

## *The Coming Battles Over Religious Objections to Participation in Same-Sex Marriages Will Be Legally Complex*

By Kevin Sali

In the wake of recent legislative and constitutional developments relating to same-sex marriage, some public officials and private citizens have sought to be exempt from participating in such marriages on religious grounds. The story of Kim Davis—the Kentucky county clerk who was briefly jailed for refusing to issue same-sex marriage licenses—may be the best-known example, but there are many others.

My own state of Oregon, for example, has spawned two highly publicized stories. On the government side, Marion County Judge Vance Day is currently in the midst of a Judicial Fitness Commission hearing based in part on allegations that he declined to perform marriage ceremonies for same-sex couples. And in the private realm, the owners of "Sweet Cakes by Melissa" are appealing a \$135,000 damage award arising out of their refusal to bake a wedding cake for a same-sex couple. In both cases, the objections to participation were based on religious beliefs.

When these cases arise, the question that usually comes up is whether state or federal law provides any sort of religion-based exemption from compliance with certain laws. Like any other question involving a potential conflict between two sources of law, this can be quite complex. Before diving into the details, it's worth outlining two basic principles:

- Within a particular legal framework—state or federal—constitutional provisions generally override statutes, administrative rules, and other "ordinary" laws. We typically think in terms of the federal constitution, but states have their own constitutions as well. So if, for example, a state statute conflicts with the same state's constitution, the statute is invalid.
- Between those two frameworks, federal law overrides state law. This generally trumps the "constitution overrides statute" rule stated above, so, for example, a valid federal statute will generally override a conflicting provision in a state constitution.

In the Davis, Day and Sweet Cakes examples, here's how this plays out. The first question in each case is whether, without regard to the claimed religious exemption, the conduct violates some applicable rule. In the Sweet Cakes case, for example, the threshold question was whether the refusal to serve the couple violated Oregon's anti-discrimination statute.

If the answer is "no," there's no need to go any further. Moreover, although the question of whether a religious exemption applies is legally a separate one, a judge might consider that question in deciding the first one. Under the doctrine of "constitutional avoidance," judges (at least in theory) prefer to avoid deciding constitutional questions, so if there are multiple plausible ways of interpreting a statute, a judge may choose the one that avoids having to reach the constitutional issue.

If the answer is "yes," the next question is whether any other legal provision provides any sort of exemption or defense. The most obvious source of protection might seem to be the Free Exercise Clause of the federal First Amendment. However, that clause has been interpreted in a way that doesn't provide much protection under these circumstances.

In *Employment Division v. Smith*, two Native Americans who used peyote for sacramental purposes argued that they should be exempt, on Free Exercise grounds, from a state law barring such use. The Supreme Court disagreed, holding that if a law is generally applicable and not directed towards religious conduct, the First Amendment generally does not provide an exemption to those who claim that their religious beliefs prevent them from complying.

The story doesn't end there. *Smith* was a controversial decision. In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA"). In a nutshell, RFRA provided that if any government rule "substantially burdened" someone's exercise of religion, it could only be valid if it was the "least restrictive means" of furthering a "compelling governmental interest." This test—known as "strict scrutiny"—is difficult to pass, and appeared to provide much more protection than the First Amendment as interpreted in *Smith*.

But . . . we're still not done. In 1997, the Supreme Court decided that Congress didn't have the power to impose RFRA's requirements on state and local governments. Congress can, however, impose those requirements on the federal

government and certain persons and entities connected with it. (The *Hobby Lobby* case, involving a claimed religious exemption from HHS regulations relating to certain contraceptives, was decided on RFRA grounds, not under the First Amendment. It was the enhanced RFRA protections that led to the challengers' legal victory.)

Additionally, some states have enacted their own versions of RFRA. These state RFRA's, along with any religious protection clauses in state constitutions, may provide religious exemptions beyond the limited protections provided by the federal First Amendment, and unlike the federal RFRA can properly apply to rules enacted by state and local governments.

And in case this discussion isn't yet dense enough, let's add yet another wrinkle. Some have argued that RFRA itself (either the federal statute or a state equivalent) violates another constitutional provision—the federal Establishment Clause, also found in the First Amendment. The argument is basically that exempting religious adherents from generally applicable laws constitutes an impermissible governmental benefit to religious groups.

So where does that leave someone seeking a religiously-based exemption from a law? If the law at issue is a federal one, or there's some other sufficient federal connection, the federal RFRA comes into play and provides significant protections. If it's a state or local law, the challenger won't have much protection under federal law—the federal Free Exercise Clause doesn't offer much, and the federal RFRA won't apply. There may, however, be protection under a state RFRA or a state constitutional provision—unless that statute or provision is deemed to violate the federal Establishment Clause. We can expect all of these issues to be litigated heavily in the coming years.

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# Oregon's Public Accommodations Law

- ORS 659A.403

“(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is of age, as described in this section, or older.”

# *Employment Division v. Smith*

- 494 U.S. 872 (1990)
- Issue: Peyote use
  - First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”
- “Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.”

## *Smith* cont'd

- “We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.”

## *Smith* cont'd

- “To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is ‘compelling’ -- permitting him, by virtue of his beliefs, to become a law unto himself, contradicts both constitutional tradition and common sense.”

# Federal Religious Freedom Restoration Act (“RFRA”) (1993)

- “[P]rohibits ‘[g]overnment’ from ‘substantially burden[ing]’ a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden ‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’”
  - 42 U.S.C. § 2000bb et seq., as described in *City of Boerne v. Flores*, 521 U.S. 507 (1997)
- Purportedly applied to federal, state and local governments



# *City of Boerne v. Flores*

- 521 U.S. 507 (1997)
- Struck down RFRA as applied to state and local action
  - “[T]he courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.”

# Remaining RFRA Applicability

- Still applies to federal laws and agencies
  - E.g. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)
  - Note: amended through Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)
- Some states have enacted their own RFRAs
  - Oregon has not

# Oregon Constitution

- Article I, Section 2 (“Freedom of Worship”)  
“All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.”

# RFRA's Constitutionality?

- Argument: RFRA Violates the Establishment Clause
  - “In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution.”
  - “[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.”
    - Justice Stevens, concurring in *City of Boerne v. Flores*
- Arguably similar provision upheld
  - *Cutter v. Wilkinson*, 544 U.S. 709 (2005)

# Overall Analysis

- Does some law prohibit/require the conduct at issue?
  - E.g. ORS 659A.403
- If so, is it a federal or state law?
  - If federal: RFRA applies, with potential religious protections
    - Unless RFRA is determined to violate the Establishment Clause
  - If state:
    - Federal RFRA will not apply
    - Look for any state version of RFRA
    - Consider whether state RFRA violates Establishment Clause
- If no federal or state RFRA applies, consider constitutional protections
  - Federal: not much protection
  - State constitution may provide additional protection (depending on the state)

BEFORE THE COMMISSION ON JUDICIAL FITNESS AND DISABILITY

STATE OF OREGON

Inquiry Concerning a Judge:

Case No. 12-139 and 14-86

**Honorable Vance D. Day**

**Opinion**

BY UNANIMOUS DECISION <sup>1</sup>

This matter comes before the Oregon Commission on Judicial Fitness and Disability on a thirteen count complaint alleging that the Honorable Vance D. Day, a Marion County Circuit Court Judge, violated the Oregon Code of Judicial Conduct.

Between November 9 and November 20, 2015, in the City of Salem, Marion County, Oregon, the Commission held its hearing with regard to the allegations in the complaint in accordance with ORS 1.420 and Article VII, § 8 of the Oregon Constitution.

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<sup>1</sup> Members of the Oregon Commission on Judicial Fitness and Disability participating in this matter were Hon. Debra Vogt, Judge Member, Presiding; Hon. James Egan, Judge Member; Hon Patricia Sullivan, Judge Member; W. Eugene Hallman, Attorney Member; Judy Snyder, Attorney Member; Judy Parker, Attorney Member; Annabelle Jaramillo, Public Member; and Linda Collins, Public Member.

Upon review of the evidence and for the reasons outlined below, the Commission concludes that counts 7, 8, 10, 11, and 13 have not been proven by clear and convincing evidence and recommends dismissal as to those five counts.<sup>2</sup>

Upon review of the evidence and for the reasons outlined below, the Commission concludes that the remaining eight counts have been proven by clear and convincing evidence, involving various violations of the Oregon Code of Judicial Conduct, and recommends removal.

## I

### FINDINGS OF FACT

#### A. Standard of Proof

A violation must be proven by clear and convincing evidence. *In re Schenck*, 318 Or 402, 405, 870 P2d 185 (1994); *In re Gustafson*, 305 Or 655, 668, 756 P2d 21 (1988); *In re Jordan*, 290 Or 303, 307, 622 P2d 297 (1981); and *Matter of Field*, 281 Or 623, 629, 576 P2d 348 (1978). This is proof that is highly probable and extraordinarily persuasive. *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.* 303 Or 390, 402, 737 P2d 595 (1987).

Although the Commission does make specific credibility findings within this opinion, the Commission bases all of the findings of fact herein on the evidence the Commission finds to be the most credible evidence before it.

#### B. Background

Judge Day has been an attorney licensed to practice law in Oregon since 1991. He was appointed to the Marion County bench in 2011 and was elected the following year. Upon his

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<sup>2</sup> If the Commission finds a violation it shall recommend censure, suspension or removal to the Oregon Supreme Court. ORS 1.420(4). The rules of the Commission require that a dismissal also be submitted as a recommendation to the Supreme Court. Rule 16(a).

swearing in, Judge Day took the oath of office for judges detailed in ORS 1.212.<sup>3</sup> Judge Day's courtroom and chambers are on the fourth floor of the Marion County courthouse, located in Salem, Oregon. Judge Day is married and has three children.

### **C. Soccer**

Judge Day's son, Daniel Day, played soccer for the Chemeketa Community College team. The Chemeketa soccer coach is Marty Limbird, a friend of the Day family. The Chemeketa team regularly played on the Willamette University campus at Sparks Field. Judge Day attended these 'home' games to support his son and the team. As is customary, at Sparks Field the designated referees' area is segregated from the public and across the field from the spectator area. Referees are trained to keep spectators away from the referees' table. Likewise, if spectators request the names or titles of referees, referees are trained to tell the person to contact the league or refer to the coaches' scoresheets for such information. Referees at this level of play are specifically trained not to give out their names to spectators.

On October 17, 2012, a year after Judge Day took the bench, Daniel Day's Chemeketa soccer team played Clark Community College at Sparks Field. The game was particularly contentious, with seven yellow cards<sup>4</sup> issued by the referees. The center referee at the game was Andrew Deuker.<sup>5</sup> Daniel Day started the game with the team but was seriously injured with a concussion twelve minutes into the match. Judge Day was quite upset and believed that his

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<sup>3</sup> The oath in ORS 1.212(2) reads as follows: "I, \_\_(name)\_, do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the \_\_(court)\_, according to the best of my ability, and that I will not accept any other office, except judicial offices, during the term for which I have been \_\_\_\_\_ (elected or appointed)."

<sup>4</sup> In soccer, a yellow card is a warning from a referee; two yellow cards against a single player or coach equals a red card, which is an automatic expulsion from the game. Even two yellow cards would be considered a lot at this level of play.

<sup>5</sup> Mr. Deuker is a Pac12 referee and the only national soccer referee in Oregon.



son's injury was due to poor officiating on the part of Mr. Deuker. Although it is highly unusual for spectators to cross the soccer field and approach game officials, Judge Day crossed the field from the spectators' section to the officials' side of the field seconds after the "end of game" whistle blew. Judge Day approached the referees' table while Mr. Deuker was changing his shoes.

At the referee's table, Judge Day asked Mr. Deuker for his name but, consistent with Mr. Deuker's training, did not receive it. Instead, he was directed to check Coach Limbird's scoresheet. Judge Day then laid his judicial business card on the referees' table and forcefully shoved it across the table toward Mr. Deuker, such that the writing on the card faced the referee. Judge Day told Mr. Deuker that he thought Mr. Deuker had lacked control over the game and failed to manage player safety. Judge Day indicated that he would be filing a complaint regarding the poor officiating. During this encounter, Judge Day's voice was loud and forceful and his behavior was condescending and intimidating. Mr. Deuker had not asked for the business card and did not pick it up. At that, Judge Day picked up his judicial business card and walked away. Mr. Deuker realized that he may need the card to include in his referee's report. Mr. Deuker then asked a second referee to get the card from Judge Day. While Judge Day was on the phone with his daughter, the second referee ran up to Judge Day, asked for and received the card.

It was only after the card was retrieved that Mr. Deuker actually read the card and realized that the person who he had encountered was a judge. It was at that time that Mr. Deuker felt both intimidated and disappointed because he believed that a judge was abusing his power within the community.

While sitting in his car after leaving the field, Mr. Deuker was frightened and nervous as a result of his interaction with Judge Day. He called Steve Brooks, the Assignor of the Oregon Intercollegiate Soccer Referee Association, and told him what happened. Mr. Deuker then started his car to drive home. As Mr. Deuker was driving his car away from Sparks Field, Judge Day and his son Daniel stopped while crossing the street and made a note of Mr. Deuker's license plate number. Mr. Deuker observed this, which further intimidated him.

After the game, Mr. Deuker called Mike Allen,<sup>6</sup> a local soccer official, and told him about the interaction he had with Judge Day. Mr. Allen urged him to come to his house to discuss the matter further. Mr. Deuker met Mr. Allen at his home in Portland. Mr. Allen urged Mr. Deuker to file a complaint with the Commission on Judicial Fitness and Disability, which Mr. Deuker did. The Commission received Mr. Deuker's complaint on October 21, 2012.

Due to Mr. Deuker's concerns about Judge Day, Mr. Allen attended the next Chemeketa game held at Sparks Field on November 7, 2012. Mr. Allen communicated his concerns to the other referees regarding Judge Day's prior conduct and, thus, all were alert for possible inappropriate spectator behavior. Separately, Mr. Brooks had contacted the CCC athletic director, Cassie Belmodis, and alerted her that a CCC player's parent had intimidated a referee at the October 17, 2012 game. As a result and at the request of Mr. Brooks, Ms. Belmodis also attended the November 7, 2012 game. Judge Day attended the same game.

At the conclusion of the game, an altercation broke out between two opposing players. As the altercation was ending, Judge Day left the spectator section, crossed the field, and approached the officials' table. In order to prevent Judge Day from engaging with the officials, Mr. Allen yelled at Judge Day to return to the spectator section, saying things similar to "get the

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<sup>6</sup> Mr. Allen is 71 years old and roughly 6' tall and 240 lbs. He was a soccer referee for 22 years and then became a national assessor for another 25 years. He is an expert referee.

hell out of here” and “you can’t be here.” At the time Judge Day approached the referees, he was a significant distance away from the location of the prior player altercation and a significant distance from Mr. Allen. All the witnesses who were present at the November 7, 2012 game, save Judge Day himself, consistently testified that neither Mr. Allen nor any other individual made any physical contact with Judge Day on the field that day.

On November 14, 2012, Mr. Allen sent the Commission an additional complaint regarding Judge Day and the events of October 17 and November 7. Mr. Allen reported that there was “great concern among the officials that [Judge Day] is using his judicial position to express his views and intimidate officials where he feels his son has been wronged.” The Commission received Mr. Allen’s complaint on November 21, 2012.

In response to Mr. Deuker’s and Mr. Allen’s complaints, the Commission queried Judge Day. The Commission received Judge Day’s response on February 11, 2013. In Judge Day’s response to the Commission about the October 17 game, he claimed that a referee requested his business card which was the only reason he gave it. Judge Day further claimed that the same referee brushed his business card off to the side of the table after he politely placed it there. The Commission specifically finds that Judge Day was, in this instance, referring to Andrew Deuker. As to the November 7 game, Judge Day claimed that he approached the referees’ side of the field post-game to thank the officials but that “[b]efore I could finish the sentence I was grabbed by my shoulders from behind without warning, whirled around, and nearly picked off my feet and forcefully thrown forward. I nearly went down on my hands and knees but was able to right myself.” Judge Day continued in his response to the Commission, “[a]s best I could tell, the person who grabbed me was about 6’ 3” and perhaps 260 lbs. He then yelled at me something along the lines ‘you have no authority to be near these officials.’” The Commission specifically

finds that Judge Day was, in this instance, referring to Michael Allen, who is roughly 6' and 240 lbs and who did indeed yell to Judge Day that he had no authority to be on that end of the field.

The Commission finds Mr. Deuker to be a very credible witness. Mr. Deuker has absolutely no motivation to misrepresent what occurred. He made a timely complaint about Judge Day's behavior, which he memorialized in writing very shortly after the event. Mr. Deuker's testimony was consistent and corroborated by other witnesses. Mr. Deuker's demeanor on the stand was earnest. Clearly nervous, he expressed fear about potential repercussions for reporting Judge Day's conduct. The depth of his concern was evident in his voice and manner on the witness stand.

Likewise, the Commission finds Mr. Allen to be a very credible witness. Mr. Allen presented as a very straightforward, honest and genuine person in his demeanor on the witness stand. Mr. Allen had no motivation to misrepresent what occurred on the soccer field. At the time of the November 7, 2012 game, Mr. Allen was being a careful observer of events. In fact, that was the very reason he was present. His testimony was consistent and was corroborated by other witnesses who were, likewise, disinterested observers.

Judge Day's testimony regarding the soccer incidents was internally inconsistent and inconsistent with his initial written response to the Commission. His testimony is contrary to virtually every other witness. His demeanor on the stand was measured and controlled when being asked about his version of events. However, when challenged by contrary evidence, his facial expressions and responses were tinged with a bit of sarcasm. Furthermore, Judge Day's demeanor while Mr. Deuker was testifying bordered on mockery. As Mr. Deuker emotionally related how afraid he felt when Judge Day was noting his license plate number, Judge Day was smiling smugly. The Commission does not find Judge Day's testimony credible.

#### **D. Staff**

Employees at the Marion County courthouse are employed by the State of Oregon. The supervisor of these judicial staff employees is the judge for whom they work.

During the time period relevant to the Commission's inquiry, Judge Day's judicial assistant was Christina "Tina" Brown and his clerk was Megan Curry. Although Ms. Brown's and Ms. Curry's leave requests were often granted, they did not always receive rest periods, meal breaks, or flex time. The Marion County Trial Court Administrator and Deputy Trial Court Administrator met with Judge Day to discuss the staff concerns and court policy.

At one point, Judge Day placed portraits of Presidents Reagan and Bush in his jury room. Senior Judge Paul Lipscomb saw the portraits when he was using Judge Day's jury room for a settlement conference. He turned the portraits to face the wall and reported the incident to Marion County Presiding Judge Jameese Rhoades. Judge Rhoades advised Judge Day that partisan artwork was best left at home as it might manifest bias. She reminded Judge Day that the courthouse is a neutral, non-partisan facility. Judge Day then hung the artwork and other partisan artwork in Ms. Brown's workspace, to which she objected. He then removed it.

#### **E. Regarding Defendant B.A.S. and Veterans Treatment Court**

In 2013, Marion County transitioned its Veterans Treatment Docket (VTD) to a Veterans Treatment Court (VTC).<sup>7</sup> During the times relevant to this inquiry, the VTC team included, among others, Judge Day as the judge presiding, an assigned Deputy District Attorney, Bryan

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<sup>7</sup> It is not the purpose of this proceeding to evaluate Marion County's Veterans Treatment Court, its practices, the best practices in any other treatment court or the effectiveness of treatment courts, either specifically to Marion County or generally elsewhere. Findings of fact herein that relate to VTC are included to give context to other inquiries that *are* relevant to this proceeding.

Orrio, Defense Attorney Daniel Wren, Probation Officer Austin Hermann, VTC Coordinator and Evaluator<sup>8</sup> E'lan Lambert. The VTC also tapped local veterans to serve as mentors for probationers. VTC met every other Friday morning. VTC was informal compared to other court settings. Judge Day required the veterans speaking to stand in "parade rest." He occasionally called the probationers "raggedy asses." He jokingly called one mentor "Baldy." Occasionally, Judge Day had the VTC participants watch certain videos or read certain books that he thought would be helpful to their progress. Judge Day has a sincere interest in helping veterans.

To participate in the Marion County VTC, a defendant must be a veteran charged with a qualifying crime in Marion County. The veteran must have an injury-induced issue, addiction issue, and/or mental health issues. Finally and ideally, a nexus would exist between the crime and the veteran's service.

Each participant in the VTC must sign a contract which sets forth terms and conditions of participation. In the VTC contract in effect between January 24, 2013 and February 6, 2015, paragraph 24 reads as follows: "I agree that the VTD Judge may communicate with others about my participation in VTD without the presence of my attorney or myself." This was the language permitting the treatment team to meet and communicate about cases without the defendant, or potentially his attorney, being present.

On June 28, 2013, BAS<sup>9</sup> appeared before Judge Day and pleaded guilty to felony driving under the influence of intoxicants and entered VTC in Marion County. Judge Day placed BAS on 24 months of supervised probation, with the standard conditions of probation applying,

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<sup>8</sup> Lambert had an evaluator contract with the County funded through a federal grant. Judge Day was not responsible for Lambert's contract. Despite Lambert's belief to the contrary, Judge Day consistently attempted to resolve the funding mechanism for her contract and to obtain payment for her professional services.

<sup>9</sup> The Commission identifies this particular veteran by these initials for security.

including that BAS not possess any weapons, including firearms. The plea negotiations also included the mandatory 90 days jail sanction as well as successful completion of VTC. If BAS was successful, at the end of his probationary period his felony conviction would be reduced to a misdemeanor at the recommendation of the VTC team. As part of the entry into VTC, BAS signed the VTC contract containing the provision in paragraph 24 noted above, which would allow Judge Day to “communicate with others about my participation in VTD without the presence of my attorney or myself.”

BAS is, without question, a national hero. A Navy SEAL who was deployed twelve to fifteen times abroad, BAS received a Bronze Star and was lauded by his fellow Navy SEALs. BAS was wounded multiple times and suffers from Traumatic Brain Injury and Post-Traumatic Stress Disorder. BAS no longer lives in Oregon, but appeared by telephone at the hearing in these proceedings.

The Commission finds the testimony of BAS to be credible. BAS has no motive to lie. He received no benefit from testifying. In fact, some of his testimony was against his interest. BAS did not initiate a complaint against Judge Day with the Commission and clearly did not want to participate in these proceedings. Although BAS’s concerns about repercussions for participating were evident, his testimony was consistent with his numerous prior interviews, the notes of which are in evidence. And, although he appeared by telephone, his demeanor was genuine, sincere, heartfelt, and he displayed authentic emotion at appropriate times.

The first two months of his participation at the VTC, BAS was in a rehabilitation center. On August 23, 2013, BAS graduated from rehab and returned to Marion County. He continued to have medical issues. As he had lost his driver’s license due to his conviction, he needed transportation assistance from his home in rural Marion County to the VA in Portland. On

September 25, 2013, Judge Day's son, Justin Day, provided transportation to BAS with the knowledge and permission of the VTC treatment team.

In late September 2013, after a VTC session, Judge Day met with BAS alone in his chambers to interview him for an article that Judge Day was writing for OTLA's Trial Magazine about VTC. This article described identifying and personal information about BAS, including that he was a member of certain high-profile Navy SEAL teams; that he was in the VTC for a felony DUII to which he pleaded guilty; that he had a traumatic brain injury and PTSD; and quoted BAS concerning trauma he experienced during his service career.<sup>10</sup> BAS felt that he was in no position to 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 bargain.

During a VTC hearing in the fall of 2013, Judge Day reiterated to BAS on the record that he was not allowed to possess or handle firearms. At VTC on October 11, 2013, Judge Day told BAS in court: "No guns, you don't get any guns." The following month, on November 8, 2013, BAS again appeared in VTC and asked, "Can I touch a gun now?" Judge Day said, on the record and unequivocally, "No."

Shortly before Thanksgiving, 2013, Judge Day arranged for BAS to do some work for Judge Day's son-in-law, Donald Mansell. Judge Day arranged to pick up BAS at his house and drive him to the Mansell house to do paint preparation work on November 18, 2013. After picking BAS up, Judge Day informed him that they would stop at a wedding at which Judge Day was officiating. Judge Day asked BAS to accompany him. BAS did not believe he could refuse

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<sup>10</sup> See Exhibit 12 - "What got to me, what I see in my dreams, is what the enemy did to the women and children The combat I could handle, but the inhumanity to the enemy toward its own people is what haunts me today." Pg.3.



the request. The wedding was a small affair – five or six guests in total, plus the bride and groom. Judge Day introduced BAS as a Navy SEAL and used BAS's call sign.<sup>11</sup> BAS felt like he was being exploited and put on display.

After the wedding, Judge Day brought BAS to the Mansell house. Although BAS had been told there would be other veterans present, BAS was the only non-Day family member there. The Mansell house has a living room which contains a homemade cabinet spanning the length of one wall. The family regularly challenged visitors to find secret compartments which Judge Day had built into the cabinet. While at the Mansell house, Judge Day challenged BAS to find a secret compartment and told him that one of the hidden drawers contained a gun. BAS found the compartment quickly and opened the drawer to see the gun. BAS asked Judge Day for permission to check the gun for safety, which Judge Day granted. BAS cleared the gun by removing the clip and making certain it was not loaded. The Commission recognizes that these facts are inconsistent with the testimony of Judge Day and his son-in-law. We specifically find that BAS is the most credible source on this information. We note also that Donald Mansell's declaration, submitted in support of his father-in-law, and his testimony on stand were not consistent.

Between November 28 and December 26, 2013, BAS received numerous texts from Judge Day and his family repeatedly inviting him to Day family events. BAS's text messages establish that he was trying, tactfully, to evade these out-of-court contacts with Judge Day.

In early December 2013, Judge Day attended a conference in Washington D.C. with his wife, Ms. Lambert and Judge Tracy Prall. The conference was for veterans' court judges and

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<sup>11</sup> The identification of his military call-sign was of particular concern to BAS because he feared identification as a result of his many Navy SEAL missions.

treatment teams throughout the country. Before the trip, Judge Day asked BAS to connect the Marion County team with some of BAS's friends in D.C. Judge Day particularly solicited an introduction to a famous Navy SEAL, Rob O'Neill. BAS complied. When Judge Day met with Mr. O'Neill, he found out the full extent of the extraordinary nature of BAS's military experience and service.

While at the conference, Judge Prall and Judge Day had a conversation about VTC. The conversation was focused on boundaries and out of court contact with probationers. She told Judge Day that she limited her contact with participants to be only in the courtroom, other than responding with "hello" or a similar pleasantries when a participant addressed her out in the community. Judge Prall also told Judge Day that she believed that out of court contact can result in concerns that inappropriate influence has affected the handling of a case. Notwithstanding Judge Prall's advice concerning boundaries, Judge Day's out of court contacts with BAS continued and, actually, increased.

December 26 is Judge Day's birthday. That day in 2013, Judge Day texted BAS and invited him to a birthday brunch at his house. Judge Day picked up BAS and brought him to his home, despite BAS's tactful attempts to avoid the event. There were no other veterans present, nor any other judges or VTC team members. The only people present were the immediate Day family and BAS. At this birthday brunch, the Day family asked BAS about his military service and had him share details about his experiences. BAS was also asked about religion and his opinions about Jesus Christ. It was an uncomfortable event for BAS. While at Judge Day's house that day, BAS saw an H&K gun case and commented to Judge Day that it was a good weapon, to which Judge Day replied, "Shhh."

At least twice after the birthday brunch, on December 27, 2013, and January 7, 2014, Justin Day asked BAS via text messaging if BAS would go shooting with him. On both dates, BAS declined. In response to the second invitation, BAS said no, texting that he was worried about getting in trouble with his probation officer for having possession of a gun.

During this same time period, BAS had a broken pellet stove and was living in the country in a farmhouse without heat. The weather was extremely cold. Due to the broken stove, on January 10, 2014, Judge Day told BAS that he would like to come over to the farmhouse the next day. BAS declined that offer. On January 11, Judge Day again asked to come over to BAS's home the next day. Again, BAS declined. BAS texted in reply that he would not be home and that he would get someone else to fix the stove. Nonetheless, later that day, January 12, 2014, Judge Day and his son Justin arrived unannounced to help BAS with his pellet stove. BAS had not invited them to his home and he had in fact repeatedly tried to convince them not to come over.

While Judge Day was in BAS's house, Justin Day went to their car and returned, bringing in the H&K pistol case BAS had seen in the Day house at the birthday party. Justin Day pulled out the gun from the case and handled it. Judge Day was present. BAS watched Justin handle the gun and asked Judge Day if he could show Justin how to handle it safely. Judge Day said, "No problem." Judge Day then indicated to BAS that, as he was the judge who put him on probation, he could make "adjustments." Judge Day further indicated to BAS that because BAS was teaching someone Judge Day loves how to shoot and handle a weapon safely, Judge Day had no objections to BAS handling the gun. Before Judge Day and Justin left, BAS confirmed with Judge Day that Justin would be returning to shoot the H&K pistol later that day. Justin Day did in fact return to BAS's house later that day and the two of them shot the H&K pistol. BAS

shot the gun because he believed that he was allowed to do so based upon Judge Day's permission.

The next day, January 13, 2014, BAS told Ms. Curry about the previous day's activities involving the gun, who in turn told Ms. Lambert. Ms. Lambert went to BAS's house to learn firsthand what had happened. She then confronted Judge Day with the information, reminding him about BAS's probation conditions and status as a convicted felon. Judge Day "panicked" during that conversation with Ms. Lambert.

At this point in time, the number of out-of-court contacts between Judge Day and BAS decreased dramatically. On January 24, Judge Day met with the VTC prosecutor and BAS's defense attorney. The purpose of this meeting was to disclose BAS's handling of the gun on January 12, 2014. Judge Day did not invite the probation officer to the meeting. Judge Day did not disclose BAS's handling a gun on November 18, 2013 at the Mansell residence. Judge Day did not disclose that Justin Day went target shooting with BAS later in the day on January 12, 2014. Judge Day downplayed the full extent of BAS's access to guns in, and due to, Judge Day's presence.

Later on January 24, BAS appeared in VTC. During that court appearance, BAS indicated to Judge Day that he would not possess firearms.

On February 21, 2014, Judge Day dropped BAS's felony status to a misdemeanor, signing the judgment *nunc pro tunc* to June 28, 2013. At that time, BAS had not yet completed his probation, nor had he completed the 90 day jail sentence ordered in the original judgment, which is required under ORS 813.011(3).<sup>12</sup> As part of the February 21 judgment, Judge Day

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<sup>12</sup> ORS 813.011 is the Felony Driving Under the Influence of Intoxicants statute - (3) reads: Upon conviction for a Class C felony under this section, the person shall be sentenced to a mandatory minimum term of incarceration of 90 days, without reduction for any reason.

gave BAS credit for time he had spent in inpatient treatment instead of having him complete the mandatory minimum term of incarceration.

BAS left Oregon in February 2014 and has not returned. He continued to appear at VTC hearings telephonically. After a particularly frustrating hearing in August 2014 during which Judge Day asked BAS, on the record and in front of other veterans, if he knew what an order was, BAS reached out to Ms. Lambert. BAS told Ms. Lambert about much of, if not all of, his treatment by Judge Day and indicated that he would like to speak to the presiding judge. Ms. Lambert took BAS's concerns to Presiding Judge Rhoades and asked that she call BAS.

Judge Rhoades talked to BAS, telephonically, on August 14, 2014. During that phone call, BAS told Judge Rhoades about (1) the events at Judge Day's house on December 26, 2013; (2) the events at BAS's house on January 12, 2014; (3) Judge Day waiving the prohibition against BAS handling the gun; (4) Judge Day making BAS feel like Judge Day's possession and that he was being put "on display" while with Judge Day; (5) Judge Day making BAS attend the November 2013 wedding against his wishes; and (6) Judge Day and his son Justin wanting BAS to be Justin's mentor. Judge Rhoades was very concerned.

Judge Rhoades assigned BAS's case to Judge Prall. She tried to schedule a meeting with Judge Day and Judge Dale Penn, although this was harder to schedule because Judge Day was out of the office.<sup>13</sup>

On August 21, 2014, Judge Rhoades and Judge Penn met with Judge Day in Judge Penn's office. The conversation centered around the gun incidents and Judge Day's ex parte contacts with BAS. Although the conversation was pointed, Judge Rhoades was not aggressive, nor did she engage in rapid-fire questioning tactics. During the meeting, Judge Day claimed he

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<sup>13</sup> Judge Day told Judge Rhoades he could not return to the courthouse because he and another VTC probationer – Joseph S. – were painting his house.

did not know that BAS was a felon and justified his contacts with BAS. Judge Day said that he had not known about Justin Day showing BAS the gun on January 12 because he was busy with fixing the pellet stove. Judge Rhoades and Judge Penn determined that Judge Day's conduct needed to be reported to this Commission. Judge Day decided to self-report his conduct to the Commission.

On August 23, 2014, Judge Day wrote the Commission a very vague letter as his self-report, noting a completely unspecified violation. The letter reads, "I was recently advised that one of the veteran participants in our court contacted our presiding judge with concerns about an interaction he had with me in January of this year." The letter named BAS and gave his case number but failed to identify any factual circumstances at all.

The Commission hired an attorney, Karen Saul, to investigate the matter further. Ms. Saul interviewed over a dozen people, including Judge Day, other Marion County judges and BAS. At the request of the Commission, Ms. Saul also investigated the 2012 soccer complaint.

Ms. Saul's December 12, 2014, interview with Judge Day was memorialized. Judge Day had an opportunity to review and revise the interview summary. The Commission finds that Judge Day was disingenuous on the following subjects:

- (1) Judge Day claimed that each and every out of court contact with BAS happened with full knowledge of the VTC team;
- (2) Judge Day claimed that his first out of court contact with BAS happened at the request of Lambert;
- (3) Judge Day denied that BAS had any contact with a gun at his daughter and son-in-law's house;

- (4) Judge Day claimed that the VTC team encouraged the Days to invite BAS to Judge Day's house on December 26, 2013; and
- (5) Judge Day denied that there was any conversation about waiving the weapons prohibition for BAS on January 12, 2014 when BAS handled Justin Day's gun in Judge Day's presence.

On February 6, 2015, Judge Day's then-counsel Mark Fucile wrote a lengthy defense of Judge Day's conduct to the Commission. One of the points Mr. Fucile made was that the VTC contract permitted ex parte contact and he cited the pertinent language: "I understand and agree that there will be discussions about my case, my treatment program, and my condition which may take place out of my presence or the presence of my attorney. I also understand that out of court contact with any members of the VTC team, including the VTC Judge and court personnel, authorized by the VTC team or treatment professionals is not considered ex parte contact." However, this was not the language in BAS's VTC contract.<sup>14</sup> The contract language cited by Mr. Fucile is actually VTC contact language that became effective on February 6, 2015, the very day of Mr. Fucile's letter to the Commission. Judge Day amended this contract language without input from other members of the VTC team.

#### **F. The "Hall of Heroes"**

In 2011, Ms. Lambert formed the Partnership for Veterans at Risk (PVR), a registered 501(c)(3) non-profit, to provide training to law enforcement regarding working with veterans. Judge Day declined a position on the PVR Board of Directors. Nevertheless, he exercised

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<sup>14</sup> Compare with the provision in the contract signed by BAS: "I agree that the [VTC] Judge may communicate with others about my participation in [VTC] without the presence of my attorney or myself."

authority over the PVR. He created its budget and directed that more than 40% of its funds be used to create military art to be hung in his courtroom and in the surrounding public areas on the fourth floor of the Marion County Courthouse. The military art consisted of memorabilia, photographs, and documents. Judge Day determined the amounts to be donated for the creation and framing of the particular pieces of military art. He publically dubbed the fourth floor the “Hall of Heroes.” He personally selected all the art work to be displayed, including pieces from his own family. The overall appearance of this military art collection, including the volume and content, created an atmosphere of implied partiality. Several of Judge Day’s colleagues on the fourth floor were uncomfortable with the scope and nature of the art.

Judge Day, and 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. Judge Day set the price each donor should pay for the piece they wished to “sponsor.” Judge Day solicited and collected funds from Marion County attorneys Kevin Mannix, Keith Bauer, Phil Parks, Ralph Spooner, Joe Much, and Paul Ferder. While Judge Day also accepted donations from some other Marion County judges, the amount of the judicial donations is quite different than the attorney donations. The judges collectively donated \$100, while the smallest individual attorney donation was \$225. The largest donation, \$793.50, came from Mr. Spooner, who was scheduled to appear in a trial before Judge Day the week following the donation. On at least one occasion, Judge Day solicited funds during a status conference involving a matter pending trial before Judge Day in Judge Day’s chambers. Some of the checks to pay for the matting and framing of the war memorabilia were delivered directly to Judge Day and some



were collected by his staff at his direction. Furthermore, the amount of each piece specifically sponsored by the attorneys exceeded the actual cost of that piece.<sup>15</sup>

Judge Day knew that the donors expected something in return for their donations and he created placards identifying the attorneys or law firms who donated the funds. He also wrote descriptive placards for all of the art. At the direction of Judge Rhoades, Judge Day later removed the “sponsored by” portions of the placards. However, the descriptive placards remained, some of which were inappropriate and showed bias and a lack of neutrality.<sup>16</sup>

One of the pieces was a collage donated by the family of Dr. Ken Vollmar which contained a portrait of Adolph Hitler. Judge Day advanced \$879.20 to mat and frame this piece. PVR reimbursed him that amount. When Judge Rhoades told Judge Day to take that piece down, he responded, “You don’t want to go there because some very influential people in this town want it up.” Judge Rhoades viewed this as a veiled political threat. Judge Day did remove the Vollmar piece but returned it to the Vollmar family rather than giving it to the non-profit. The Vollmar family then reimbursed Judge Day \$879.20 for the expense associated with framing it. Judge Day did not reimburse PVR from the funds he received from the Vollmar family.

Judge Day did not personally profit from the proceeds of the wall hanging project.

#### **G. Same Sex Marriage**

Although performing marriages is not a mandatory judicial duty, from the beginning of Judge Day’s tenure, he had officiated marriage ceremonies.

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<sup>15</sup> Mannix, for example, donated \$400 to sponsor a Wally Carson collage, which Elsinore framed and matted for \$232.12. Park and Bauer collectively donated \$500 to sponsor an Otto Skopil collage, valued at \$203.95. Spooner’s \$793.50 far exceeded the \$387.60 value of a Bruce Williams collage. Ferder donated \$400 to sponsor a collage of the Vietnam War featuring Chief Justice De Muniz, which cost only \$270.90 to frame and mat.

<sup>16</sup> For example, artwork with a placard that declared a bias against mental illness defenses. See Ex. 599.

On May 19, 2014, Judge Michael McShane overturned Oregon's ban on same-sex marriage. *Geiger v. Kitzhaber*, 994 F Supp 2d 1128 (D Or 2014). In early summer of 2014, Judge Day instructed his staff to "screen" marriage applicants to determine if they were a same sex couple. When a couple called about a marriage, Judge Day directed his staff to get their personal information and to tell them they needed to check the judge's schedule and would call them back. Staff was to then search OJIN for indications of same sex relations. If staff found that the couple was a same sex couple, Judge Day instructed them to call the couple back and indicate that Judge Day was "unavailable" on the day of their service and refer them to other judges. Judge Day continued to marry opposite-sex couples. He performed his last marriage on or after August 2014. In November 2014, Judge Day removed himself from the Marion County list of wedding officiants.

Between early summer 2014 and November 2014, Judge Day's staff did not have an occasion come up where Judge Day's screening process had to be used.

Judge Day is a Christian whose firmly held religious beliefs include defining marriage as only between a woman and a man.

#### **H. Miscellaneous Factual Findings**

##### **1. Dating Website**

In mid-2014, Ms. Brown and Ms. Curry viewed a profile on the dating website farmersonly.com which contained a picture of three people at a wedding, one of whom was Judge Day. The profile indicated it belonged to a man in the Salem area approximately Judge Day's age. Thus, Ms. Brown and Ms. Curry assumed the profile to be that of Judge Day. Evidence at the hearing established very clearly that the profile did exist and the photograph was indeed of Judge Day. However, the profile had nothing to do with Judge Day. It belonged to a

person for whom Judge Day had performed a wedding. Thus, the farmersonly.com evidence is simply not relevant to any material issue in this case.<sup>17</sup>

2. District Attorney's Office Internship

In the summer of 2015, Judge Day's son Daniel Day was looking for a summer legal internship due to his intent to apply to law school. For that purpose, Judge Day facilitated a connection between Daniel Day and Deputy District Attorney Orrio. Mr. Orrio then brought Daniel Day onto his prosecutorial team as an intern on a criminal case being tried before Judge Day that summer. According to Mr. Orrio, the defense attorneys did not object to Daniel Day's participation. Daniel Day was in the court room assisting Mr. Orrio during the trial and was identified to the jury as being Judge Day's son.

3. Judge Pellegrini

After Judge Cheryl Pellegrini was appointed to the bench in 2014, Judge Day invited her out to breakfast. Judge Day had been opposed to her appointment. At that breakfast, Judge Day indicated to her that his objections were not due to her qualifications to serve on the bench, but were due to her sexual orientation as a lesbian. Judge Pellegrini was relieved that Judge Day's objection to her appointment did not have to do with her abilities.

Judge Day's testimony was inconsistent with Judge Pellegrini's on this topic. Judge Day testified that he did not support Judge Pellegrini's appointment because she was a government lawyer. He stated that was the reason he had expressed to her at the breakfast noted above.

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<sup>17</sup> All evidence proffered on this subject was proffered by Judge Day in an attempt to impeach Ms. Brown and Ms. Curry. However, in that regard, the evidence only proved that Ms. Brown and Ms. Curry were truthful regarding what they viewed on the website.

Given all the other factual and credibility findings herein, the Commission finds Judge Pellegrini to be the more credible.

4. Publicity

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. To this end, Judge Day made repeated public assertions that he was being unfairly attacked by this investigation due solely to his religious beliefs concerning same sex marriage. Judge Day made these statements despite the fact that his position on same sex marriage was not discovered by the Commission until after the investigation was well underway. His assertions in this regard were intentionally deceptive to the public.

II

ANALYSIS AND CONCLUSIONS OF LAW

**A. The Constitutional and Statutory Scheme.**

The permissible grounds for disciplining a judge were altered in 1976 as Article VII, §8(1) of the Oregon Constitution was amended to read:

“(1) In the manner provided by law, and notwithstanding section 1 of this Article, 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:

(a) Conviction in a court of this or any other state, or of the United States, of a crime punishable as a felony or a crime involving moral turpitude; or

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

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

- (d) Generally incompetent performance of judicial duties; or
- (e) Wilful violation of any rule of judicial conduct as shall be established by the Supreme Court; or
- (f) Habitual drunkenness or illegal use of narcotic or dangerous drugs.”

In 1971 before these amendments to the Constitution, the Oregon legislature amended ORS 1.420 and 1.430, to give the Oregon Supreme Court authority to “suspend or censure” with further power to “suspended from office for the period specified in the order and his salary shall cease, if so ordered,” without creating “... a vacancy in the office of judge during the period of suspension.” The new statute did not specify the grounds or methodology for determining “suspension or censure” as distinct from grounds or methodology for removal.<sup>18</sup>

Since there are no separate grounds for suspension or censure, the Commission must prove the accused was guilty of one of the specific grounds for removal as stated in Article VII, §8(1) of the Oregon Constitution. *In re Piper*, 271 Or 726, 734-35, 534 P2d 159 (1975). Nevertheless, the Supreme Court retains authority to reprimand and censure judges for misconduct under its inherent power over lower courts. *Id* 271 Or at 738.

The Commission has authority to inquire into complaints concerning “any judge” or judicial candidate who allegedly failed to abide by the Code of Judicial Conduct. *In re Fadeley*, 310 Or 548, 556, 802 Or 31 (1990); *In re Piper*, 271 Or 726, 736, 534 P2d 159 (1975). The Supreme Court has admonished that the courts of Oregon belong to the people and in order to maintain the confidence of the people of Oregon in the courts of this state, it is essential that the judges of those courts be held to the highest standard of honesty and competence. *In re Jordan*,

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<sup>18</sup> The legislature adopted this statute, as Senate Bill 711, after the Commission called the Senate Judiciary Committee’s attention to the fact that it had “no power to recommend censure or suspension of judges, but could only removal for the offending judge.” See Report of the Judicial Fitness and Disability Commission dated March 2, 1971. See Minutes, Senate Judiciary Committee, April 7, 1971, p. 14.

290 Or 303, 335, 622 P2d 297 (1981). This standard appears to afford the Commission, as the Supreme Court's investigatory arm, the widest discretion in applying Article I, §8(1) and ORS 1.420.

The authority of the Commission to investigate is not limited to the words of a complaint submitted by a person. ORS 1.420(1) reads in part:

- 1) Upon complaint from any person concerning the conduct of a judge or upon request of the Supreme Court, 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.
  - (b) The Commission may request the Supreme Court to appoint three qualified persons to act as masters, to hold a hearing ... on the conduct of the judge.
  - (c) The Commission may allow the judge to execute a consent to censure, suspension or removal. ... The consent and stipulation of facts shall be submitted by the commission to the Supreme Court.

The words "complaint from any person" in this section does not impose a jurisdictional requirement that there be a formal complaint by some identifiable person. *In the Matter of Sawyer*, 286 Or 369, 374, 594 P2d 805 (1979). The Commission may investigate the conduct of a judge upon the basis of any information coming to it from any person, including any information coming to it through any of its members or staff. *Id.* Furthermore, the accused judge need not be informed of the identity of any complainant or be provided with a copy of the complaint when the facts are not in dispute. <sup>19</sup> *Id.*

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<sup>19</sup> This is not to say that the Judge alleged to have committed a violation of the Oregon Code of Judicial Conduct must defend against a complaint without notice of the allegations. The rules governing the hearing process clearly provide that the judge shall receive a copy of the Commission's complaint and shall have an opportunity to prepare an answer to the complaint. The statute further provides that the hearing shall be public, the judge may be present at all times during the hearing, the judge has the right to present testimony and other evidence, the judge has the right to cross-examine the Commission's witnesses, and the judge has the right to representation. ORS 1.420(3).

As explained earlier, the burden of proof in this case is by clear and convincing evidence before a judge may be censured, suspended, or removed from office. This is the standard of review carried over from bar disciplinary proceedings accorded under *In re J. Kelly Farris*, 229 Or 209, 367 P2d 387 (1961). *In re Field*, 281 Or 623, 629, 576 P2d 348 (1978), citing *Geiler v. Commission on Judicial Qualifications*, 10 Cal3d 270, 515 P2d 1, 110 Cal Rptr 201 (1973); *In re Nowell*, 293 NC 235, 237 SE2d 246 (1977).

## **B. Applicable Sections of the Oregon Code of Judicial Conduct**

The Commission finds that the following code sections from the Oregon Code of Judicial Conduct are applicable to the conduct being reviewed in the present case:

### **Rule 1.3 Definitions**

For the purposes of this Code, the following definitions apply:

**Ex parte communication:** A communication between a judge and fewer than all parties or their lawyers, concerning a pending or impending matter.

**Pending matter:** A matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

**Personally solicit funds:** Directly requesting financial support or in-kind services, in person, by letter, by telephone, or by any other means of communication, but does not include receiving and handling funds or goods donated or offered in exchange for goods and services sold to raise funds.

### **Rule 2.1 Promoting Confidence in the Judiciary**

(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.

(B) A judge shall not commit a criminal act.

(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 *Avoiding Misuse of the Prestige of Office***

A judge shall not use the judicial position to gain personal advantage of any kind for the judge or any other person. However, a judge may provide a character or ability reference for a person about whom the judge has personal knowledge.

### **Rule 3.3 *Impartiality and Fairness***

(A) A judge shall uphold and apply the law and perform all duties of judicial office, including administrative duties, fairly, impartially, and without bias or prejudice.

(B) 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.

(C) A judge shall not take any action or make any comment that a reasonable person would expect to impair the fairness of a matter pending or impending in any Oregon court.

### **Rule 3.7 *Decorum, Demeanor, and Communication with Jurors***

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not praise or criticize jurors for their verdict other than in a ruling in a proceeding, but a judge may thank and commend jurors for their service. A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

### **Rule 3.9 *Ex Parte Communications***

(A) Unless expressly authorized by law or with the consent of the parties, a judge shall not initiate, permit, or consider ex parte communications. The following exceptions apply:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, that does not address the merits of a matter, is permitted, provided:

(a) the judge reasonably believes that no party will gain a



procedural, tactical, or other advantage on the merits, as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties a reasonable opportunity to respond.

(2) A judge may consult with court staff, court officials, and employees of the judicial branch of government whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges at the same level, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(3) A settlement judge may, with the consent of the parties, confer separately with the parties or their lawyers in an effort to settle matters before the court.

(B) If a judge receives an unauthorized ex parte communication bearing upon the merits of a matter, the judge shall promptly notify the parties of the substance of the communication and provide them with a reasonable opportunity to respond.

#### **Rule 3.12 *Cooperation with Disciplinary Authorities***

(A) A judge shall cooperate and be candid with judicial and lawyer discipline agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person whom the judge knows or suspects has assisted or cooperated with an investigation of a judge or lawyer.

#### **Rule 4.5 *Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities***

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

(B) So long as the procedures employed are not coercive, a judge may personally solicit funds for an organization or entity from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority, and the judge may assist the judge's minor children with fundraising.

(C) Subject to Subsection (A) and Subsection (D), and so long as the procedures employed are not coercive, a judge may participate in activities sponsored by organizations or entities devoted to the law, legal education, the legal system, or the administration of justice, and those sponsored by or on behalf of not for profit, public or private, legal, educational, religious, charitable, fraternal, or civic organizations, including but not limited to the following activities:

(1) assisting such an organization or entity in fundraising, management, and investment of the organization's or entity's funds;

(2) speaking at, receiving an award or other recognition at, or being featured on the program of such an organization or entity;

(3) serving as an officer, director, trustee, or nonlegal advisor of, and soliciting membership for, such an organization or entity;

(D) A judge may not engage in activities described in Subsection (C) if it is likely that the organization or entity will frequently be engaged in adversary proceedings in the state courts of Oregon.

(E) So long as the procedures employed are not coercive, a judge may personally encourage or solicit lawyers to provide publicly available pro bono legal services.

### **C. Wilfulness under the Oregon Constitution**

Under the Oregon Constitution a judge may be removed for numerous reasons, including “wilful misconduct in a judicial office where such misconduct bears a demonstrable relationship to the effective performance of judicial duties;” “wilful or persistent failure to perform judicial duties;” and a “wilful violation of any rule of judicial conduct as shall be established by the Supreme Court.” Or Const, Art VII (Amended), §8(1)(b); §8(1)(c); §8(1)(e).

A judge’s conduct is considered “wilful” under Article VII (Amended), section 8, if the judge intended to cause a result or take an action contrary to an applicable rule and the judge is aware of circumstances that in fact make the rule applicable. *In re Conduct of Gustafson*, 305 Or 655, 660 (1988). The intent required under this rule is the same as for an intentional act – that the act was done with the conscious objective of causing the result or of acting in the manner defined in the rule of conduct. *In re Conduct of Schenck*, 318 Or 402, 405 (1994). An improper motive is not required for a finding of willful misconduct. *Gustafson*, 305 Or at 660. (“*An improper motive can taint an otherwise permissible act, and a benign motive will not excuse an intentional or knowing violation of a nondiscretionary norm.*”) Both subjective and objective elements of culpability may be used in determining willful misconduct. *Id.* at 659.

The severity of a judge's misconduct has no weight in determining if the misconduct was willful. *Id.* at 660. Ignorance of the applicable standards does not negate the willfulness of a judge's actions. *Id.* In fact, if a judge acts in conscious ignorance of the legal basis for an action and does not seek to determine the lawfulness of that action, this action is considered willful. *Id.* at 668. Mere incompetence does not fall under the definition of willfulness. *Id.* at 659.

#### **D. Count One**

Judge Day violated Rule 2.1(A) at the October 17, 2012 Chemeketa soccer game. All of Judge Day's actions that day were clearly designed to intimidate a referee because Judge Day was upset. His behavior did not observe high standards of conduct required to preserve the integrity, impartiality, and independence of the judiciary. Furthermore, he did not act in a manner that promotes public confidence in the judiciary. His behavior embodied the opposite.

Judge Day also violated Rule 2.1(C) at the October game. In trying to intimidate Mr. Deuker through the use of his judicial business card, Judge Day engaged in conduct that reflects adversely on his character and temperament to serve as a judge, as did the manner in which Judge Day addressed Mr. Deuker. This violation was also evident by Judge Day's demeanor while Mr. Deuker was testifying concerning the events of that day.

Finally, Judge Day violated Rule 2.2 during the exchange with Mr. Deuker. Judge Day is well aware of the power of his position as it may impact a member of the public in this type of interaction. By brandishing his judicial business card while threatening to complain to a person's employer about their job performance, Judge Day was clearly trying to use his judicial position for personal gain, that gain being compliance with his requests.

It has been established by clear and convincing evidence that Judge Day intentionally intimidated Mr. Deuker by the use of his judicial position for his own personal gain. Judge Day

was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

#### **E. Count Two**

Judge Day was not forthright to the Commission in his February 2013 response regarding the soccer incidents. He claimed that, at the October game, he only produced his card because Mr. Deuker requested it. That was not true. Not only was there credible evidence to the contrary, the Commission finds it completely implausible that the event could have unfolded as Judge Day claims. Mr. Deuker did not request Judge Day's card, Judge Day thrust it at him in anger. Judge Day further claimed that at the November game, Mr. Allen had physically accosted him. That is likewise not true. Neither Mr. Allen nor anyone else on the field at the November game touched Judge Day.

By misrepresenting these facts in his February 2013 response letter to the Commission, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit, and misrepresentation, and violated Rule 3.12(A) by not being candid with the Commission, a judicial discipline agency.

It has been established by clear and convincing evidence that Judge Day's misrepresentations were an intentional attempt to avoid responsibility for his own actions. As such, Judge Day was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

## **F. Counts Three and Four**

On November 18, 2013 and January 12, 2014, Judge Day facilitated the handling of a firearm by BAS, a convicted felon on active supervised probation. On January 12, 2014, Judge Day was also aware of his son's plans to target shoot with BAS, which would also facilitate BAS's handling of a firearm.

During these incidents, Judge Day verbally granted permission for BAS to handle the weapon. Although Judge Day continues to deny this, it is actually inconceivable that BAS would handle a firearm in the presence of Judge Day without asking and receiving permission from the judge. BAS was on Judge Day's caseload and had every motivation to be successful on probation. For this veteran, success meant not having a felony conviction on his record at the end of his probationary period. Judge Day clearly waived the prohibition against BAS handling a firearm during these incidents. At the time of these incidents, Judge Day knew that BAS was a felon and knew that BAS's supervised probation conditions prohibited him from possessing firearms. Judge Day was fully aware that, under Oregon law, it is a felony for a felon in BAS's position to possess a firearm.

At the time of these incidents, BAS's case was a pending matter. BAS's attorney, Mr. Wren, and the prosecutor, Mr. Orrio, were not present and neither of them had been consulted previously by Judge Day regarding the events that transpired. Nothing within BAS's VTC contract allowed Judge Day to have ex parte communications with BAS.<sup>20</sup>

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<sup>20</sup> It should be noted that there are no special provisions in the Code of Judicial Conduct that pertain to specialty or treatment courts or exempt judges presiding over those courts from the rules in the code.

By facilitating the handling of a firearm by a convicted felon on active supervised probation on each of these dates, Judge Day violated Rule 2.1(A) in that his behavior did not observe high standards of conduct so that the integrity and impartiality of the judiciary would be preserved, nor did he act “in a manner that promotes public confidence in the judiciary.”

By facilitating the handling of a firearm by a convicted felon on each of these dates, Judge Day aided and abetted in the commission of the crime of felon in possession of a firearm, which is a felony. *See* ORS 166.270 and ORS 161.155(2)(b). Thus, during these incidents Judge Day violated Rule 2.1(B), which prohibits a judge from committing a criminal act.

By facilitating the handling of a firearm by a convicted felon on active supervised probation on each of these dates, Judge Day violated Rule 2.1(C) in that his conduct was adverse to both his character and his competence to serve as a judge.

By facilitating the handling of a firearm by a convicted felon on active supervised probation and by verbally granting the permission for that person to handle the weapons in violation of his probation conditions and prohibitions under Oregon law on each of these dates, Judge Day violated Rule 3.9(A), which prohibits a judge from initiating or permitting ex parte communications as such communications are defined in Rule 1.3.

It has been established by clear and convincing evidence that Judge Day facilitated the possession of a firearm by a felon intentionally. In the first instance, Judge Day encouraged BAS to seek out and find the weapon, followed by his permission to allow BAS to handle it. In the second instance, Judge Day purposefully allowed BAS to handle the weapon in order to show his son how to use it safely. As such, on each occasion, Judge Day was acting with a conscious objective to cause a result. His violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(B), 2.1(C) and Rule 3.9(A) during each incident constitutes willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is also in violation of Article VII, §8(1)(b) of the Oregon Constitution.

#### **G. Count Five**

Judge Day was not forthright with the Commission's investigator in several respects, most notably when he denied having waived the prohibitions against BAS possessing firearms. For the reasons previously stated herein, the Commission finds this not to be a true statement. Furthermore, Judge Day was not forthright to his colleagues, Judge Rhoades and Judge Penn when he indicated to them that he had not waived those same prohibitions and when he claimed to not know that BAS was a felon. Those statements were simply not true.

By misrepresenting facts in his statement to the Commission's investigator, Karen Saul, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, he violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit and misrepresentation, and he violated Rule 3.12(A) by not being candid with the Commission, a judicial discipline agency.

By misrepresenting the facts noted above to Judge Rhoades and Judge Penn, Judge Day violated Rule 2.1(C) by engaging in conduct adverse to his character to serve as a judge, and he violated Rule 2.1(D) by engaging in conduct involving dishonesty, deceit and misrepresentation.

It has been established by clear and convincing evidence that Judge Day's misrepresentations were an intentional attempt to avoid responsibility for his own actions. As such, Judge Day was acting with a conscious objective to cause a result. His violation of the

above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

#### **H. Count Six**

Clearly, Judge Day was enamored with BAS's notoriety and his accomplishments in the military. This fascination with BAS's military history caused Judge Day to lose perspective on who he was really dealing with. BAS was a criminal defendant on Judge Day's caseload subject to Judge Day's orders and sanctions. In this context, Judge Day's unsolicited, and often unwanted, personal out-of-court contacts with BAS were completely inappropriate. These contacts include texting BAS, showing up at BAS's home uninvited, taking BAS to a wedding, soliciting introductions to BAS's out of town friends, bringing BAS to Judge Day's home, nurturing a relationship between BAS and Judge Day's son, allowing BAS to handle firearms and facilitating other favors for BAS in the form of rides, food, etc. In many, if not most, of these instances, BAS actively tried to avoid Judge Day's overt attentions. In the end, due to Judge Day's conduct, this criminal defendant had no choice but to acquiesce to Judge Day's requests to avoid any negative impact on the outcome of his probation.

Judge Day's conduct singled out BAS for obvious favoritism. Several VTC participants testified on Judge Day's behalf at the hearing. However, no other VTC participant had personal visits from Judge Day at their home while in VTC. No other VTC participant received texts from Judge Day while in VTC. No other VTC participant had been to Judge Day's residence for any reason, let alone during the holidays for a family celebration. These acts of favoritism are tangible manifestations of Judge Day's bias toward BAS.

Judge Day's conduct regarding BAS violates Rule 2.1(A) in that he did not observe high standards of conduct so that the integrity, impartiality and independence of the judiciary were



preserved. Further, this conduct violated Rule 2.1(C) as it reflects adversely on Judge Day's character, competence, and temperament to serve as a judge. Finally, Judge Day's conduct violated Rule 3.7(B) in that his insistent, unwanted out of court contacts were discourteous and undignified toward BAS.

It has been established by clear and convincing evidence that all of the out-of-court contacts with BAS were intentional and purposeful, as was Judge Day's overall treatment of him. Judge Day was acting with a conscious objective to cause a result. In some instances, Judge Day's objective may have been charitable. However, in other instances, his objective was personal gain. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(C) and Rule 3.7(B) constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is also in violation of Article VII, §8(1)(b) of the Oregon Constitution.

### **I. Count Seven**

As previously noted, it is not the purpose of this proceeding to evaluate Marion County's Veterans Treatment Court, its practices, the best practices in any other treatment court, or the effectiveness of treatment courts, either specific to Marion County or generally elsewhere. During the hearing on this matter, expert opinions varied greatly regarding such practices and procedures.

None of the findings made by the Commission regarding the allegations in count seven implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count seven.

#### **J. Count Eight**

The allegations in count eight were not proven by clear and convincing evidence. As such, the Commission recommends dismissal as to count eight.

#### **K. Count Nine**

The “Hall of Heroes” was Judge Day’s personal project and he was the sole fundraiser for it. Either directly or under the guise of PVR, Judge Day secured all the funds, decided how they would be spent, gathered the materials and artwork, worked with the framer, drafted the placards, and hung the pieces.

To this end, there is no question that Judge Day sought and received money from attorneys. In various contexts, Judge Day talked to attorneys about the project and donations, prompting the attorneys to ask about donating. Judge Day would then solicit financial support from them and collect the money. Oftentimes, this occurred in the courthouse with attorneys that appear before Judge Day. In one instance, it happened during a status conference in his chambers.

By soliciting funds from attorneys, Judge Day violated Rule 2.1 (A). Instead of preserving the integrity, impartiality, and independence of the judiciary, Judge Day’s actions tarnished each of those concepts.

By soliciting funds from attorneys, Judge Day also violated Rule 4.5(A) which prohibits judges from personally soliciting funds from anyone for any organization or entity. There are

exceptions to this rule, but there are no exceptions that excuse Judge Day's solicitations.

Soliciting funds from anyone in this context is a violation of Rule 4.5(A). Judge Day's doing so from attorneys who appear before him is a flagrant violation of the rule.

Soliciting funds is very clearly an intentional and purposeful act. Judge Day was acting with a conscious objective to cause a result. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(C) and Rule 3.7(B) by soliciting funds from attorneys constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is in violation of Article VII, §8(1)(b) of the Oregon Constitution.

#### **L. Count Ten**

None of the findings made by the Commission regarding the allegations in count ten implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count ten.

#### **M. Count Eleven**

None of the findings made by the Commission regarding the allegations in count eleven implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count eleven.

## **N. Count Twelve**

Between the time of Judge McShane's ruling on same sex marriage in May of 2014 and November of 2014, when Judge Day declined to perform any marriages, Judge Day implemented a system directing his staff to discriminate against any same sex couple that may seek out Judge Day to perform their marriage. He directed his staff to research inquiring couples and, if their research revealed a same sex couple, he instructed his staff to lie to the couple about his availability and direct the couple to another judge. Judge Day asserts that this system of discrimination "accommodated" same sex couples.

Judge Day took the oath of office for judges in ORS 1.212 upon his swearing in. "The oath represents the judge's solemn and personal vow that he or she will impartially perform all duties incumbent on the office and do so without regard to the status or class of persons or parties who come before the court. The oath is a reflection of the self-evident principle that the personal, moral, and religious beliefs of a judicial officer should never factor into the performance of any judicial duty. When a judge takes the oath of office, 'he or she yields the prerogative of executing the responsibilities of the office on any basis other than the fair and impartial and competent application of the law ....' *Mississippi Judicial Performance Com'n v. Hopkins*, 590 So2d 857, 862 (Miss 1991)." OH Adv Op 15-001 (Ohio Bd Prof Cond), 2015 WL 4875137.

In keeping with the oath of office, Rule 3.3(B) prohibits a judge from manifesting prejudice against anyone based upon sexual orientation in the performance their judicial duties. The discriminatory practice implemented by Judge Day violates Rule 3.3(B). Furthermore, the idea that a discriminatory practice is a positive "accommodation" to those being discriminated against shows a deplorable lack of understanding of the most basic concepts of impartiality.

Judge Day's implementation of this discriminatory practice also violates Rule 2.1(A). Despite the fact that Judge Day's staff did not have the occasion to utilize his plan, the intended discrimination corrodes the integrity and impartiality of the judiciary. Furthermore, Judge Day's actions did not promote public confidence in the judiciary and the judicial system. In fact, his actions have had quite the opposite effect.

Judge Day's discriminatory plan required his staff to lie to the public in order to conceal Judge Day's discriminatory tactics. Thus, Judge Day also violated Rule 2.1(D).

Judge Day's discriminatory practice was an intentional, purposeful act with a conscious objective to cause a result. Judge Day's violation of the above judicial disciplinary rules was willful. Thus, Judge Day is in violation of Article VII, §8(1)(e) of the Oregon Constitution.

The Commission further concludes that Judge Day's willful violations of Rule 2.1(A), 2.1(D) and Rule 3.3(B) constitute willful misconduct in his judicial office, such misconduct bearing a demonstrable relationship to the effective performance of his judicial duties. Thus, Judge Day is in violation of Article VII, §8(1)(b) of the Oregon Constitution.

#### **O. Count Thirteen**

Despite the non-partisan nature of his judicial position and the neutral nature of the court, Judge Day's plan for the décor in his jury room was clearly partisan. Although Judge Day originally planned to hang partisan artwork in his jury room, knowing that some colleagues would likely object, the artwork was never actually hung. Judge Day acquiesced to Judge Rhoades request by eventually removing the artwork from the courthouse without displaying it to the public. Thus, the allegations in count thirteen do not implicate an ethical violation on the part of Judge Day. As such, the Commission recommends dismissal as to count thirteen.

### III

#### SANCTION

##### **A. The Purpose and Standard for Judicial Sanctions**

The purpose of this proceeding is not punishment, but the proper administration of justice for the public good. *In re Jordan*, 290 Or 303 (1981). In that regard, it is the duty of the Commission under ORS 1.420(4) to make a recommendation to the Oregon Supreme Court of censure or suspension or removal of the judge.

“In order to maintain the confidence of the people of Oregon in the courts of this state, it is essential that the judges of those courts be honest and competent judges. To accomplish that purpose, the Oregon Constitution was amended in 1976 to impose upon this court the duty and responsibility of suspending or removing from judicial office any judge found by it to be unfit for judicial office for any of the grounds set forth in that constitutional amendment. Article VII (Amended), Section 8(1). \* \* \* To be a competent judge it is not sufficient that a judge have legal knowledge and ability and be diligent, industrious and independent. It is also essential that a judge must have unquestioned integrity, together with a judicial temperament of fairness, patience, courtesy and common sense.”

*Id.*

“Judges are disciplined primarily to preserve public confidence in the integrity and impartiality of the judiciary. Thus, disciplining judges serves to educate and inform the judiciary and the public that certain types of conduct are improper and will not be tolerated. Discipline of a judge also serves to deter the disciplined judge as well as other judges from repeating the type of conduct sanctioned.” *In Re Conduct of Schenck*, 318 Or 402, 438 (1994).

The general criteria to be evaluated in determining the appropriate sanction in judicial discipline cases include the impact upon litigants and attorneys of the judge's conduct, the extent to which the conduct tends to undermine public confidence in the judicial system, the seriousness

of the violations, and the extent to which the judge demonstrates an interest in avoiding similar problems in the future. *Id.*

Similarly, in *In re Deming*, 736 P2d 639 (Washington 1987), the Washington Supreme Court stated that, to determine the appropriate sanction, it would consider the following non-exclusive factors: (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent, and frequency of occurrence of the acts of misconduct (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

## **B. Analysis of Judge Day's Conduct**

In reviewing the *Scheneck* and *Deming* factors, an overview of Judge Day's behavior reveals several patterns of misconduct.

First, Judge Day's behavior indicates that he has little insight concerning the boundaries required in a judicial position. In fact, much of Judge Day's conduct violated common sense restrictions prescribed by the very nature of the judiciary. Examples of Judge Day's lack of boundaries include:

- Facilitating the hiring of probationers under his supervision to assist with home projects for himself and his family
- Continuing to have improper ex parte contact with VTC probationers despite

Judge Prall's warnings at the December 2013 treatment court conference

- Sitting as the judge on a case while his son was working for one of the parties and allowing that fact to be announced to the jury
- Compelling BAS to come to Judge Day's home and interact with his family
- Relentlessly texting BAS, all the while ignoring his efforts to avoid engaging in a personal relationship with Judge Day and his family
- Sending personal photos and family images to BAS
- Going to BAS's home
- Interviewing BAS for the article Day wrote for the OTLA Trial Magazine and revealing personal information about BAS
- Soliciting an introduction to BAS's Navy SEAL friends
- Shoving his judicial business card at a soccer referee and crossing the soccer field to interact with the officials in an off limits area
- Responding to Judge Rhoades in the manner he did when she asked him to take down the Hitler collage – not only was it a veiled political threat, it also reflected his knowledge that contributors expected political benefits
- Imposing his personal agenda onto the courthouse via the volume and content of his military wall art collection
- Soliciting funds from attorneys, some of whom appear before him

Judge Day's lack of boundaries in these instances clearly evidences a pattern of misconduct the nature of which is disturbing. The behavior is frequent and extensive. His lack of boundaries occurs both in and out of the courtroom and in both his official capacity and in his personal life. Although Judge Day acknowledges that most of these acts did in fact occur, he either does not believe that they implicate any of the governing judicial rules or he characterizes them in such a way as to excuse them. All these boundary issues have had a damaging effect on the integrity of and respect for the judiciary. The misconduct undermines confidence in the judicial system. Furthermore, much of this misconduct was an exploitation of his position for personal gain. Given the nature of the misconduct and Judge Day's lack of appreciation for its seriousness, the Commission is not confident that Judge Day will make any effort to change or modify his behavior.



Second, there is a pattern of self-benefit to much of Judge Day's conduct. Examples of Judge Day's misconduct that provided him with a personal benefit include:

- Allowing a felon to handle a firearm to help his own son learn to safely handle a gun and to mentor his own son to prepare him for entry into the military
- Taking a noted Navy seal to a wedding to show him off
- Soliciting an introduction to a famous person from a probationer under his supervision
- Using his judicial business card to intimidate a soccer referee
- Encouraging his son's internship with the District Attorney's office during a case he was adjudicating such that his son would gain experience prior to applying for law school
- Putting up certain artwork in order to ingratiate himself to "powerful people"
- Compelling BAS, with whom he was fascinated because of BAS's military activities, to come to his home and interact with his family
- Using probationer laborers at his home, whether or not they were paid
- Soliciting funds from attorneys for his personal project
- Receiving a double reimbursement for the Vollmar wall hanging
- Using the 501(c)(3) PVR to decorate his own courtroom and the hallways of the fourth floor to promote a personal agenda and personal prestige
- Making public statements in pre-hearing publicity to create the impression that this proceeding was solely regarding his religious beliefs and his refusal to conduct same-sex marriages in order to deflect public attention away from other misconduct

Judge Day's actions evidence a pattern of exploiting his judicial position to satisfy his personal desires. The behavior is frequent and extensive. Judge Day uses his judicial position to exert discreet pressure on members of the public, including attorneys and litigants, for his personal gain. The conduct occurs both in and out of the courtroom and in both his official capacity and in his personal life. Judge Day acknowledges that most of these acts did in fact occur. However, once again, he either does not believe that they implicate any of the governing judicial rules or he characterizes them in such a way as to excuse them. The misconduct undermines confidence in the judicial system. Given the nature of the misconduct and Judge

Day's lack of appreciation for its seriousness, the Commission is, once again, not confident that Judge Day will make any effort to change or modify his behavior.

Third, and possibly the most disturbing, Judge Day has engaged in a pattern of dishonesty. Although the goal of much of his disingenuousness appears to be covering up misconduct, some of this conduct seems to have other independent objectives. Examples of Judge Day's untruthfulness include:

- Judge Day represented by implication to the Commission via letter that the new VTC contract language, implemented on February 6, 2015, was in effect at the time of his interactions with BAS and, thus, it excused his ex parte contacts with BAS, neither of which were true.
- Regarding the October 17, 2012 soccer game, Judge Day stated in writing and under oath at the hearing that he provided his business card to Mr. Deuker because Mr. Deuker asked him for the card. That is not true.
- Regarding the November 7, 2012 soccer game, Judge Day stated in writing to the Commission that Mr. Allen physically accosted him. That is not true. After credible evidence was discovered to the contrary, Judge Day maintained under oath at the hearing that someone physically shoved him, but backed off on identifying the individual. Although Judge Day attempted to adjust his testimony to conform to the more credible evidence, his statements remained deceptive.
- Judge Day's testimony concerning how he introduced BAS at the wedding was untruthful.
- Judge Day indicated that he did not solicit funds from attorneys for the Hall of Heroes project. That is not true.
- Judge Day was dishonest in accepting reimbursement from the Vollmar family for their wall hanging when it was removed when he had already been fully reimbursed for that piece by the 501(c)(3) PVR.
- Regarding the gun at the Mansell residence, Judge Day testified under oath at the hearing that he did not suggest that BAS find the gun. That was untrue. Judge Day testified under oath at the hearing that he did not waive the prohibition against BAS handling guns on that occasion. That was not true. Judge Day testified under oath at the hearing that BAS did not touch the gun on that occasion. That was not true.
- Regarding the gun on January 12, 2014, Judge Day testified under oath at the hearing that he did not give BAS permission to handle the gun. That was

untrue. Judge Day testified under oath at the hearing that he did not see BAS handle the gun on that occasion. That was not true. Judge Day testified under oath at the hearing that he did not know that his son was returning that day to go target shooting with BAS. That was not true.

- Judge Day was not honest with the VTC staff concerning BAS's access to guns and he disingenuously omitted the extent of BAS's gun handling when speaking to the prosecutor and defense attorney.
- At the meeting in Judge Penn's chambers, Judge Day claimed that he was unaware that BAS was a felon. That was not true.
- Judge Day instructed his staff to lie about his scheduling in the event that a same-sex couple sought his services in the performance of their marriage.
- Judge Day testified under oath at the hearing that he told Judge Pellegrini that he was concerned about her appointment because of the number of government attorneys on the bench. That was not true. Judge Day actually indicated to her that he was concerned about her appointment due to her sexual orientation.
- Judge Day has been dishonest to the public at large when asserting that this proceeding is due to his religious beliefs and his refusal to perform same-sex marriages. That is not true:

Judge Day's dishonesty by its very nature greatly undermines public confidence in the judicial system, particularly those untruths uttered under oath. A judge's integrity is paramount to the fair and impartial administration of justice. Judge Day's misrepresentations constitute a systematic effort to avoid responsibility for his misconduct. His continual mischaracterization of his behavior involving a felon and a firearm are particularly serious and disconcerting. Not only does it impugn his integrity, but it is an attempt to conceal criminal conduct. Given the nature of Judge Day's dishonesty, rehabilitating his integrity to the point of judicial competency is dubious at best.

Finally, the pattern of Judge Day's continuing conduct indicates that, even after the Commission's investigation of his behavior began in August, 2014, he was unable to understand the magnitude of his actions in relation to the Code of Judicial Conduct. Examples of Judge Day's continuing poor judgment include:

- Continuing to collect and track money donations for his Hall of Heroes project as late as October 2015
- Making the VTC contract change in February 2015 in an attempt to justify his ex parte contacts with BAS
- Sitting as the judge on a case in the summer of 2015 while his son was working for one of the parties and allowing that fact to be announced to the jury
- Continual public mischaracterizations of this disciplinary process, both procedurally and substantively

This pattern of ongoing conduct indicates a continuing lack of appreciation for the nature of a judicial position. Judge Day does not appear to recognize situations that either impugn his integrity or trigger ethical violations. Thus, once again, the Commission is not confident that Judge Day will make the required effort to change or modify his behavior.

### **C. Conclusion**

Although Judge Day has no prior record of discipline and has a good reputation among his colleagues, all other evaluation factors noted in *Schenck* and *Deming* are implicated by Judge Day's behavior. His misconduct is not isolated. It is frequent and extensive. The Commission has found that Judge Day willfully violated ten Rules of the Code of Judicial Conduct, several of them multiple times.<sup>21</sup> Judge Day's pattern of behavior includes misconduct for personal gain and misconduct amounting to criminal behavior. Judge Day shows no outward sign of comprehending the extent or nature of his ethical violations. His misconduct is of such a nature as to impugn his honesty and integrity. Finally, Judge Day's conduct before, during and after the Commission's investigation undermines the public's confidence in the judiciary.

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<sup>21</sup> Rules 2.1(A), 2.1(B), 2.1(C), 2.1(D), 2.2, 3.3(B), 3.7 (B), 3.9(A), 3.12(A) and 4.5(A).

“Removal from office is appropriate where the judge is not competent to perform the duties of the office, *In the Matter of Field, supra*, 281 Or at 634-37, 576 P2d 348, or where a series of misconduct incidents calls into question the judge’s competence and integrity, *In re Jordan*, 290 Or 303, 336-37, 622 P2d 297, reh’g den 290 Or 669, 624 P2d 1074 (1981).” *Schenck, supra*.

Taking into account the reasons for imposing judicial discipline, the nature of the accused's misconduct, and all the other factors described above in *Schenck* and *Deming*, the Commission concludes unanimously that the appropriate sanction in this case is removal.

Pursuant to Commission Rule of Procedure 16 (b) – I certify this to be the true and accurate recitation of the findings of fact, conclusions of law, and recommendation of the Oregon Commission on Judicial Fitness and Disability.

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by a horizontal line and a small loop.

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Oregon Commission on Judicial Fitness and Disability Chairperson