knows that he violated the rule. *In re Gustafson*, 305 Or 655, 660, 756 P2d 21 (1988). Accordingly, this Court must find no willful violation unless it can conclude that the evidence was highly probably that Judge Day consciously intended to cause a result or take an action contrary to a particular Canon. *See Schenck*, 318 Or at 414.

The intent required is having the “conscious objective” of causing a result that is contrary to an applicable rule or having the “conscious objective” of acting in a manner that is contrary to an applicable rule. *In re Schneck*, 318 Or at 405.

As set out more fully below, the evidence offered in support of the charges against Judge Day does not clearly and convincingly demonstrate the willful intent required. The Court, therefore, should dismiss the complaint.

B. Response to Counts

1. Count 1- Judge Day Properly Exercised His Freedom of Speech at the October 2012 Soccer Game and Did Not Violate Ethical Rules.

The first Count arises out of the 2012 soccer incident that was the subject of previously dismissed Complaint No. 12-139. In that case, the Commission deemed the soccer referee complaint meritless, finding that Judge Day had not used his judicial position “inappropriately or unethically,” and that Judge Day did not act inappropriately in a public place. Ex 655. If the Court does not dismiss

Counts 1 and 2 based on claim preclusion, Count 1 should be dismissed for lack of clear and convincing evidence of willful violation of any rule.

a. The Commission’s Recommended Findings Present a One-Sided, Inflammatory Version of the Events without Citations to the Evidentiary Record.

In the current case, the commission charged Judge Day with violating Rule OCJC 2.1(A) and (C) and Rule 2.2,⁵ alleging that Judge Day produced his business card to a soccer referee after informing him that he intended to report the referee to higher authorities due to the referee’s poor performance officiating the game Judge Day had just watched, and the that alleged conduct violated Art VII §8(1)(b) and (e). ER 1-2.

Judge Day does not dispute the facts as specified in Count 1. The Commission’s recommended findings, however, depict a one-sided, inflammatory

⁵ Rule 2.1 (A), (C) & (D) provide:

“(A) A judge shall observe high standards of conduct so that the integrity, impartiality and independence of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.

“(C) A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge.

“(D) A judge shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”

Rule 2.2 provides: “ A judge shall not use the judicial position to gain personal advantage of any kind for the judge or any other person,***.”

portrayal of the circumstances that is unsupported by citations to the evidentiary record.

The Commission recommends finding that Judge Day violated Rule 2.1(A), asserting that “[a]ll of Judge Day’s actions that day were clearly designed to intimidate a referee * * *.” ER 93. This accusation, couched as a finding, employs conclusory and inflammatory phrases such as “all of Judge Day’s actions” and “clearly designed to intimidate,” without specifying the actions or the “clear” evidence that supposedly supports the finding. Further, and importantly, intimidation of a referee was not alleged in the Complaint.

The Commission recommends finding that Judge Day violated Rule 2.1(C), asserting that Judge Day tried “to intimidate Deuker through the use of his judicial business card,” and that the violation was “evident by Judge Day’s demeanor while Deuker was testifying concerning the events of that day.” *Id.* The recommended finding that Judge Day was trying to intimidate Deuker is not only contrary to the overwhelming evidence presented in this proceeding, it directly conflicts with the Commission’s finding made contemporaneously with its investigation when this matter was active. Additionally, the suggestion that Judge Day’s perceived trial demeanor while listening to Deuker’s testimony is evidence of an intention to intimidate Deuker three years earlier is illogical, and reflects an overreaching of the Commission’s impartial role as a fact-collecting body.

The Commission further recommends finding that Judge Day violated Rule 2.2 “[b]y brandishing his judicial business card while threatening to complain” about the soccer referee’s poor officiating of the October 17, 2012, game and that Judge Day “was clearly trying to use his judicial position for personal gain, that gain being compliance with his requests.” *Id.* Again, these accusations, couched as findings, rely on conclusory and inflammatory language and conduct not alleged in the Complaint. Judge Day was charged with “produc[ing]” his business card, not “brandishing” it, and he was charged with “stat[ing] that he intended to send a report to higher authorities,” not “threatening to complain.” ER 1. The term “personal gain” has no meaning at all if the commission’s purported meaning- compliance with personal requests applies. For all of the above reasons, this Court should disregard the Commission’s findings and its further recommendation that Judge Day be found in violation of Art VII, §8(1)(e).⁶ ER 93-94.

b. The Commission’s Recommended Findings Fail for Lack of Clear and Convincing Evidence of Willful Intent.

Contrary to the impression created by the Commission’s recommended findings, there are inconsistencies in the evidence as to what transpired at the

⁶ The Commission did not recommend that Judge Day be found in violation of Art VII, § 8(1)(b).

October 17th soccer game. The Commission's assertion that Judge Day's "testimony is contrary to virtually every other witness," ER 70, neglects to report that the testimony of no two witnesses was entirely consistent. This is what happens when witnesses are told years earlier that a matter is finally resolved – they move on and their memories of the details fade. The Commission also neglects to report that Judge Day's recitation of the events is supported by the testimony of Marty Limbird, Chemeketa Community College's (CCC) head soccer coach, who heard the exchange between Judge Day and Deuker and has no apparent motivation to misrepresent what he recalled.

The Commission's recommended findings rely almost exclusively on the testimony of Deuker, the soccer referee who initially filed Complaint No. 12-139 against Judge Day, and the Commission's only witness who had a current recollection of the post-game exchange.⁷ The Commission's recommendations entirely ignore Judge Day's presentation of evidence from several witnesses, including Daniel Day, Marty Limbird, Cassie Belmodis, CCC's athletic director, and Elizabeth Mansell. Under a balanced consideration of the evidence, the evidence overwhelmingly supports the Commission's formal dismissal of

⁷ The Commission's other witness, Shayla Sharp Green, a second referee at the October 17th game, admittedly did not remember the game. Tr 539.

Deuker's complaint in 2013, and demonstrates that Judge Day did not violate applicable ethical standards, willfully or otherwise.

Despite the Commission's attempt to discredit Judge Day's conduct by claiming that it is "highly unusual" for spectators to enter a soccer field and approach game officials after a game, ER 66-67, the evidence confirms that it was not unusual for Judge Day to do so and, when he did, it was in a positive manner. Tr 1647, 1649. Instead, the "highly unusual" aspect of the October 17th game was the undisputed conclusion shared by Judge Day and members of CCC's athletic staff, that the game was unusually aggressive, and that poor officiating allowed the game to get out of control to the point that player safety was a concern. Tr 520, 541, 577, 1633. The uncontroverted evidence leads to but one conclusion - that Judge Day's decision to report his officiating concern with the overseeing agency was appropriate. Tr 1662. Coach Limbird also complained about the officiating to Steve Brooks, the Assignor of the Oregon Intercollegiate Soccer Referee Association. Tr 578. Cassie Belmodis, the Athletic Director of Chemeketa Community College, also complained to Mr. Brooks about the officiating. Tr 574.⁸

⁸ Judge Day's complaint to Brooks was ignored; he never received a reply. ER 304-06.

Despite evidence to the contrary, the Commission asserts that the evidence clearly and convincingly shows that Judge Day approached the referee's table exhibiting a condescending and intimidating demeanor and using a loud and forceful voice, ER 66-67, *but see* Tr 1638, 1640, and that the evidence clearly and convincingly shows that Judge Day placed his business card on the table, and forcefully shoved it toward Deuker even though Deuker had not asked for the card, and that Deuker did not pick up the card before Judge Day retrieved it from the table and walked away. *Id.* This, testimony, however, conflicts with the recollections of Judge Day and Coach Limbird, and cannot be reconciled with the testimony of Green, the Commission's own witness, recalling that Judge Day pressed his card into Deuker's hand. Tr 507, 531.

Judge Day testified that he asked the referee for his name. Tr 507. When Deuker was not forthcoming, Judge Day asked Deuker if he had a card that would identify his name or information relating to whom to contact to register a concern. ER 303. Deuker responded negatively and then asked Judge Day for his name and whether he had a card. *Id.*, Tr 1640. Judge Day gave Deuker his business card and, remaining calm, said something like, "well you've got my name right here." Tr 1640, 1651. Deuker did not look at or take the card. Tr 508-09. Judge Day then walked away. Tr 510.

Consistent with Judge Day's recollection, Limbird saw Judge Day approach the referees' table "casually" with no outward signs of negative emotion. Tr 1638. Judge Day asked Deuker for his name but Deuker refused to disclose it. Tr 1640. Despite Judge Day's calm demeanor, Deuker became very defensive in response to Judge Day's questions and he did not explain to Judge Day that officials are trained to not give out their names. Tr 535, 558, 1640.

While walking away, Judge Day took a phone call from his daughter, Elizabeth Mansell. Tr 2063. While talking with her Dad, there was a pause in the conversation and Mansell heard a male voice ask for Judge Day's business card and Judge Day calmly responded "along the lines of yeah, here you go." *Id.*

Judge Day did not intend to intimidate Deuker. Ex 655 at 2. The Commission claims that Judge Day's behavior was intimidating and that "Mr. Deuker was frightened and nervous as a result of his interaction with Judge Day." ER 67-68. However, Deuker himself testified that he was not intimidated by Judge Day's behavior. Tr 508. Rather Deuker felt intimidated only after Judge Day walked away and Deuker finally read Judge Day's business card. Tr 508, 510.

Though not alleged in the Complaint, the Commission recommends finding that when leaving the parking lot following the October 17th game, Judge Day and his son jotted down Deuker's license plate number to intimidate Deuker. ER 68.

The evidence, however, shows that Judge Day and his son noted Deuker's license plate number, not to intimidate him, but for potential use to identify his name through the DMV. Tr 2076.

Later that same day, Judge Day filed a report with the Oregon Referee Committee. ER 30. Deuker spoke with Steve Brooks, the assignor of referees for college soccer games (the same official to whom Judge Day emailed his complaint Ex 607, and Mike Allen, an ex-soccer referee, and filed his Complaint with the Commission on October 18, 2012. Tr 510, 514-15.

The Commission's findings after timely investigating Deuker's complaint stand in stark contrast to the Commission's current recommended findings. Contrary to the Commission's now strident opinion that Deuker "has *absolutely* no motivation to misrepresent what occurred, ER 70 (emphasis added), in February 2013, just a few months after the event, the Commission's investigation determined that Judge Day's recitation of the events rings more true * * * than those of the complainants" and that a likely explanation for Deuker's complaint was that he was "using the approach that the best defense is a good offense since the judge threatened to file a complaint against him." Ex 655 at 2. Thus, a few years ago the Commission was able to not only consider that Deuker might have motivation to file a complaint favorable to his interests, it actually identified his likely motivation.

Finally, the allegations regarding Counts 1 and 2 do not address conduct that conduct which bears a demonstrable relationship to the effective performance of Judge Day's judicial duties, and as such they do not fall within the purview of Article VII § 8 (1)(b). The Commission came to the same conclusion in its original decision, finding the complaints should be dismissed due to lack of jurisdiction. Ex. 655

For all the reasons explained above, Count 1 should be dismissed.

2. Count 2- Judge Day Was Forthright With The Commission In His Letter Response to Complaint No. 12-139 and Did Not Violate Ethical Rules.

The Commission charged Judge Day with intentionally making a false statement to the Commission in his January, 2013 letter explaining an interaction with an unknown man on a soccer field after his son's November 7, 2013 game. ER 3. There is no clear and convincing evidence of willful violation of a rule to support this charge.

a. The Commission Impermissibly Recommends Finding Violations Not Charged in the Complaint.

The Commission charged Judge Day with willfully violating OCJC Rule 2.1(C) and OCJC 2.1 (D), alleging that Judge Day falsely wrote in his January 31, 2013, letter that a soccer official initiated physical contact with him after a November 7, 2012 soccer game. ER 3-4. The Commission now recommends finding that Judge Day lied in two respects: (1) he "claimed" that the reason he

produced his business card was because the soccer official, Deuker, requested it; and (2) he “claimed” that he was physically accosted at a November, 2012 soccer game. ER 94. Count 2 accuses Judge Day of lying about the physical contact in his February 2013 letter and nothing more. Accordingly, the recommended finding that Judge Day lied about his reason for producing his business card must be disregarded and rejected because Judge Day was not given adequate notice to defend against it.

Further, the Commission’s recommendations improperly add the new charge that Judge Day violated Rule 3.12(A)⁹ “by not being candid with the Commission, a judicial discipline agency.” ER 94. This new charge must be disregarded because Judge Day was not charged with violating Rule 3.12(A) and, therefore, was not given adequate notice or an opportunity to defend against it.

The Commission recommends that Judge Day intentionally misrepresented the events and thereby violated Art VII §8 (1)(e).

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⁹ “A judge shall cooperate and be candid with judicial and lawyer discipline agencies.”

- b. The Commission's Recommended Findings on Count 2 Fail for Lack of Clear and Convincing Evidence of Willful Intent.**
 - i. The Recommended Finding that Judge Day Lied When Reporting That Deuker asked for his Business Card is Not Supported by Clear and Convincing Evidence of Willful Intent.**

In the event this Court considers this recommended finding despite the fact that it falls outside the scope of the alleged charge, the recommended finding should be dismissed because the evidence does not clearly and convincingly support this new allegation. ER 94. Again, as demonstrated above, despite the Commission's one-sided and inflammatory portrayal, the evidence on this point is equivocal. Deuker's testimony described a forceful exchange where Judge Day pushed his business card toward Deuker without a request from Deuker. Tr 502, 507, 526. The Commission's "Opinion" exaggerates that testimony and claims that Judge Day "thrust [the card] at him in anger." ER 94. The Commission also leaps to judgment that it is "completely implausible that the event could have unfolded as Judge Day claims," but offers no evidentiary basis for this conclusion. *Id.*

Under a balanced consideration of the evidence, it is more implausible that the event unfolded as the Commission describes it. The Commission's rendition of the event ignores the unified testimony of Coach Limbird and Judge Day that

Judge Day remained calm during the exchange and presented his card upon a request by Deuker. Tr 1638, ER 303. Their testimony differs slightly as to what request prompted Judge Day to produce his card, but there is no dispute that a request for Judge Day's name or his card was made by Deuker. *Id.*

Additionally, the Commission's rendition ignores Deuker's testimony that he did not feel intimidated by Judge Day until after Judge Day had walked away and Deuker read the card. Tr 508. It is more likely that had Judge Day thrust his card in anger at Deuker, Deuker would have felt intimidated at that point.

The Commission's recommended finding should be rejected because the Commission cannot prove this charge by clear and convincing evidence.

ii. The Recommended Finding That Judge Day Lied About Being Physically Accosted at the November 7th Soccer Game is Not Supported by Clear and Convincing Evidence of Willful Intent.

The Commission recommends finding that Judge Day lied in his January 31, 2012 letter, by reporting that, "Mr. Allen had physically accosted him." ER 94. This is based on the Commission's conclusion that, "[n]either Allen nor anyone else on the field at the November game touched Judge Day. ER 94. The Commission's "Opinion" erroneously represents that "[a]ll the witnesses who were present at the November 7, 2012 game, save Judge Day himself, consistently testified that neither Allen nor any other individual made any physical contact

with Judge Day on the field that day.” ER 69. The Commission ignores much of the evidence, and fails to clarify that no witness testified that no individual made any physical contact with Judge Day on the field after the November 7th game.

The undisputed evidence establishes that after his son’s November 7th soccer game, Judge Day approached the referee’s table to thank the officials for officiating the game. Tr 568. Allen, the former soccer official who had previously urged Deuker to file a complaint with the Commission, attended the soccer game. Tr 547. The November 7th game was a playoff game, which Allen typically attends. *Id.* At the conclusion of the game a physical altercation between players of opposing teams occurred. Tr 550. Allen saw Judge Day walking toward the referee’s table and put his hands in the air and aggressively yelled at Judge Day to get the “hell” off the field. Tr 548, 551, 568. Judge Day responded calmly and tried to say that he just wanted to thank the officials. Tr 568.

Witnesses testified that a physical altercation between players of opposing teams had just occurred, that there was a bit of chaos, and that there were a lot of people milling around in the area. Tr 593, 2091. The attention of the witnesses was not focused on Judge Day at all times. Tr 568, 571, 574,576.

Judge Day’s January, 31, 2012, letter to the Commission did report that a man fitting Allen’s description physically accosted him; he did not, as the Commission claims, report that the man was Allen. Ex 607. Judge Day did not

know the identity of the man who had almost pushed him down. *Id.* Allen testified that he did not grab or shove Judge Day. Tr 548. Although Daniel Day did not see his father get shoved, he does recall that on the night in question, as the two were walking off the field, Judge Day told him that he was shoved on the field after the game. Tr 2069-2071, 2077-2078.

A week after the game, Allen filed a complaint with the Commission, writing that Judge Day had “again intruded on the official’s area” after the November 7th game and that he “intercepted the judge and advised him he was to leave * * * at which he appeared to take great offense.” Ex 41. Allen’s 2012 description of his interaction with Judge Day is inconsistent with the undisputed evidence at hearing. Allen admits he “yelled” at Judge Day, yet in 2012 he reported his conduct as merely “advising” Judge Day. *Id.*; Tr 548. Additionally, no one else testified that Judge Day appeared “to take great offense.” Ex 41. Allen’s language and physical gesticulation, on the other hands, suggests that he was emotionally agitated, and initiated the engagement with anger. Tr 548. Nonetheless, the Commission finds “Mr. Allen to be a very credible witness,” and that he was “being a very careful observer of events.” ER 70.

Contrary to the Commission’s recommended finding, there is no clear and convincing evidence making it highly probable that Judge Day lied to the

Commission in his February 2012 letter. Accordingly, Count 2 should be dismissed.

3. Counts 3 and 4- Judge Day Never Intended to Permit a Felon to Handle a Gun.

Under Counts 3 and 4, the Commission claims that on two separate occasions Judge Day intentionally permitted Shehan, a known felon, to handle a gun. The Commission combines its recommended findings under these Counts despite that they concern two separate events that, other than Judge Day and Shehan, involved different people.

a. In Count 3, The Commission Impermissibly Recommends Finding Violations Not Charged in the Complaint.

In Count 3, the Commission charged Judge Day with violating Rule 2.1(A) and (C), alleging that in November 2013, Judge Day gave Shehan, whom he knew to be a convicted felon, permission to handle a loaded gun while Shehan was with Judge Day working at Judge Day's daughter's house. ER 4-5. The Commission further charged that Judge Day's violation of Rule 2.1(A) and (C), violated Art VII §8(1)(b) and (e). ER 5-6.

In Count 4, the Commission charged Judge Day with violating Rule 2.1(A) and (C), alleging that on January 12, 2014, Judge Day gave Shehan permission to handle a gun while Judge Day and his son, Justin, were at Shehan's home and that Judge Day told Shehan that, as his probation judge, he could waive the firearm

prohibition.¹⁰ ER 6. The Commission further charged that Judge Day's violation of Rule 2.1(A) and (C) violated Art VII, §8(1)(b) and (e). ER 7.

The Commission recommends finding that on November 18, 2013, and January 12, 2014, Judge Day violated Rule 2.1(A) and (C) by facilitating the handling of a firearm by Shehan, knowing his felony status, finding that Judge Day verbally granted Shehan permission to handle the weapon, waived the prohibition against Shehan handling a firearm, and was aware of Justin Day's plans to target shoot with Shehan. ER 96-97. The Commission also recommends finding that Judge Day violated Art VII, §8(1)(b) and (e). ER 96-97.

The Commission goes beyond the charges in the Complaint and improperly recommends finding that Judge Day violated Rule 2.1(B), prohibiting a judge from committing a criminal act, and finding that Judge Day violated OCJC Rule 3.9(A), prohibiting a judge from initiating ex-parte communications as defined in Rule 1.3. ER 96. These recommended findings must be disregarded because the alleged violations were not charged in the Complaint and, therefore, Judge Day was not given adequate notice and an adequate opportunity to defend against them.

¹⁰ The evidence demonstrates that the event actually occurred on Sunday January 4, 2014. Ex 28, p. 641, 590, Tr 360, 416.

b. The Commission's Recommended Findings Under Count 3 Fail for Lack of Clear and Convincing Evidence of Willful Intent.

Judge Day and his son-in-law, Donald Mansell, worked on a very ambitious cabinet-building project at Mansell's house for over a year. Tr 416; Ex 140. In November 2013, Judge Day and Mansell installed 18 cabinet units into Mansell's living room. Ex 140. Mansell wanted to hire help to paper the room in preparation for spray-lacquering the cabinets. *Id.* Mansell knew about the VTC program and understood that the VTC team tried to find employment opportunities for the vets when they could. *Id.* He asked Judge Day if he knew anyone who would want to help. *Id.*; Tr 1492. Judge Day gave Shehan's phone number to Mansell. *Id.*; Tr 1494. Mansell connected directly with Shehan about working at Mansell's house. *Id.*; Tr 1494. Shehan gratefully agreed to do the work, which took him about five hours, for \$100. *Id.*; Tr 415, 1495, 1504. Shehan asked Mansell to call him "Tiny." *Id.*; Tr 1495.

Judge Day, who was also helping Mansell with his house project, drove Shehan to Mansell's house. Tr 414, 1497. Shehan worked on taping the walls from floor to ceiling. Ex 140; Tr 1497. Judge Day worked in and outside of the living room where Shehan worked and, when in the same room, Judge Day worked across the room from Shehan performing detailing work on the cabinetry. *Id.*; Tr 416, 1498, 1525.

The cabinets Judge Day and Mansell built had three, floor-to-ceiling corner units, each with a secret drawer which was nearly impossible to detect. Ex 140; Tr 1501. Judge Day and Mansell typically challenged friends or others who came to work at the house to try to find a hidden drawer. *Id.*; Tr 1499, 1526. Mansell challenged Shehan to locate a hidden drawer. *Id.*; Tr 414, 1499. Most people could not locate a drawer, but Shehan did, and once he found the first drawer the other two were easy to identify because they were located in each of the similar corner cabinets. Ex 140.

The first hidden drawer Shehan discovered contained an unloaded family gun. Tr 1501. Mansell testified, both in his declaration dated January 29, 2015, and at the Commission hearing, that Shehan did not handle the gun. *Id.*; Tr 1502. He further testified that he and Shehan engaged in a conversation about the fact that Mansell owned the gun for protection purposes. *Id.*; Tr 1502. Mansell recalls that Shehan told him if he needed protection, “just call me. I’ll be there.” Tr 1502. Judge Day was not involved in this interaction as he was engaged working on something else. *Id.*; Tr 1502. Mansell testified that Judge Day was not in close enough proximity to see Shehan discover the hidden gun. Tr 1513. Judge Day did not challenge Shehan to find a hidden drawer, nor did Judge Day give Shehan permission, verbal or otherwise, to handle the gun. Tr 414-415. Judge Day did not see Shehan handle the gun. Tr 415.

At the time, Mansell did not think the hidden-gun incident was significant. Tr 1505. Mansell knew he stored a gun in the first drawer Shehan discovered, but he did not know or consider Shehan's probationary status. Tr 1505, 1521. Shehan did not become upset or raise any concern about finding the gun with Mansell. Tr 1505.

Shehan's rendition of the hidden-gun incident is inconsistent with Judge Day's corroborated testimony. Shehan claims that Judge Day challenged him to find a secret drawer and that when he found it and saw the gun, he asked Judge Day for permission to check it for safety and Judge Day granted it. Tr 1105. The Commission accepted Shehan's testimony, despite its inconsistencies with the two other witnesses present at the time, and found Shehan "the most credible source on this information," despite Shehan's refusal to testify in person and undergo cross-examination in Judge Day's presence. ER 75.

The Commission's proffered reason for accepting Shehan's word over the word of Judge Day and Mansell, whose credibility and character was not challenged, is that "Mansell's declaration and his testimony at the hearing were not consistent." *Id.* The Commission, however, did not identify how Mansell's testimony differed, because it could not. Mansell's declaration, Ex 140, and his trial testimony speak for themselves and reveal the error in the Commission's finding. Both Mansell and Judge Day were forthright in their manner of

testifying. Judge Day did not intentionally expose Shehan to a gun in this situation. Judge Day did not even know his son had brought the gun until he saw him showing it to Shehan. Ex 609 at DAY06399, DAY 06340, Tr 1930-31. He did not give Shehan permission to handle the gun.

Shehan's testimony should not be given any weight. First, neither the Commission nor this court observed Shehan's demeanor, as he refused to appear at the hearing in person, and only appeared by phone. He claimed he did not receive exhibits emailed to him, Tr 1144, even though the Commission's counsel claimed she sent them to him and represented that Shehan had them. Tr 1095.

As detailed above and in other filings with this Court, extensive efforts before this Court to obtain an order to present Shehan's live testimony at the hearing and video testimony post-hearing were thwarted. ER 138-41, 156-57,194-98; ER 235-266 (all outlining efforts to secure the right to confront this witness). Judge Day was not given the opportunity to depose Shehan prior to the hearing, present his live testimony to the Commission, cross-examine Shehan with exhibits, or take a video deposition for use during this Court's *de novo* review. *Id.* Both the Commission's practices and Shehan's shenanigans prevented Judge Day from confronting this witness, and presenting Shehan's complete testimony to this Court. Thus, Shehan's testimony should not be deemed credible, and should be given little or no weight.

The weight of the evidence demonstrates that the Commission's recommended finding is not supported by clear and convincing evidence of a willful intent to permit Shehan to handle a gun or to waive Shehan's probationary prohibition. Count 3 should be dismissed.

c. Count 4 – although Judge Day Acknowledges a Lapse in Judgment, There is Not Clear and Convincing Evidence of Willful Intent to Commit an Ethical Violation.

In early January, 2014, Judge Day and his son, Justin, went to Shehan's rural home to help with a broken pellet stove, which served as the only source of heat. Tr 361, 412, 427, 2322; Ex 609 at 6. Judge Ochoa had informed the VTC team about the broken stove, and the team was concerned about Shehan's safety, particularly with the very cold weather. Tr 361, 427, 2322. Shehan's criminal defense attorney, Wren, knew at the time that Judge Day was going to try to fix the stove. Tr 1423. Justin drove his truck and, unbeknownst to Judge Day, had his personal H&K handgun stored in a case in the back of the truck. Tr 2316; Ex 6; Ex 609 at 6-7 Ex 6.

While Judge Day was inspecting the pellet stove, Justin went to his truck to retrieve his handgun, and when he returned he showed it to Shehan. Tr 1109; 2316; Ex 609 at 7. Shehan handled the gun, demonstrating a maneuver for Justin, and then returned it to Justin. Tr 1045. The whole incident took a couple of

minutes. Judge Day witnessed the latter part of incident but did not partake in it. Tr 1045; Ex 609 at 7; Ex 6.

Judge Day did not intentionally expose Shehan to a gun in this situation; he did not even know his son had brought the gun until he saw him showing it to Shehan. Tr 1930-31. Shehan did not ask Judge Day for permission to handle the gun. Tr 417. Judge Day did not tell Shehan that he would waive the prohibition against felons handling a gun. Tr 417. Judge Day had no intent to put Shehan at risk or harm him. Tr 427. There was no discussion about Shehan and Justin Day target shooting. Tr 423.

Shortly after this gun-handling incident, Judge Day learned from Lambert that Shehan had expressed concern about the amount of contact Judge Day's family was having with him, and concern about Justin showing him a gun because of his felon status. Tr 2320-21. As to the first concern, Judge Day responded that if Shehan was uncomfortable with his family's contact then "of course" the contact should be reduced. Tr 2321. When Judge Day heard Shehan's second concern, he did not "panic" as the Commission claims, ER 78; he, instead reacted with the realization that "oh, my gosh, you're right, he is a felon. I didn't even think of that." Tr 2321. Judge Day felt sick to his stomach, foolish and "frankly, a bit afraid" because he had overlooked the fact that Shehan was a felon. *Id.*; Tr 2323. Judge Day "had not even picked up on" the fact that holding a gun could be

“really bad” for Shehan until Lambert brought it up. *Id.* Judge Day understood Shehan’s concern, and told Lambert that he would talk to Orrio, Wren, and Herman to find out if any bad could come of it. *Id.*, Tr 1906.

Consistent with his statement to Lambert, Judge Day informed all three gentlemen about the gun-handling incident. Tr 1415, 1423, 1455-56, 1901-02; Ex 609, Ex 7 (DAY06402, DAY06404). He did not fault Shehan or “downplay the full extent of BAS’s access to guns” as the Commission’s claims. Tr 1906; ER 78. The evidence is that Judge Day did not witness Shehan handle a gun on any other occasion, and he never went target shooting with Shehan. Tr 415, 423. Judge Day did not know that Justin and Shehan went target shooting until after he self-reported to the Commission. Tr 423. Judge Day does not know when Justin and Shehan went target shooting. Tr 424.

Initially, District Attorney Orrio considered charging Shehan with a crime, but decided not to, based upon several considerations, including Shehan’s criminal history and the fact that his DUII did not announce itself as a felony since 97% of DUIIs are misdemeanors, and Shehan did not seek out the gun. Tr 1902-03, 1949. No one recommended sanctions against Shehan, and the passing contact with the gun did not adversely affect Shehan’s participation in the VTC or his successful completion of the program. *Id.*; Tr 1415, 1453.

In February, 2014, Judge Day signed a judgment *nunc pro tunc* to June 28, 2013, reducing Shehan's felony status to a misdemeanor. Tr 1960, 2091; Ex 510. The Commission's suggestion that Judge Day exercised preferential treatment to Shehan because of the gun-handling incident is not supported by the evidence. ER 78-79. One of the legal benefits to participation in the VTC is less jail time and reductions of felony crimes to misdemeanors. Tr 1935. Where there is a nexus between military service and criminal activity and the participant demonstrates commitment to the VTC program, the reward is shorter probation, lowering of fines, and misdemeanor treatment. Tr 1936. The VTC team unanimously agreed that it was appropriate to reduce Shehan's felony to a misdemeanor in February 2014. Tr 1958. The team decision was made during a regular VTC team meeting, where the gun-handling incident was not discussed and was not part of the decision. Tr 1958-59.

Although Shehan chose to tell his gun-handling story to Curry and then Lambert, and then much later to Judge Rhoades, he neglected to inform anyone--or stated otherwise--concealed the fact that he possessed his own gun during this time. Tr 636-37. The Commission elected to accept Shehan's version of the story even though his testimony conflicts with that of the other two witnesses involved, and he refused to appear in person to be cross-examined about his accusations. The Commission found Shehan the most credible source, even though evidence

shows he knew how to “put on a good front” in the VTC context, and outside of that context, was hot-headed, quick tempered, and deceiving. Tr 629-30, 632, 636, 640. Further, Shehan’s testimony should be given limited or no weight for the reasons set out above, and his concerted efforts to evade providing in-person or complete testimony in this matter.

Despite Judge Day’s acknowledgement of the use of poor judgment, there is not clear and convincing evidence of a willful violation by Judge Day on Count 4. This count should be dismissed.

4. Count 5- Judge Day Was Forthright With the Commission and His Judicial Colleagues.

Count 5 charges that Judge Day intentionally made false statements to Commission Investigator Saul about the January 2014 gun-handling incident, and to Judge Rhoades and Judge Penn during the August 21, 2014 meeting when Judge Rhoades informed Judge Day that she had recently spoken with Shehan about the gun-handling incident, and had concerns because of his felony status. ER 7-8.

Judge Day answered Saul and Judge Rhoades’ questions honestly and never intended to deceive anyone. He acknowledged that he was asked questions by the Commission’s investigator about this incident. When talking to the investigator, Judge Day did not deny that his son brought a gun on the day of this incident. In

fact, Judge Day described the incident involving the gun in detail with the investigator. *See* Ex. 71 at 26-27.

He acknowledges that he did not tell the Commission's investigator that he told Shehan he "waived" the statutory prohibition against felons having or handling firearms. In fact, Judge Day denied the allegation that he gave permission for Shehan to handle the weapon because no such discussion occurred on January 5, 2014, or at any other time. When interviewed by the Commission's investigator, Judge Day stated: "The gun incident took very little time – no more than one or two minutes at most. There was no discussion about whether Shehan should touch the gun." Ex 71 at 26.

Judge Day was asked about this incident in a meeting with Judge Rhoades and Judge Penn on August 21, 2014, and Judge Rhoades testified that Judge Day did not acknowledge during their meeting that on the day of this incident, January 5, 2014, he knew Shehan was a felon. Judge Day admitted in his Answer that when he was asked by Judge Rhoades, he used a phrase to the effect, "I did not know he was a felon." ER 26. Judge Day admitted this explanation was in-artful. *Id.* He was simply trying to explain that, at the time the incident, he wasn't thinking of Shehan's felony conviction when the incident happened. *Id.*

The context of the August 21, 2014, discussion is important to understanding Judge Day's comment: Judge Rhoades was making factual

statements to Judge Day based upon what she had learned from Shehan, Lambert, and other staff members in the days preceding the meeting. Judge Day testified that he was surprised and felt attacked by Judge Rhoades' aggressive questions. Tr 420,424. Judge Penn testified that during the meeting, Judge Day commented that he thought the meeting was about artwork. Tr 1063, 1070. Judge Day's comment concerning Shehan's felony status was made after several questions about what had happened at Shehan's home while Judge Day was fixing the pellet stove. Tr 421-22. In that context – working on the stove in Mr. Shehan's home – the DUII felony was not even in Judge Day's mind. Tr 2220, 2275, 2323. He was not trying to mislead his colleagues. Tr 422.

Judge Rhoades acknowledged during her testimony that Judge Day may have used the phrase, "I didn't realize he was a felon." Tr 672. Prior to the meeting, Judge Rhoades had looked at Shehan's criminal file information to see if he was a felon at the time of the incident. Tr 1065. She also testified that she did not tell Judge Day about the purpose of the meeting as she wanted to surprise him and see what he would say" Tr 771.

Judge Penn testified he was more of an observer at the meeting, but did not feel that it was not the judges' role to be investigators. Tr 1063-1066. He further testified that before the meeting took place, Judge Rhoades told him the matter needed to be reported so it could be investigated. Tr 1063-64. Judge Penn also

testified that Judge Day may have used the phrase, “at the time I didn’t realize he was a felon” when he was asked by Judge Rhoades if he knew Shehan was a felon when he was at Shehan’s home fixing the heater. Tr 1068. Judge Penn advised Judge Day to keep his report to the Commission general. Tr 1056-1057, 1069. In fact, Judge Penn testified that the Commission should not hold Judge Day responsible for the content of his August 23, 201, letter because Judge Penn had instructed him to keep it short and simple. Tr 1080. Judge Penn also testified that the purpose of the meeting was not to conduct an investigation, but to determine if Judge Day would self-report to the Commission. Tr 1063, 1066.

In conclusion, the evidence concerning Judge Day’s discussions with Saul and Judges Rhoades and Penn about the January 25, 2014 incident is not in conflict. There is no clear and convincing evidence that Judge Day lied about his knowledge of Shehan’s status as a felon at the time of the incident on January 5, 2014, in violation of Rule 2.1 (D). While his explanation may have been in-artful, it did not amount to lying. There is no evidence that he intended to mislead his colleagues. The incident involving the gun was unexpected, and lasted only a few minutes. At the time of the incident, Judge Day was simply trying to fix Shehan’s stove so he would have some heat in the dead of winter. It is understandable that he was not thinking about Shehan’s status as a felon at that moment. Even Deputy District Attorney Orrio testified that he was “embarrassed to admit” that he forgot

Shehan was a felon. The same is true with Judge Day, as he testified that he didn't categorize, in his mind, participants in the veteran's treatment court as felons or even recall the category of their crimes. His focus was on helping veteran to address their problems and to get treatment for things that contributed to their being brought before the court on criminal charges in the first place. When Judge Day was later asked about the incident, he didn't lie. He did the right thing; he self-reported the incident so it could be investigated.

There is no clear and convincing evidence of intentional conduct in violation of the ethics rules. This count should be dismissed.

a. The Commission Impermissibly Recommends Finding Violations Not Charged in the Complaint.

The Commission charged Judge Day with violating OCJC Rule 2.1(D), alleging that Judge Day was dishonest to the Commission by denying to Investigator Saul that his son brought a gun to Shehan's house, that he told Shehan he would waive the statutory prohibition against felons handling a firearm, and that he was dishonest with Judges Rhoades and Penn when he told them that he did not know Shehan was a felon. ER 7-8. The Commission further charged that these alleged violations were wilful and violated Art VII, §8(1)(b) and (e). ER 8.

The Commission's findings determined that Judge Day lied to the Commission investigator about not having waived the prohibitions against Shehan possessing firearms and to Judges Rhoades and Penn about the same thing, and when he told them he did not know Shehan was a felon. ER 97. The Commission further recommended that these violations were willful violations of Art VII, §8(1)(e), not subsection (b). ER 97-98.

Here again, the Commission went beyond the charges made in the Complaint and improperly recommended finding that Judge Day violated Rule 3.12(A) by not being candid with the Commission. ER 97. This recommendation must be disregarded because Judge Day was not charged with violating this rule and, therefore, was not given an adequate opportunity to defend against the new charge.

Additionally, the Commission improperly recommends a litany of findings that are unrelated to the charges alleged in the Complaint, and appear to be included in its "Opinion" for the purpose of creating the erroneous impression that Judge Day is not credible or trustworthy. ER 80-81. These finding must also be disregarded and, in any event, are not supported by clear and convincing evidence.

b. The Commission's Recommended Findings on Count 5 are Not Supported by Clear and Convincing Evidence of Willful Intent.

The Commission found that Judge Day was not forthright with investigator Saul “most notably when he denied having waived the prohibitions against BAS possessing firearms” which the Commission finds is untrue. ER 97. Judge Day did not lie because he never told Shehan he would waive prohibition. Tr 417.

The Commission also asserts that Judge Day was not forthright with Judges Rhoades and when: (1) “he indicated to them that he had not waived those same prohibitions” and (2) “when he claimed to not know that BAS was a felon,” which the Commission finds is not true. ER 97. As set forth above, the evidence was that Judge Day did not think about Shehan’s felony status at the time, and while this was perhaps naïve, it is the truth of the matter. Tr 422.

Judge Day met with Judge Rhoades and Judge Penn on August 21, 2014, regarding the gun incidents and Judge Day’s *ex parte* contacts with Shehan. Judge Penn confirmed that he was aware that Judge Day felt “blind-sided” by the meeting having not been given advance notice of the purpose of the meeting. Ex 71 at 48. It was during this meeting that Judge Day “claimed he did not know that BAS [Shehan] was a felon and justified his contacts with BAS[,]” he also denied knowing that Justin showed BAS the gun on January 12, 2014 because he was busy with fixing the pellet stove. ER 80. Judge Day just did not consider

Shehan's felony status. There is reasonable context to out-of-court contacts with Shehan that the Commission ignored. Judge Day never denied knowing that Justin showed Shehan his gun, but he did not know Justin brought the gun or intended to show it.

The Commission found that Judge Day's August 23, 2014, self-report letter to the Commission was "very vague," and noted a "completely unspecified violation" failing to identify any factual circumstances, but naming Shehan and giving the case number. ER 80. As set forth above, however, Judge Penn advised Judge Day to be general and testified that Judge Day should not be blamed for his self-report. Tr 1069, 1080.

The Commission further noted that in a February 6, 2015 letter to the Commission, Judge Day's attorney, Mark Fucile, wrote that the VTC contract permitted *ex parte* contact and that Fucile cited language not included in Shehan's VTC contract and language that only became effective on February 6, 2015 because "Judge Day amended the contract language without input from other members of the VTC team." ER 81. This was not charged in the Complaint, and further is contrary to the evidence. The VTC participant contract has been revised several times. Tr 406; Exs 3, 131, 132, 609. At a February 6, 2015, procedural team meeting, the VTC team revised the VTC contract to include the current *ex parte* language. *Id.*; Tr 1923. Everyone agreed to the change. Tr 349, 1952.

5. Count 6-Judge Day Acknowledges that During a Brief Period of Time He Erred in Maintaining Appropriate Boundaries with Shehan, But He Always Treated Shehan Fairly and Respectfully and Had No Intent to Violate Ethical Rules.

The Commission describes Shehan as “without question a national hero. A Navy SEAL who was deployed twelve to fifteen times abroad, [who] received a Bronze Star and [who] was lauded by his fellow Navy SEALs.” ER 73. All of the VTC team members were likewise impressed with Shehan’s military service, but this did not result in unfair or preferential treatment. Tr 413, 1899, 1912, 2282; Ex 71 at 41; Exs 118-130.

Judge Day acknowledged that during a brief time at the end of December 2013 and into early January 2014, his out-of-court contact with Shehan crossed appropriate boundaries. Tr 2252. He regrets that he personally responded to VTC team concerns about Shehan’s socialization and well-being during that time, and understands that he should have left it to others to handle those concerns. Tr 2251. The evidence shows that when Judge Day heard for the first time from Lambert that Shehan was uncomfortable with his and his family’s out-of-court attention, he understood and stopped the contact. Tr 2321.

Judge Day’s out- of- court contacts with Shehan came from a heartfelt desire to help; it did not occur to him at the time that his concern could have a negative impact on Shehan. Tr 2250. Consistent with the evidence, the

Commission agrees that “Judge Day has a sincere interest in helping veterans.”

ER 72. Shehan benefitted from his successful completion of the VTC probationary program. Tr 986-87, 1247.

a. The Commission Impermissibly Recommends Findings Based on Violations Not Charged in the Complaint.

The Commission charged Judge Day with violating Rule 2.1(A) and (C) and Rule 3.7 (B), alleging that Judge Day “singled out for attention and improperly imposed himself on [Shehan]” while being in control over Shehan’s probation status, including making Shehan stand next to him while he performed a wedding and introducing Shehan to wedding attendees as a Navy SEAL. ER 8-9. The Commission further charged that this conduct violated Art VII, §8(1)(b) and (e). ER 9-10.

The Commission asserted that Judge Day’s actions are tangible manifestations of his bias toward Shehan, ER 98, and that he violated Rule 3.7(B) because his “insistent, unwanted out-of-court contacts were discourteous and undignified toward [Shehan].” ER 101. To the extent the Commission’s recommended sanction is based on wrong-doing that is not charged in the Complaint, it is inappropriate and must be rejected, both for the lack of due process and as a violation of the Commission’s rules.

b. The Commission's Recommended Findings on Count 6 are Not Supported by Clear and Convincing Evidence of Willful Intent.

Contrary to the Commission's claim that Judge Day was "enamored" with Shehan's "notoriety" and that his "fascination" with Shehan caused him to lose perspective, ER 98, the evidence is that Judge Day had "deep reverence" for all veterans who put their life on the line for liberty, and he and the entire team were understandably impressed with Shehan's military service. Tr 1899, 2282. This did not, as the Commission claims, result in "bias" or "obvious favoritism" toward Shehan. ER 98. Instead, the evidence shows that the VTC team treated Shehan fairly and responded to his unique needs as a VTC participant with his best interests in mind. Tr 1972-74; Exs 118-130.

The Commission's recommended finding is based in large part upon Shehan's allegation that Judge Day forced him to attend a wedding ceremony that Judge Day officiated and that Judge Day intentionally made him feel like a "showpiece" at the wedding. Tr 1104. The evidence does not this rendition of the event. When he, as described above, Shehan agreed to help Mansell, Judge Day's son-in-law, work on cabinetry at his house, Shehan received a ride to the courthouse from Judge Ochoa, where Judge Day picked him up se to take him to Mansell's house. Tr 2303. On the way to Mansell's house, Judge Day stopped to officiate at a wedding at the Gazebo on the Capital grounds. *Id.*; Tr 1389. Judge

Day had not planned to take Shehan to the wedding but it worked out that way because Judge Day agreed to officiate at the last minute. Tr 1392, 2303. The couple requesting the wedding was in a hurry because both were active duty Air Force. Tr 1388, 1392.

When they arrived at the wedding site, Judge Day asked Shehan if he wanted to join him or wait in the car. Tr 1104, 2303. Shehan said he wanted to join. Tr 2303. A few family members attended the small, causal wedding that lasted approximately 15 minutes. Tr 1397, 1389, 1392. Judge Day introduced Shehan to the family who wondered who Shehan was. Tr 1389. As the groom's aunt, Ronna Jo Warner, recalled, it would have been rude in that setting for Judge Day not to introduce Shehan. *Id.* Shehan did not stand next to Judge Day as he officiated, and Judge Day did not introduce Shehan using his Navy SEAL nickname. Tr 1390, 1396. Shehan, however, shared his nickname with some of the wedding attendees. Tr 1390.

Warner recalled that Shehan was extremely proud of the fact that he was a Navy SEAL, and testified that she and Shehan had a friendly conversation about her son being a Navy SEAL, during which Shehan requested her to ask her son if he knew him. Tr 1389, 1390. The groom's mother, Bobbie Jo Hernandez, also testified that the interactions were friendly and polite, and that she saw nothing inappropriate that day. Tr 1395. Neither Warner nor Hernandez knows Judge

Day, but their testimony supports his version of the events at the wedding. Tr 1392, 1397. As with almost all of Judge Day's evidence at the hearing, the Commission's "Opinion" fails to mention this testimony at all, much less describe why it was not deemed believable.

c. *Ex Parte* Contact

The Commission found that nothing in Shehan's VTC contract allowed Judge Day to have *ex parte* communications with Shehan, and that Judge Day did not previously consult with Shehan's attorney (Wren) or the prosecutor (Orrio) about these events. ER 95.

These findings should be rejected, as the evidence shows that there was no *ex parte* contact, only contact was out-of-court.

OCJC Rule 3.9 generally prohibits *ex parte* communications. Rule 1.3, in turn, defines an *ex parte* communication as "[a] communication between a judge and fewer than all parties or their lawyers, concerning a pending or impending matter." The only claim regarding *ex parte* contact comes from Shehan – specifically that on two occasions, Judge Day said that Shehan could handle a gun. As set forth above, the witnesses present during the alleged events say that no such statement was made by Judge Day. Further, the record demonstrates without question that Shehan was already in violation of his probation because he possessed his own gun during this time. Tr 636-37. He needed an excuse for the

possession if it was discovered, so he had ample motivation to lie about the alleged “permission” given to him by Judge Day. As argued above, Shehan’s testimony should be given little or no weight.

There is simply no credible evidence of any communication between Judge Day and Shehan concerning Shehan's case. See *Schenk*, 318 Or at 423 (finding that for a violation, the communication must concerned the "subject and substance" of the pending proceeding). Because there is no clear and convincing evidence that Judge Day intentionally engaged in conduct in violation of Rules 2.1(A), (C) or 3.7(B) or the Oregon constitution, Count 6 should be dismissed.

d. VTC Court

The Commission also found that there are no special provisions in the OCJC that pertain to specialty or treatment courts or the exempt judges presiding over those courts from the rules in the Code. ER 95. The undisputed evidence, however, is, and even the Commission found this that, “VTC was informal compared to other court settings.” ER 72.

Specialty courts are an evolving vehicle within the judicial system. While it is true that the OCJC has not been updated to address the unique role of a judge in a specialty court, individual courts have crafted standard-form agreements which allow out of court contact with, among others, the judge, without being considered *ex parte* communication. Ex 609 at DAY06408-06409. This approach is in

keeping with the recommended role of judges generally in therapeutic courts. *See* generally, ABA Model Code of Judicial Conduct (2007), Rule 2.9 (The equivalent to Oregon CJC Rule 3.9), comment 4.¹¹

The Commission failed to prove, by clear and convincing evidence or otherwise, that Judge Day intentionally engaged in conduct in breach of any ethical violations.

6. Count 9- Judge Day Did Not Commit Any Ethical Violations Related to the Courthouse Historical Wall Hangings.

During the months of May, June, and July of 2014, Judge Day worked with numerous members of the community to create historical wall hangings to be hung in an area of the fourth floor of the Marion County Courthouse. Ex 116. Judge Day referred to this project as the “Heroes and Heritage Hall.” Tr 375. At the outset, the project was well received by members of the courthouse community. Tr 171, 876, 1234, 2231; Exs 555-57.

¹¹ Comment 4 provides: “A judge may initiate, permit, or consider *ex parte* communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.” The accompanying reporters’ notes explained that the quoted comment was developed in recognition of “salutary *ex parte* contact the judges may increasingly be called upon to make when operating within emerging ‘therapeutic’ or ‘problem-solving courts.’” Geyh and Hodes, Reporters’ Notes to the Model Code of Judicial Conduct at 40 (2009).

One particular family of a local veteran, the Vollmar family, wished to donate their deceased father's military service memorabilia for the creation of several wall hangings. The purpose of the wall art, including that related to Dr. Ken Vollmar, was to honor Marion County residents who had served in the military and to honor their successful civilian careers, with the goal of encouraging current VTC participants in their recovery and rehabilitation process. Tr 821, 1893, 1988, 2263; Ex 116.

Funding for the project came from Judge Day's personal funds and donations made to PVR. Tr 388, 393-94, 819; Ex 90, 116. Some of the donated funds were provided by check delivered directly to Judge Day and some were collected by his staff. ER 82-83. Judge Day did not solicit funds. Tr 2318. The Commission properly concludes that Judge Day did not personally profit from the "Hall of Heroes" project. ER 83.

a. The Commission Impermissibly Recommends Finding Violations Not Charged in the Complaint.

Count 9 charged Judge Day with violating OCJC 2.1(A) and (C) in several respects with regard to historic, predominantly veteran-related wall hangings in an area of the fourth floor of the Marion County Courthouse. ER 13-14. Both rules are set out in App 4.

Of the numerous allegations pertaining to these wall hangings, the Commission's recommended findings pertain only to the Commission allegation that Judge Day "collected money from lawyers, including those appearing before him in court, to sponsor veteran-related wall hangings in the Marion County courthouse hallways" and that "[d]onation checks were delivered to Judge Day at the courthouse." ER 13.

The Commission further charged that the alleged violation of OCJC 2.1(A) and (C) constituted: (1) "[w]ilful misconduct in a judicial office where such misconduct bears a reasonable relationship to the effective performance of judicial duties;" and (2) "[w]ilful violation of any rule of judicial conduct as shall be established by the Supreme Court." ER 14-15, citing Art VII, §8(1) (b), (e).

The Complaint did not allege that Judge Day "solicited" funds from attorneys or that Judge Day violated OCJC 3.7(B) or 4.5(A).

Rule 3.7(B) provides:

"A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, *** and other with whom the judge deals in an official capacity ***"

Rule 4.5(A) provides:

"Except as provided in Subsection (b), a judge may not personally solicit funds for an organization or entity."

The Commission now recommends finding that Judge Day solicited funds from attorneys and thereby "tarnished" the integrity, impartiality, and

independence of the judiciary in violation of Rule 2.1(A). ER 100. The Commission made no finding regarding the charged violation of Rule 2.1(C).¹²

The Commission improperly went beyond the charges in the Complaint and further recommended finding that Judge Day violated Rule 4.5(A), which, subject to exception, prohibits judges from personally soliciting funds for any organization or entity. *Id.* The Complaint does not contain any allegation that Judge Day “solicited” funds or that he violated Rule 4.5 in any respect. There is a significant difference between alleging “collecting” money and the finding of “soliciting” funds. This finding must be disregarded because Judge Day was given neither adequate notice of, nor the opportunity to defend against, this new charge.

The Commission’s “Opinion” concludes that because soliciting funds is an intentional and purposeful action, Judge Day’s violation of any disciplinary rules was willful. ER 101. The Commission concluded that, based upon the above findings, Judge Day violated Art VII, §8(1)(e), but not Art VII, §8(1)(b). *Id.*

The Commission’s “Opinion” further recommends finding that Judge Day’s willful violations of Rule 2.1(C) and 3.7 (B) violated Art VII, §8(1)(b) of the Oregon Constitution.” *Id.* The Commission, however, did not charge Judge

¹² The Commission’s “Opinion” merely concludes that Judge Day willfully violated Rule 2.1(C); it does not make a specified finding of a violation of Rule 2.1(C), nor does the evidence support such a finding. ER 101.

Day with violating Rule 3.7(B), nor did it make any finding that Judge Day violated Rule 2.1(C) or Rule 3.7(B). Therefore, these recommended findings are improper and must be disregarded.

b. The Commission's Findings on Count 9 Fail for Lack of Clear and Convincing Evidence of Willful Intent.

The Commission's "Opinion" on Count 9 is incorrect and does not support the charge.

i. Solicitation of Funds

The Commission "found" that Judge Day was the sole fundraiser for the "Hall of Heroes" and either directly or, under "the guise" of PVR, secured all the funds, decided how they would be spent, gathered the materials and artwork, worked with the framer, drafted placards, and hung the pieces. ER 100.

First, Lambert testified that she approved all expenses. Tr 819, 1200-04. Furthermore, while Judge Day did much of the leg work, Martin of Art & Antiques Plus, did a great deal of work finding the various pieces that needed to be in the wall hangings. Tr 393, 395; Ex 594 at 16, 19, 20, 21.

The Commission also found that "[t]here is no question that Judge Day sought and received money" for this project. ER 100. However, while he did receive funds donated, the evidence shows that Judge Day did not solicit funds--

solicitation which was the charge asserted in the Complaint that Judge Day defended. Tr 2381.

The Commission also asserts that Judge Day “prompted” attorneys to ask about donating. ER 100. There is no such evidence in the record. Judge Day did not solicit funds. Tr 2318. The Commission’s assertion that Judge Day solicited financial support from those attorneys and collected money, ER 100, is also not supported by the evidence. There is no evidence of solicitation; Judge Day did not solicit. Tr 607, 2318.

ii. Partnership for Veterans at Risk

In 2011, Lambert, not Judge Day, formed Partnership for Veterans at Risk (PVR), a registered non-profit. The Commission found that even though Judge Day did not hold a position on PVR’s Board of Directors, he “exercised authority” over the PVR. ER 81-82. This is an unfounded assertion. Again, Lambert testified that she approved all expenses. Tr 819, 1200-04. PVR was a separate and distinct organization that simply assisted the VTC. The budget created by Judge Day was for the “community culture” aspect of the VTC program. Ex 625 p. 2. It was not a budget for PVR and nothing in the budget document mentions PVR. *Id.* The Commission’s conclusion is inaccurate, and there is no basis for this Court to make such a finding.

The Commission also found that Judge Day created the PVR budget and directed that more than 40 percent of its funds be used to create military art to be hung in his courtroom and the surrounding public areas on the fourth floor of the Marion County Courthouse. ER 82. Again, Lambert testified that she approved all expenses. Tr 819, 1200-04. Further, Judge Day did not create the PVR budget – it was separate and not controlled by Judge Day, as set out above.

iii. Atmosphere of “Implied Partiality”

The Commission found that “[t]he overall appearance of the military art collection, including the volume and content, created an atmosphere of implied partiality.” ER 82. First, the Commission’s finding, using an amorphous and meaningless phrase “atmosphere of implied partiality” illustrates how far the Commission stretched to find fault with Judge Day. Such a vague, and ultimately meaningless, finding has no place in a serious proceeding in which a judicial and legal career are at issue. The display of military art is based on history. It does not demonstrate partiality, implied or otherwise. This finding is groundless, and based only on subjective opinions; most people thought it was a good thing for the courthouse; Judge Day had no intent to convey partiality. Tr 2124, 2125, 2267. There is no clear and convincing evidence to support the Commission’s finding.

iv. Payment for the Historical Art

The Commission further found that Judge Day alone sought and obtained donations from attorneys, some of whom appeared before him, to pay for the matting and framing of some of the military art. ER 82. This is a repetitive finding, but goes further to state that Judge Day set the price each donor would pay for the piece they wished to “sponsor.” *Id.* This too, is wrong. The evidence showed the price was based on cost of framing, plus the cost of the individual artifacts, photos, and art contained in each wall hanging. Tr 608, 387, 391-393.

The Commission also found that Judge Day solicited and collected funds from Marion County attorneys Mannix, Bauer, Parks, Spooner, Much, and Ferder and that Judge Day’s accepted donations from Marion County judges was a modest \$100 collectively, compared to the smallest individual attorney donation of \$225. ER 82. Again, Judge Day did not solicit. Tr 2318. Each attorney called as a witness testified that Judge Day never solicited funds from them at any time, but that they volunteered to help out because they wanted to honor local members of the bar. Tr 1671-1672, 1687, 2115.

The Commission also incorrectly found that the amount paid for each piece specifically sponsored by the attorneys exceeded the actual cost of that piece. ER 8,n 15 (including findings as to exact pricing of framing as compared to donation). The Commission incorrectly assumed the actual cost of the piece was just the

framing, neglecting to consider the cost of the numerous artifacts, photos, and art which each wall hanging contained. Tr 387, 391-393; Ex 594, 76, 79, 80, 81. Ex 594 shows the amounts added to the retail cost (column C) of the framing. The total cost of the internal items (artwork, artifacts, and photos), and the cost of creating foam placards, is the difference between the “final cost” in column “D” and the figure in column “E.”

The Commission also concluded that “Judge Day knew that the donors expected something in return for their donations,” and he initially created placards identifying the donating attorneys or law firms and describing the art. ER 83. Judge Day did believe attorneys who donated supported the project honoring veterans, but he did not believe they looked for anything in return. He realized later the placards were inappropriate, and removed them. Tr 2204-05.

The Commission also found that, when asked to take the art down, Judge Day said, “You don’t want to go there because some very influential people in this town want it up” which Judge Rhoades viewed as a veiled threat. ER 83. Judge Day denies that phrasing and intent. Tr 383.

Further, the Commission found that Judge Day removed the Vollmar piece, and returned it to the family rather than giving it to the non-profit, finding that Judge Day received reimbursement of \$879.20 from the Vollmar family, but did not reimburse PVR those funds. ER 83. It is important to note that the

Commission found Judge Day did not personally profit from the proceeds of the wall hanging project. *Id.*

Also, the Commission missed a key piece of evidence – Ex. 76 at 4. Judge Day originally paid the \$879.20 cost of the Vollmar piece on July 11, 2014. Ex 48 at 9; Tr 385. Lambert wrote a PVR check to reimburse Judge Day on July 29, 2014. Ex 48 at 8. In the fall of 2014, PVR had still not paid the final billing due to the Elsinore Art Gallery so Judge Day paid \$879.20 on his Visa card toward the amount owed by PVR to Elsinore. Tr 385. Ex 76 at 4. The Vollmar piece was then returned to the Vollmar family, and they reimbursed Judge Day in the amount of \$879.20. Tr 384. PVR was not due a reimbursement because Judge Day had already paid down their outstanding bill by the cost of the Vollmar piece.

There is no clear and convincing evidence of any willful violations of the allegation in Count 9, and it must be dismissed.

7. Count 12-Judge Day Exercised his Religious Freedom and Did Not Commit An Ethical Violation In Deciding Not To Perform Weddings in Order to Avoid Violating His Religious Principles by Performing Same-Sex Marriages.

In addition to performing his judicial duties, in the latter part of 2011, Judge Day first made himself available to the public to perform wedding ceremonies under ORS 106.120. Performing wedding ceremonies is a non-compulsory service of those Oregon judges who choose to provide it. Tr 162, 829. Judges

who provide this service often have their own parameters, such as when, where, and for whom they will perform wedding ceremonies. Judge Day accepted and performed weddings requested by members of the public from late 2011 until the summer of 2014. Tr 975-76, 1008.

On May 19, 2014, United States District Court Judge Michael McShane held Article XV, section 5A of the Oregon Constitution (“[i]t is the policy of Oregon *** that only a marriage between one man and one woman shall be valid or legally recognized as a marriage”) was unconstitutional under the Equal Protection Clause of the United States Constitution. Neither OJD, the Oregon Circuit Court Judges Association, nor Marion County provided any guidance to judges about how (or even the need) to implement of Judge McShane’s decision. Tr 829. It wasn’t until June 26, 2015, that the United States Supreme Court decided *Obergefell v Hodges, supra*, that it was conclusively determined that the United States Constitution prohibits a Oregon’s ban on same sex marriages.

Judge Day has a sincerely held religious belief that same-sex marriage violates the tenets of his faith. Ex 116, 117. He holds a Judeo-Christian world-view, and has been attending Morning Star Community Church since 1996. Tr 2299. He follows the tenets of his church and does not and will not discriminate against LBGTQ individuals, nor would he be biased against such individuals if

they were to appear before him. Tr 2309. Judge Day is known as a fair judge who does not discriminate on the basis of sexual orientation. Tr 114-16, 120-21, 142, 162, 459, 1084-85, 1088. His ability to be impartial and to administer justice is in no way affected by his unavailability to perform marriages, whether same-sex or otherwise.

a. The Commission Impermissibly Recommends Finding Violations Not Charged in the Complaint.

The Commission charged Judge Day with violating OCJC Rule 3.3(B), alleging that Judge Day “inappropriately screened and ordered his court staff to screen wedding applicants to ensure that they were not same-sex applicants, because Judge Day refused to marry same-sex partners even though they could lawfully marry under Oregon law.” ER 18-19. Rule 3.3 (B) provides:

“A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice, or engage in harassment, against parties, witnesses, lawyers, or others based on attributes including but not limited to, sex, gender identity, race, national origin, ethnicity, religion, sexual orientation, marital status, disability, age, socioeconomic status, or political affiliation and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.”

The Commission further charged that the alleged violation of Rule 3.3(B) constituted; (1) “[w]ilful misconduct in a judicial office where such misconduct bears a reasonable relationship to the effective performance of judicial duties;” (2) “[w]ilful or persistent failure to perform judicial duties;” and (3) “[w]ilful

violation of any rule of judicial conduct as shall be established by the Supreme Court.” ER 19, citing Art VII §8(1) (b), (c), (e). The Commission believes that Judge Day violated Rule 3.3 (B) by manifesting prejudice against any person based upon sexual orientation in the performance of his judicial duties in “implement[ing] a discriminatory practice” of screening same sex couples to refuse to perform their marriages. ER 102. The Commission’s recommendations also improperly add new charges not made against Judge Day, claiming that Judge Day violated Rule 2.1(A) in “corrod[ing] the integrity and impartiality of the judiciary” and failing to promote public confidence in the judiciary and judicial system by implementing a discriminatory practice, *Id.*, p. 40, and that he violated Rule 2.1(D) in his “discriminatory plan requir[ing] his staff to lie to the public in order to conceal Judge Day’s discriminatory tactics” *Id.* The findings pertaining to Rule 2.1(A) and (D) must be disregarded because Judge Day was not charged with violating these rules and, therefore, was not given either adequate notice or the opportunity to defend against these new charges.

The Commission’s “Opinion” concluded that Judge Day’s discriminatory practice was an intentional, purposeful act with a conscious objective to cause a result, that this violation of judicial disciplinary rules was willful and his misconduct bears a demonstrable relationship to the effective performance of his judicial duties, and recommended that Judge Day be held in violation of Art VII,

§8(1)(b) and (e) of the Oregon Constitution. ER 103. The Commission did not find, as it had alleged, that Judge Day violated Art VII §8(1)(c).

b. The Commission’s Recommended Findings are Not Supported by Clear and Convincing Evidence of Willful Intent.

The Commission acknowledges that “performing marriages is not a mandatory judicial duty,” ER 83, and that “Judge Day is a Christian whose firmly held religious beliefs include defining marriage as only between a woman and a man.” ER 84.

The Commission further found that the May, 2014, ruling by Judge McShane changed the law on same sex marriage, and that Judge Day continued to marry opposite sex couples and performed his last marriage until November, 2014. ER 102. The evidence is that Judge Day stopped performing all marriages in the summer of 2014. Tr 977. Further, the law did not actually change until *Obergefell* was decided by the United States Supreme Court in 2015. *See, Johnson v Williams*, 133 S Ct 1088(2013)(the views of lower federal courts on federal constitutional issues are not binding on state courts).

After McShane’s decision, Curry and Brown raised the issue of performing same-sex weddings to Judge Day because they knew that Judge Day’s firmly-held religious beliefs would require him to change his office’s response to applicants seeking his officiating services. Tr 828, 830, 832. Judge Day met with Curry and

Brown to discuss to how requests by same-sex couples could be discreetly handled. Tr 830. Judge Day had no intent to outrage the public or offend same-sex couples. Exs 116, 117. He simply wanted to excuse himself from performing the voluntary service. *Id.*

The plan that Judge Day initially suggested was that his staff respond to wedding inquiries by checking OJIN to determine if the couple requesting his service were the same-sex, and explain that Judge Day was not available if they were. Tr 786, 830, 948. However, that plan was never employed, between May and the summer of 2014, no same sex couples requested marriage services when Judge Day was available, and none were turned away because of they were same sex. Instead, one such couple was turned away because Judge Day was truly not available.

By the summer of 2014, nearly a year before *Obergefell*, Judge Day no longer performed weddings. Tr 977, 1008.

There is no clear and convincing evidence to support any violation on Count 9.

8. The Commission Properly Recommended Dismissal of Counts 7, 8, 10, 11 and 13.

As a result of the Commission's flawed investigation, the Commission relied on untruthful, biased sources, without necessary follow-up before levying

charges against Judge Day. These allegations should never have become formal charges in this proceeding against Judge Day, and the Commission correctly concluded they were not supported by the evidence. ER 65. This Court must review the entire record under ORS 1.420, and only this Court has adjudicatory authority to dismiss the charges. However, in both *In re Schenck*, 318 Or at 404 n.2, and *In re Gustafson*, this Court accepted the Commissions' recommendation, and did not review the dismissed charges. Judge Day asks this Court to do the same here. In light of the limitations on brief length, Judge Day will not address the dismissed claims here, and will do so in the reply only if the Commission addresses them in its response. If the Court wishes to review these Counts, Judge Day incorporates by reference his Closing Argument in the Commission proceeding. Ex 657.

III. Findings Included in Background Section of Opinion, But Not Relevant to Any Found Violation

The Commission made findings on several topics in its "Background" section, which are not related to any found violation, and amount to "other-bad-act" type evidence that should be disregarded. These include findings:

- that Judge Day required the veterans speaking to stand at "parade rest." ER 72;

- that he interviewed Shehan in his chambers and then published an article in OTLA's magazine about the VTC, including personal information about Shehan, ER 74;
- that Shehan felt (but never expressed) that he could not decline the interview or to object to the release of his personal information for fear that it would harm his chances of being successful on probation and obtaining the benefits of his plea. ER 84;
- that the dating profile at www.farmersonly.com did exist and the photograph was indeed of Judge Day, despite the fact that evidence established that the profile had nothing to do with Judge Day, or any issue in the case, and belonged to a person for whom Judge Day had performed a wedding. ER 85;
- a purported "District Attorney's Office Internship" for Judge Day's son Daniel, ER 85, where the evidence was that Judge Day facilitated a connection between Daniel and Deputy DA Orrio for the purpose of helping him secure a summer legal job as a gofer, and that Daniel was not a member of Orrio's "prosecutorial team" or an intern, and where the defense team did not object to Daniel's participation in the case, and he was not introduced to the jury. The subject matter of these findings not

relevant to any charge made in the Complaint and the findings are incorrect;

- relating to whether Judge Day opposed Judge Pelligrini's appointment due to her sexual orientation as a lesbian, ER 85, rather than because of his belief that the Marion Count bench needed a lawyer from private practice rather than a government lawyer, where Judge Day's testimony was inconsistent with Judge Pellegrini's on this topic, and where the Commission deemed this topic irrelevant at the hearing, and, therefore, refused to accept evidence supporting Judge Day's testimony, including a published article recounting Judge Day's efforts to have the open judicial seat filled with a civil litigator from the private sector. ER 211-12,219-232;
- that Judge Day has been "dishonest to the public" by "mischaracterizing this disciplinary process," and that prior to the hearing in this case, Judge Day engaged in an "organized media campaign" designed to "create the impression" that the only reason for the investigation of his conduct is his position regarding same sex- marriage, and that he was being unfairly attacked due to his religious beliefs, despite the fact that his position on same sex marriage was not discovered by the Commission until after the investigation was well underway, and that Judge Day's assertions were

“intentionally deceptive to the public.” ER 86. These findings must be disregarded as they are not relevant to any Count, and Judge Day was not put on notice that publicity was an issue at the hearing. What the Commission describes, however, is that Judge Day has expressed his *opinion* that his deeply held religious beliefs, which informed his decision not to perform same-sex marriages and, therefore, any marriages, have fueled the Commission’s proceeding against him. There is no evidence that Judge Day’s “opinion” is false, nor can his opinion be used to support an ethical violation. Further, there is no evidence that Judge Day *designed* any media campaign, of what his intent was if he had, or that he knew when the Commission discovered his position on same-sex marriage. Finally, Judge Day has the right to express himself under both Article I, section 8 of the Oregon constitution, and the First Amendment to the United States constitution. Tr 2330; Exs 114, 116

IV. Constitutional Arguments

In the event the Court finds that any of the Counts are supported by clear and convincing evidence of willful conduct, this Court must consider the following constitutional deficiencies, and dismiss the complaint accordingly.

A. Incorporation of Arguments

Due to the brief-length limitations imposed by this Court, many of Judge Day's constitutional arguments and supporting authorities are incorporated by reference from Judge Day's prior filings in this court and with the Commission. Most are included in the Excerpt of Record.

B. ORAP 11.27, Art. VII §8(1), and Particular OCJC Rules Violated Judge Day's Procedural Due Process Rights.

ORAP 11.27 and the Commission's procedures in this matter did not afford Judge Day his rights to notice, to a fair trial, to be heard, and to confront an adversary. ER 130-133 (discussing relevant Fourteenth Amendment due process requirements). They are, therefore, unconstitutional.

1. ORAP 11.27's Briefing Schedule Violates Judge Day's Procedural Due Process Rights.

ORAP 11.27(2)(b)(iii)'s requirement that Judge Day file the first brief in this Court violates his due process rights and is unconstitutional, both facially and as applied. Judge Day sought to prevent this harm by bringing this constitutional deficiency to the Court's attention prior to the commencement of briefing. ER 42-43. This Court denied the motion without prejudice. ER 233. It is renewed here.

By requiring Judge Day to brief this matter first, ORAP 11.27 places the burden on the judge as the accused, rather than the Commission as prosecutor, and suggests that this matter is an appeal of an adjudication that has already occurred.

ER 161-62. No such adjudication has occurred. ER 123-130. And the burden the judge assumes is evident in the length of this brief, which must cover a host of topics and tackle a vast record without meaningful guidance from the Commission. Indeed, requiring Judge Day to take the lead in this Court to defend himself assumes guilt until proven innocent, despite this Court's explicit recognition that the accused judge is entitled to a presumption of innocence. *Jordan*, 295 Or at 156. The Commission's recommendations to this Court, although characterized as an "Opinion" "BY UNANIMOUS DECISION," provide twenty pages of "FINDINGS OF FACT," with only a solitary record citation—an exhibit cited in a footnote—provide no meaningful guidance to Judge Day in preparing his brief or to provide guidance to this Court in the exercise of its independent fact-finding obligation. Until the Commission has set out its arguments in full, along with notice of those portions of the record it intends to rely on, ORAP 11.27 denies Judge Day adequate notice of what precisely is being alleged and an opportunity to properly respond. The Commission's recommendations are no substitute for those arguments and citations.

The appropriate remedy is dismissal of the complaint, or alternatively, re-briefing in the proper order.

2. The Commission's Procedures Violated Judge Day's Procedural Due Process Rights

The Commission's rules establish both hearing procedures and investigatory procedures. The Commission's rules must ensure due process protections as to hearing procedures and procedures leading up to a hearing. ER 130-135. The Commission's rules and practices violated Judge Day's due process rights.

a. The Commission Conducted an Inadequate Investigation

The Commission is statutorily mandated to conduct an investigation of a complaint concerning a judge's conduct to determine whether to initiate formal proceedings and hold a hearing on the matter. ORS 1.420. Authorized by ORS 1.415(3), the Commission, by its own Rules of Procedure Rule 7a, is permitted to conduct discovery during this investigation by "any processes necessary to compel the production of any books, papers, records, or documents as may be required to conduct such preliminary investigation."¹³ App 10.

In response to Judge Day's self-report, the Commission hired Saul, a rookie investigator, and directed her to interview a small, select group of courthouse community members who had been talking amongst themselves and sharing their

¹³ The provisions of the Commission Rules of Procedure are reproduced in the Appendix.

wide-ranging criticisms of Judge Day behind his back for months. Tr 91-92, 173. Saul admittedly accepted the statements and accusations of these individuals as truth without further investigation, Tr 176-77, 182-83, 186-87, and conducted no investigation of the veracity of the accusations, the credibility of the sources, or the subjective nature of the personal opinions. Further, she failed to interview Judge Day's many supporters or neutral witnesses who were directly involved in the situations implicated by the flurry of criticisms. Saul did not interview many of Judge Day's colleagues or VTC team members and participants, whose opinions contrast starkly to those of the individuals interviewed, nor did she interview any wedding participants, any attorneys who sponsored wall hangings, Court staff supervisors, or judges who know Judge Day best.

Satisfied with this unbalanced investigation, the Commission levied multiple charges against Judge Day that went well beyond the scope of the self-reported incident, and revived an old complaint filed against Judge Day in 2012, which the Commission had already investigated and formally dismissed for lack of cause. The Commission's approach of dumping this dizzying array of unvetted charges upon Judge Day unreasonably placed the burden on him to expend significant time and resources to disprove the unfounded accusations. Tr 1777-80, 2326, 2335-60.

Judge Day's defense team was forced to do its own investigation, which revealed that the accusations against Judge Day were unfounded or amounted to differences of opinion, personal preferences, and erroneous conclusions. It was against this backdrop that Judge Day attempted to obtain discovery to defend the charges against him.

b. The Commission's Discovery Process Violated Judge Day's Procedural Due Process Rights.

As set out in his Motion to Strike, Judge Day sought to depose Shehan, but was denied that opportunity, because the Commission has sole authority over depositions. CR 11 c; CR 16 b. He also sought additional discovery of a key witness's cell phone, emails from the Marion County Court staff relating to him, and medical records on Shehan. The Commission subsequently authorized Shehan to testify at the hearing by phone. Tr 920. Judge Day requested the opportunity to cross examine him with exhibits at the hearing. Tr 920-21, 927. That opportunity was denied, Tr 927, and despite this Court's later authorization to depose Shehan, all attempts to do so have been thwarted. Thus, Judge Day's opportunity to be heard has been denied. This Court should dismiss Counts 3-7, which rely on Shehan's testimony.

3. The Commission Hearing Violated Procedural Due Process.

At the hearing on the charges in the Complaint, the Commission excluded impeachment evidence Judge Day offered against Shehan. Ex 640; Tr 1792-94.

Ex 640 documenting the Commission's 'hide the ball' tactics when a timely deposition of Shehan was sought was also excluded. ER 165. The consequences of Shehan not being present at the hearing were briefed to this court on multiple occasions, ER 156,191-198, 236-266. Those briefings are incorporated by reference in this brief.

Excluded Exhibit 640, ER 165-174, is relevant to impeach Shehan by showing his unreasonable and unfounded mental state as it relates to his perception of the consequences of testifying at hearing. Judge Day's counsel made an offer of proof. Tr 1665. Shehan's paranoid state of mind reveals why he avoided attending the hearing in person, and bears on his credibility. Exhibit 640 also demonstrates Judge Day's good faith effort to depose Shehan and the Commission's counsel's tactic to delay a response and not assist in securing the deposition.

Exhibit 650, a photo copied from Shehan's Facebook page, was excluded when offered at hearing, Tr 1794, and an offer of proof was made. Tr 1792-94. Shehan testified that his Facebook page was "private" and that you "couldn't view it" unless you were his "friend." Tr 1129. Investigator Carroll, however, testified

that he was able to access Shehan's page, although he is not a Facebook "friend" of Shehan's. Tr 1793. This Court should have an opportunity to see and understand Shehan in an unvarnished context. Exhibit 650 was posted on Shehan's Facebook page and it impeaches his testimony concerning his Facebook page because he testified that he "does not post selfies," Tr 1128, yet exhibit 650 is a "selfie," and it gives the court a fuller understanding of how Shehan chooses to express himself when he thinks others are not looking.

The exclusion of Exhibits 640 and 650 violated Judge Day's right to be heard. Attorney Blachly's objections should have been overruled. This evidence must be allowed in to prevent violation of Judge Day's right to due process. This Court should admit Exhibits 640 and 650 into the substantive record because they impeach Shehan's credibility.

The Commission's rules grant a judge the right to defend and to examine/cross-examine witnesses, CR 11 h, but Judge Day was denied the right to cross-examine witnesses interrogated by the Commission. Tr 210-11.

As set out above, Judge Day has been deprived of notice, the right to be meaningfully heard, the right to confront, and the right to a fair trial. At a minimum, to prevent a due process violation, this Court should exclude Shehan's testimony. Further, this Court should exclude improper testimony of Shehan, and dismiss Counts 3-7 with prejudice.

4. The Commission's Violation of Its Own Rules Violated Judge Day's Right to Due Process.

The Commission received evidence on, and made findings regarding, new allegations and charges not contained in the Complaint, yet admits that the Complaint charges were never amended. Commission's Opp. to Mot to Strike et al, 4/15/16, pp 10-11. It did not provide Judge Day the opportunity to answer, and to prepare and present a defense against the new accusations raised at the hearing.

Indeed, Judge Day was ambushed during the hearing by the introduction of testimony regarding matters that went well beyond the Complaint's allegations and charges. He was given no time, let alone a reasonable amount of time, to answer and prepare a defense to the unexpected evidence on new claims of wrongdoing. The right to notice of, and to answer and respond t, charges is provided in the Commission's own rules. CR 8 c; CR 2 j; CR 10 b; CR 13 g.

The "Opinion" is replete with "findings" and accusations that are not relevant to any charge, are mean-spirited and rife with subjective, non-factual, non-legal verbiage that has no place in a solemn proceeding, and that are not supported by the record. The evidence on new allegations and findings on charges not contained in the Complaint must be disregarded or stricken, otherwise; Judge Day's right to due process is violated.

C. The Law and Effect of the Commission’s Proceeding Against Judge Day Are Unconstitutional or Otherwise Violate Federal Law.

1. Rules 3.3(B) and 3.7(B, As Applied to Judge Day, Violate Substantive Due Process.

Substantive due process under the Fourteenth Amendment prohibits “certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’” *Zinerman v. Burch*, 494 US 113, 125 (1990) (citing *Daniels v. Williams*, 474 US 327, 331 (1986)). A violation occurs if there is a “government deprivation of life, liberty, or property” that is “intended to injure in some way unjustifiable by any government interest.” *Brittain v. Hansen*, 451 F3d 982, 991 (9th Cir 2006) (internal citations omitted). “The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights.” *Planned Parenthood of SE Pennsylvania v. Casey*, 505 US 833, 847 (1992).

The Commission’s effort to sanction and remove Judge Day from office for his decision not to perform same-sex marriage is arbitrary. The Commission seeks penalties under OCJC 3.3(B) and 3.7(B) for a decision not to participate in a voluntary, non-judicial act. On their face, OCJC Rule 3.3(B) applies only to judicial duties, and 3.7(B) applies only to conduct in a judicial capacity. To apply them in other contexts is arbitrary enforcement.

Such arbitrary enforcement would deprive Judge Day of his right to freely exercise his sincerely held religious beliefs. The Commission would remove Judge Day from office. OCJC 3.3(B) and 3.7(B), as applied to Judge Day, violate due process and so cannot constitutionally be applied here.

2. OCJC 3.3(B), and 3.7(B,) As Applied to Judge Day, Violate the Equal Protection Clause.

The Commission, by asserting a violation of OCJC 3.3(B) and 3.7(B) against Judge Day for not performing same-sex marriages, a non-compulsory, non-exclusive judicial service, because of sincerely held religious beliefs on a disputed social issue, and for hanging portraits of Republican U.S. presidents, intentionally treated Judge Day differently from other judges without a compelling state interest. ER 292-93. While other judges can choose not to perform weddings without adverse consequence on their judicial status, Judge Day is subject to disciplinary proceedings for failing to perform marriage ceremonies, something that is not even an obligation of his judicial office. Further, paintings of President Washington and President Lincoln are hung on the walls of Marion County Circuit Court Judge Dennis Graves' courtroom. No one could seriously argue or conclude that the presence of these portraits in the courtroom would create an impression that would cause a litigant to think Judge Graves was biased or partial.

Such disparate treatment is not justified by any compelling state interest. OCJC 3.3(B) and 3.7(B,) as applied to Judge Day, violate equal protection and is unconstitutional.

3. OCJC 2.1(D) and Art VII §8(1) are Unconstitutionally Overbroad.

A law is overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F3d 936, 944 (9th Cir 2011) (quoting *United States v. Stevens*, 559 US 460 (2010)). Stated another way, a law or regulation is overbroad “if it does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech.” *Klein v. San Diego County*, 463 F3d 1029, 1038 (9th Cir 2006) (internal citations omitted).

a. Art VII §8(1) is Overbroad.

Article VII §8(1)(e) permits removal from office for *any* willful violation of Oregon’s Code of Judicial Conduct, but “[t]he purposes of a judicial code of ethics are broader, serving aspirational and precautionary purposes.” *State v. Pierce*, 263 Or App 515, 523, 333 P3d 1069, 1075 (2014). To punish a judge for subjectively failing to satisfy the Code’s aspirational goals—such as preserving public confidence in the judiciary— because he engaged in protected political and

religious speech—such as hanging presidential art on the walls, as Judge Day has done—gives Art VII, §8(1)(e) a substantial number of unconstitutional applications and renders it unconstitutionally overbroad under the First and Fourteenth Amendments of the United States Constitution. This Court should limit its application to “provisions *** addressing specific circumstances where certain conduct is either prohibited or required.” OCJC 1.1. Since none of the Rules at issue are addressed to specific circumstances or expressly prohibit or require certain conduct that Judge Day has engaged in, *see infra* p 136-140, this Court should dismiss this proceeding.

b. OCJC 2.1(D) Is Overbroad.

OCJC 2.1(D),(prohibiting conduct involving dishonesty, fraud or deceit or misrepresentation) on which Counts 2, 5, and 8 are based, reaches protected speech. *See*, Trial Brief, ER 283. While the government can legitimately regulate defamatory speech, OCJC 2.1(D) is not limited to defamatory speech, but instead sweeps into its purview any unwitting, unintentional, and tangential associations with any dishonest, fraudulent, or deceptive acts. *See Walter v. Comm'n for Lawyer Discipline*, No. 05-03-01779-CV, 2005 WL 1039970, at *1 (Tex App May 5, 2005) (upholding a similar rule against an as-applied over breadth and vagueness challenge because “the rule requires an intentional falsehood”). Rule

2.1(D) reaches substantial amounts of protected speech. It is unconstitutionally overbroad.

D. OCJC 2.1(A), 2.1(C), 3.3(B), 3.7(B) and Art VII §8(1)(e) Fail Strict Scrutiny

Restrictions on the First Amendment right to freedom of speech are subject to strict scrutiny, and the regulation of the free exercise of religion, when coupled with another constitutional right such as speech, is similarly subject to strict scrutiny. Judge Day's arguments in his trial brief are incorporated herein. Tr Br 16-18.

The Commission seeks to discipline Judge Day for violating OCJC 2.1(A), 2.1(C), 3.3(B), 3.7(B), pursuant to Art VII, §8 (1)(e) because of political speech in which he has engaged and speech he has declined to utter because it contradicts his sincerely held religious beliefs. Consequently, OCJC 2.1(A), 2.1(C), 3.3(B), 3.7(B) and Art VII §8 (1)(e) must survive strict scrutiny.

The Commission must prove that these provisions are narrowly tailored to serve a compelling interest in preserving judicial impartiality or in preserving public confidence in the integrity of the judiciary. The arguments in Judge Day's trial brief are incorporated here. Tr 286-88.

The Commission cannot meet its burden.

1. Article VII, §8 (1)(e) Fails Strict Scrutiny.

Article VII, §8 (1)(e), on which all Counts rely, authorizes censure and removal of any judge who willfully violates Oregon's Code of Judicial Conduct. Yet the Code is in part aspirational, *Pierce*, 263 Or App 515, 523, 333 P3d 1069 (2014), and so its scope limits the Rules' enforcement to specific circumstances involving certain proscribed or required conduct. OCJC 1.1.

Oregon has no compelling interest in enforcing aspirational purposes as such. Even *Yulee v Florida State Bar*, 135 S Ct 1656, 1666 (2015), which recognized a state interest in judicial confidence, only upheld as enforceable a specific circumstance of proscribed conduct—personal solicitation—in light of that aspirational interest.

Additionally, Art VII, §8(1) is not narrowly tailored. It permits punishment of sincerely held religious beliefs and chills core political speech and association for *any* willful violation of the Code, not just violations of specific circumstances involving proscribed or required conduct. Thus, it cannot survive strict scrutiny for this additional reason.

This Court should limit Art VII §8(1)'s enforcement to specific circumstances and expressly required or prohibited conduct. And since none of the Rules at issue are addressed to specific circumstances or expressly prohibit or

require certain conduct that Judge Day has engaged in, as set out below, the Court should dismiss this proceeding.

2. ORJC 3.3(B) Fails Strict Scrutiny As Applied to Judge Day.

The Commission seeks to enforce ORJC 3.3(B) (judge shall not manifest bias or prejudice ***) relied on in Count 12, against Judge Day for failing to conduct same-sex marriages, a content-based application that seeks to compel speech despite sincerely-held religious beliefs.

Judge Day's failure to conduct same-sex marriages neither affects his ability to be impartial, *White*, 536 US at 775-76, nor his ability to administer justice without fear or favor. *Yulee*, 135 S Ct at 1666. Marriage ceremonies are non-mandatory and non-exclusive services that judges may choose to perform. ORS 106.120. "Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise." *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943). ORJC 3.3(B) is not narrowly tailored to serve a compelling interest, as applied to Judge Day. The Commission seeks an unconstitutional application. This Court should not enforce it against Judge Day.

3. OCJC 3.7(B) Fails Strict Scrutiny.

Rule 3.7 (B), allegedly violated in Counts 10, 11, and 13, is an aspirational Rule that, as shown *supra*, cannot satisfy strict scrutiny if enforced.

Rule 3.7(B) is not narrowly tailored to serve a compelling interest as applied to Judge Day. This Court should not enforce it against him.

4. OCJC 2.1(A) Fails Strict Scrutiny.

OCJC 2.1(A)¹⁴, relied on in Counts 1, 3, 4, 6, 7, and 9-11, restricts core political speech and so is subject to strict scrutiny. It fails.

OCJC 2.1(A) is an aspirational Rule. As discussed *supra*, Oregon has no interest in enforcing it directly.

Additionally, the grounds on which the Commission seeks to enforce this rule are not narrowly tailored to a compelling state interest. *White*, 536 US at 774-75. *See* Trial Brief, ER 289. In these contexts, Rule 2.1(A) is not narrowly tailored to serve a compelling interest, so it also is unconstitutional as-applied to Judge Day, and this Court should not enforce it against him.

5. OCJC 2.1(C) Fails Strict Scrutiny.

As with OCJC 2.1(A), the Commission seeks to discipline Judge Day for the same speech under OCJC 2.1(C) in Counts 1-4, 6, 7, and 9-11. And just as Rule 2.1(A) fails strict scrutiny, so too does OCJC 2.1(C).

¹⁴ OCJC 2.1(A) requires a judge to observe high standards of conduct so that the integrity, impartiality, and independence of the judiciary and access to justice are preserved and to act in a manner that promotes public confidence in the judiciary and judiciary system.

Like OCJD 2.1(A), OCJC 2.1(C) is an aspirational Rule. As shown *supra*, aspirational provisions cannot survive strict scrutiny if enforced.

Additionally, the alleged conduct does not threaten his ability to be impartial, *Republican Party of Minnesota v. White*, 536 US 765, 774-75 (2002), or to administer justice without fear or favor. *Yulee*, 135 S Ct at 1666. In these contexts, OCJC 2.1(C) is not narrowly tailored to serve a compelling interest, so it is unconstitutional, and the Court should not enforce it against Judge Day.

E. Removing Judge Day from Office Because Of His Sincerely Held Beliefs Will Result in a Title VII Violation.

Title VII of the Civil Rights Act of 1964, 42 USC § 2000e *et seq.*, precludes employers—both public and private—from discriminating against their employees. It mandates that a reasonable accommodation must be afforded to an employee with sincerely held religious beliefs that prevent the employee from performing her duties, with an exception to this requirement provided only in those circumstances where the employer can demonstrate undue hardship. *See Slater v. Douglas County*, 743 F Supp 2d 1188 (D Or 2010) .

Should this Court discipline or remove Judge Day from office pursuant to Art VII §8(1)(e) because he has declined the non-mandatory function of performing same-sex marriages because of his sincerely-held religious beliefs, a Title VII violation will result. *See* ER 298-99.

F. Art VII §8(1) of the Oregon Constitution Violate Article VI of the United States Constitution as Applied to Judge Day

Should this Court censure or remove Judge Day from office because he did not perform same-sex marriages on sincerely-held religious grounds, the Commission establishes a religious test for Oregon judicial offices. See, Trial Brief, ER 296. Art VII §8(1), applied in this way, would violate the religious qualifications prohibition of Article VI of the United States Constitution.

Feminist Women's Health Center v. Codispoti, 69 F3d 399 (9th Cir 1995).

G. OCJC 2.1(A), 2.1(C), 2.1(D), and 3.3(B) Are Unconstitutionally Vague

Laws regulating speech must sufficiently define their terms so that the boundary between permissible and impermissible speech is clearly marked.

Buckley, 424 U.S. 1, 41 (1976). See Trial Brief ER 284.

1. OCJC 3.3(B) Is Vague As Applied to Judge Day

OCJC 3.3(B), alleged to be violated in Count 12, is being applied to Judge Day because he recused himself from performing same-sex marriage ceremonies. It fails to provide fair warning to Judge Day that it would be applied this way. Tr. Br. 16. Indeed, the Rules state that their scope is limited to "specific circumstances where certain conduct is either prohibited or required." OCJC 1.1. This Court should not enforce OCJC 3.3(B) against Judge Day.

2. OCJC 2.1(A) Is Facially Vague

OCJC 2.1(A), relied on in 8 of the 13 Counts, does not define “public confidence in the judiciary and the judicial system.” *See*, Trial Brief, ER 285. It fails to provide fair warning to judges like Judge Day that protected speech like that at issue here is being regulated. As a federal court has held, “[f]rom reading this phrase there simply is no way to determine permissible and impermissible conduct, short of the extreme [unlawful conduct] *** each and every charge of misconduct against [plaintiff] cites this provision which again demonstrates that the Commission’s enforcement of this provision must be arbitrary and subjective, for lack of any specific, objective standards to apply.” *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F Supp 2d 72, 90-91 (ND NY), *vacated on abstention grounds*, 351 F3d 65 (2d Cir 2003). As occurred in *Spargo*, the Commission has alleged a violation of this Rule in the vast majority of the Counts. This Court should not enforce it against Judge Day.

3. OCJC 2.1(C) Is Facially Vague

OCJC 2.1 (C), (prohibiting conduct that reflects adversely on the judge’s character, competence, temperament, or fitness to serve as a judge) alleged to be violated in 9 of the 13 Counts, fails to define the subjective phrase “reflect adversely.” It fails to provide fair warning to judges like Judge Day that protected speech like that at issue here implicates OCJC 2.1(C) and allows arbitrary,

subjective, and ad hoc application—it too, is alleged to be violated in the vast majority of the counts. *Spargo*, 244 F Supp 2d at 91. Arguments in Judge Day’s Trial Brief, ER 285, are incorporated herein. This Court should not enforce it against Judge Day.

4. OCJC 2.1(D) Is Facially Vague

OCJC 2.1(D), (prohibiting conduct “involving” dishonesty, fraud deceit etc.) alleged to be violated in 3 of the Counts, fails to define “involving” and requires no intentionality. *Walter*, 2005 WL 1039970 at *1. So, it fails to provide fair warning to judges like Judge Day that their protected political speech can implicate Rule 2.1(D) and allows arbitrary, ad hoc application. *Spargo*, 244 F Supp 2d at 91. *See* Trial Brief, ER 286. It is unconstitutionally vague, so this Court should not enforce it against Judge Day.

Disciplining or removing Judge Day from office for failing to perform a non-compulsory, non-exclusive judicial service demonstrates an unwillingness to provide reasonable accommodation for his sincerely held religious belief, an accommodation for which there is no hardship for the State of Oregon.

CONCLUSION

What occurred before the Commission, and its impact on Judge Day’s reputation and livelihood, is a travesty of justice. Judge Day urges this Court not to be influenced by the Commission’s recommendation. The law requires the

Court to review the evidence *de novo*. Such review is critical in this case, and will demonstrate that the Commission cannot prove its charges.

De novo review is made difficult by the Commission's over-charging, resulting in the 13-Count Complaint, and a 9-day hearing, including admission of evidence on matters not relevant to the charges, and multiple charges not supported by evidence. The problem is compounded by the Commission's one-sided portrayal of the evidence and inappropriate use of provocative descriptors throughout its 48-page, record-cite-free "Opinion." The Commission completely fails to present an unbiased recital of the facts; indeed, the "Opinion" fails to mention Judge Day's evidence, and is replete with rhetorical and inflammatory language not consistent with the fact-finding Commission's statutory charge. It ignores important impeachment evidence as to its key witnesses—Shehan, Lambert, Brown and Curry, while finding Judge Day to be untruthful, despite evidence corroborating his testimony. Where other witness' testimony was contrary to Judge Day's, the Commission labeled this a "lie" by Judge Day, rather than as events viewed differently by another, or in other instances, differences of opinion. It also took no account of the proven lies and motives of the Commission's witnesses. There is simply not space in this brief to call out all of the places where the Commission's factual and credibility findings are incorrect or

not supported by clear and convincing evidence, when the record is viewed in its entirety.

This case impacts not only Judge Day, but also larger societal concerns. Most citizens expect judges to be treated fairly, just as they expect judges to treat them fairly. Judges can and do make mistakes every day, but not every mistake is tantamount to a violation of the OCJC. This is the reason for the clear and convincing standard of proof. There must be more than a mistake. There must be a willful intention to violate the Code, which has not been shown in this case.

Judge Day is a conservative man of faith, who works hard, has sincere intentions, and has done a lot of good. He has acknowledged that he is not perfect, and that he has made mistakes in judgment. He can be trusted not to make these mistakes again. Indeed, it was Judge Day's voluntarily self-report to the Commission that started this process, triggering a rogue investigation, which led to a multitude of charges unrelated to the self-report, or to any complaint, and resurrected two charges previously dismissed in 2012. Indeed, the Commission dismissed five of the charges as unfounded after the hearing.

While Judge Day advocates for a finding of no ethical violations, as set forth in detail above, this Court may determine otherwise, at which point the issue of sanctions is presented. In disciplining judges, this Court has available several different sanctions, including censure, suspension, or removal. This Court looks

to the purposes of disciplining judges to determine which sanction to apply. *Schenk*, 318 Or at 438. The criteria include the impact of the acts upon litigants and attorneys, the extent to which the conduct tends to undermine public confidence in the judicial system, and the extent to which the judge demonstrates a willingness to change his behavior to avoid problems in the future. *Id.*

The Commission's recommendation of the most drastic sanction—removal—is unsupportable under the evidence and the law. Removal may be appropriate where the judge is not competent to perform the duties of office, or where a series of misconduct calls into question the judge's competence and integrity, taking into account the magnitude of the violations, and the probability of recurrence. *Schenck*, 318 Or at 441-41.

Judge Day has recognized and admitted when he has used bad judgment and indicated his willingness to change his behavior to avoid problems in the future. He recognized the issue with same-sex marriages and the tension with his religious beliefs, and ceased performing weddings shortly after Article XV, section 5a was ruled upon by Judge McShane. He had ceased performing weddings for the nearly a year by the time *Obergefell* was decided. The short-lived plan to handle same sex-marriages was never implemented, and no same-sex couple was discriminated against. Judge Day has demonstrated the courage of his

convictions when it comes to the issues involving his faith, and he should not be punished for this.

While Judge Day acknowledged that he may have exercised poor judgment regarding boundaries with Shehan, his motive for working closely with him was to help a disabled veteran, not some unstated personal gain, as the Commission suggests. Even the Commission recognized that Judge Day has a sincere interest in helping veterans. ER 72.

The VTC court is relatively new, and the boundaries are not clear. Judge Day was not the only judge meeting with and helping out VTC court participants in general, and Shehan in particular, in the out-of-court setting, yet he is the only one being prosecuted for doing so.

Furthermore, much of the charged conduct does not demonstrably relate to Judge Day's judicial duties, particularly the art work and soccer disputes. See, Counts 1, 2, 5, 7, 9, 10, 11 and 13. The artwork charges amount to petty courthouse squabbling, yet once Judge Day learned of colleague's concerns, he complied with his judicial colleague's requests. Furthermore, how one soccer official viewed an interaction with Judge Day on one occasion, when there were multiple recollections of the years-old event, surely can't satisfy the high burden for judicial sanction.

Despite the Commission's attempt to spin the facts, none of the alleged misconduct resulted in any personal gain to Judge Day.

In *Gustafson*, the Commission found 13 violations of the OCJC against a newer judge, who acknowledged in each instance his behavior was improper, but contested its willfulness. This court found willful misconduct, but noted that although Judge Gustafson was slow to recognize that his conduct in office fell short of judicial standards, he had undertaken steps to learn from his unfortunate start. 305 Or at 669. This court concluded that there was no need for, or useful purpose to be served by, a suspension, and instead imposed a censure. *Id.*

There are no issues of judicial incompetence presented here, and no single issue of any magnitude. There is no basis to conclude there is a probability of recurrence of the violations--Judge Day recognized and admitted poor judgment in multiple respects, and stopped doing marriages altogether. If this Court does not accept Judge Day's arguments, and finds one or more willful violations of the OCJC, this Court should follow *Gustafson*, and find there is no purpose served by a suspension, much less a suspension without pay. Defending this matter already has been financially catastrophic for Judge Day, and the media frenzy over this

case has caused tremendous impact on his reputation. Thus, while there should be no violation found or sanctions imposed, if the Court reaches the issue, in no event is there a basis for removal. At most, this Court should impose censure.

Respectfully submitted this 17th day of January, 2017.

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**CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 34,261.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f)

DATED this 17th day of January, 2017.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 17th day of January, 2017, I filed the MOTION TO STRIKE WITNESS TESTIMONY AND INVESTIGATIVE STATEMENT with the State Court Administrator by Electronic Filing. I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by electronic filing:

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