No. 202239-1

SUPREME COURT OF THE
STATE OF WASHINGTON

TRACY SHARVON FLOOD,
Municipal Court Judge for the City of Bremerton

Appellant,

v.

COMMISSION ON JUDICIAL CONDUCT,

Respondent.

APPELLANT'S OPENING BRIEF

Anne Bremner, WSBA #13269
FREY BUCK
1200 5TH Avenue, Suite 1900
Seattle, Washington 98101
Tel. (206) 486-8000
abremner@freybuck.com
Attorney for Appellant

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INTRODUCTION

On October 21, 2024, Judge Tracy Flood entered into a stipulation and agreement with disciplinary counsel before her Commission on Judicial Conduct ("CJC") hearing commenced. In the agreement, as drafted by disciplinary counsel and agreed to by defense counsel, Judge Flood admitted to three violations of the Code of Judicial Conduct ("Code") and certain undisputed facts. Judge Flood's violations of the Code are Canon 1, Rules 1.1 and 1.2 (comply with law, including the Code, and promote public confidence, avoid impropriety and appearance of impropriety), and Canon 2, Rule 2.8(B) (perform competently and diligently, and be patient, dignified and courteous).

Disciplinary counsel agreed not to recommend Judge Flood's removal from the bench, opting instead for a recommendation that would include training, coaching, and mentoring. Despite this agreement, counsel for the CJC departed from it, and recommended Judge Flood's removal from the bench.

The CJC's recommendation is nearly the most drastic available under the law. The gravity of the recommendation, however, does not comport with the evidence provided at the hearing, and in large part is premised not upon Judge Flood's actions in the role, but rather on the zealousness of her former counsel's representation, which the CJC plainly found offensive. Moreover, the CJC recommendation is built upon a patent exaggeration of the evidence introduced at the hearing, without which the extreme recommendation would not be founded.

The removal of a jurist is justified only where the behavior is so extreme and deleterious of the propriety of the juridical process that no alternative sanction is appropriate. Removal is justified only when clear and convincing evidence establishes it is the sole appropriate remedy. Here the evidence does not support that finding.

JURISDICTIONAL STATEMENT

This honorable Court exercises jurisdiction over the issues by virtue of Washington Constitution, Art. IV, § 31, and RCW 2.64 *et seq.*

STATEMENT OF THE ISSUES

Whether the CJC erred in censuring and suspending Judge Flood?

ASSIGNMENTS OF ERROR

1. The CJC failed to follow the stipulation between disciplinary counsel and Judge Flood, accepted after inquiry by the panel, and subsequently issued discipline upon a ground the parties had agreed to dismiss in that stipulation.

2. The CJC erred in disciplining Judge Flood based upon her former attorney's tactical approach which the panel found offensive.

3. The CJC erred in recommending extraordinary discipline based upon unsupported findings that Judge Flood failed to cooperate with the hearing process.

4. The CJC erred in recommending extraordinary discipline based upon significant exaggeration of evidence from the hearing, citing "evidence" that in some circumstances was plainly false.

5. The CJC erred in recommending extraordinary discipline while ignoring disciplinary counsel's stipulation that Judge Flood had experienced racism by members of the court staff, and by blaming Judge Flood for every staff member failure despite a lack of evidence connecting Judge Flood's acts to the perceived staff failures.

6. The extraordinary discipline rendered by the CJC is out of whack with this Court's history of judicial discipline in similar cases

STATEMENT OF THE CASE

In order to properly evaluate the application of the *Deming* factors, Judge Flood respectfully suggests that her personal history is relevant to the Court's consideration.

1. Judge Flood's background.

Judge Tracy Sharvon Flood was raised in Chicago, Illinois by parents who had been reared in the south. Hearing Transcript, Vol. IV pp. 677 23; 668 1 – 2 (hereafter I, II, III, or IV for transcript volumes). Judge Flood's family was one of little means. As such, Tracy joined the United States Navy at the age of 17, requiring her mother's permission, in the hopes to further her education. IV p. 678 4-17.

While in the Navy, Judge Flood finished in the top 10 of her A school class and was selected to work for the first black Rear Admiral General; she also received educational benefits. IV p. 679 10-13. Judge Flood eventually relocated to Kitsap County, where she completed community college. She eventually obtained an Associate degree from Olympic College while still on active duty and received a BA in both Sociology and Political Science from the University of Washington. She ultimately received a J.D. from Seattle University School of Law. IV pp. 679 23-25; 680 1 - 23. Judge Flood also obtained her LL.M.

(Master of Laws) in Elder Law from Seattle University School of Law after becoming a care giver for her brother who had suffered a catastrophic stroke. IV p. 682 3-15.

Judge Flood was the first elected female black judge in Kitsap County, Washington. IV p. 737 22-25. She was elected to the Bremerton Municipal Court bench in November 2021 during the COVID Pandemic. IV p. 677 18-19. Prior to taking the bench, Judge Flood was a *pro tem* judge, a public defender, and an elder law attorney in private practice. IV pp. 686 8-10; 715 15; 682 22.

Judge Flood has an impressive history of public service, and service to the bar. Judge Flood was the recipient of the Washington Women Lawyers President's Award. She is a recipient of the Loren Miller Bar Champion of Justice Award. She served on the Board of Governors of the Washington State Bar Association. She was a member of the inaugural class of the Washington State Leadership Institute; and has been profiled many times in various bar and legal publications. IV pp. 684 18-25; 685 1-8. Judge Flood has also appeared on the cover of

Seattle University Law School's magazine and was recently profiled as a Kitsap County "Trailblazer." IV p. 681 6-8.

On a personal note, Judge Flood and her husband share a blended family, as well as a commitment to their community. Her husband chairs the NAACP in Kitsap County and was the lead engineer for the Seattle Tunnel project. IV p. 683 18-23.

2. Testimony at the hearing.

Faymous Tyra, Jr., the therapeutic court coordinator who has worked in the court system for thirty years, testified that he witnessed an anti-minority mindset at the court and courthouse. III pp. 604 24-25; 605 1-2; 5-11; 607 21-35; 608 1-25; p. 609 1-12; 611 2-14. Mr. Tyra also testified that he observed an anti-Judge Flood sentiment via court staff badmouthing the Judge. III pp. 597 22-25; 597 1; 598 20-25; 600 3-5; 604 13-25; 602 23-25; 603 1-23; 611 21-25; 612 1-2. Mr. Tyra also testified that he never saw Judge Flood mistreat anyone. III pp. 600 24-25; 601 1-6. However, Mr. Tyra did see Judge Flood being mistreated by court staff and lawyers. III pp. 602 23-25; 603 1-23; 613 10-25;

613 1; 614 13-25; 617 24-25; 618 1-25; 619 5-11, 17-20, 25; 620 1-25; 621 1-10; 622 18; 623 23-25; 624 1-8.

Keyera Gaulden, who worked with Judge Flood on community work while she was employed with the YWCA, testified that Judge Flood was very professional in her interactions with therapeutic court participants as well as being kind and understanding towards them. III pp. 399 21-25; 400 1-2.

Ms. Gaulden also testified that she never heard Judge Flood use an inappropriate tone with anyone inside or outside of court. III p. 400 13-20.

Ms. Gaulden also testified that she witnessed court staff treating Judge Flood in disrespectful ways. III p. 402 1-3. She heard court staff discourteously calling Judge Flood "Tracy" instead of calling her by her proper title and name - i.e., Judge Flood. III pp. 402 14, 24-25; 403 1-7. Ms. Gaulden also testified that she witnessed court staff gossiping about the judge behind

her back and rolling their eyes while doing so. III pp. 403 8-9; 404 8-9.

During her CJC testimony, Judge Flood testified that she had difficulty getting her staff to execute the administrative tasks she delegated to them. IV pp. 705 22-25; 706 1-4.

Judge Flood also testified that she was trying to institute changes at Bremerton Municipal Court as part of her duties as a judge. IV p. 687 11-20. These changes included adding a therapeutic/community court (courts dealing with persons who are addicted to drugs and/or suffering from mental illness). IV pp. 688 21-25; 689 1-16.

Judge Flood's detractors were resistant to the changes. Her detractors were all white, except for court clerk/administrator Jennefer Johnson. In her testimony before the CJC, Judge Flood stated that Ms. Johnson, too, had a history of pushing back against her as well as being insubordinate. IV pp. 701 2-25; 702 1-15; 703 1-9.

In fact, Ms. Johnson has the same reputation with other judges. One such judge is Judge Lisa Leone. III pp. 480 19-25; 481 1-25; 482 1-8. During her testimony before the CJC, Judge Leone stated that on one occasion Ms. Johnson got into a screaming match with her regarding a piece of office equipment. III pp. 483 20-25; 484 1-25; 485 1-21. Judge Leone also testified that, "… [Jennefer exhibited] some behaviors [toward me] that … were not … respectful" (e.g., during bar or staff meetings Ms. Johnson would cut the Judge off while she was speaking). III pp. 486 19-25; 487 1-7. Judge Leone also testified that she, "…felt like [Jennefer] let the court down" when Jennefer gave a seven day notice that she was resigning, instead of giving the required 30 day notice as stipulated in her contract. In her testimony, Judge Leone stated that, "… we were sort of left in the lurch" when Ms. Johnson gave such short notice. III pp. 487 21-25; 488 1-4.

During his testimony before the CJC, William Kohn, an armed security guard for the Bremerton Municipal Court,

testified that he formed the following positive impression of Judge Flood:

> I've always found the judge to be professional. I've found the judge to be patient with clients that -- maybe she's trying to explain the process to [the clients] and then they interrupt.· I find her to be patien[t] (sic) during that process and I found her to be courteous to people if there were technical issues on the court's part. So I've always found her to be very professional, very patient and very courteous. III pp. 642 8-19.

Mr. Kohn also testified that he never saw Judge Flood do something in the courtroom that he thought was inappropriate or unprofessional. III p. 642 20-24.

It should be noted that during Judge Flood's hearing, the testimony of the CJC witnesses primarily revolved around Judge Flood's demeanor and tone. The CJC witnesses had absolutely no issue of discriminatory, racist, sexist, or other offensive speech by Judge Flood.

It should also be noted that during the hearing, the CJC made serious allegations about the Judge's in-court conduct and called witnesses to support their contentions. However, despite

the fact that every single court session over which Judge Flood presided was audio recorded, the CJC never played any of these tapes during the Judge's hearing. These crucial tapes were never requested by the CJC, and obviously could have clarified the discrepant testimony the panel heard.

Finally, it should be noted that Judge Flood admitted to the facts and violations contained in the CJC stipulation. During her testimony Judge Flood stated, "I agreed to the stipulated facts because I want to accept responsibility for myself." IV p. 740 14-15.

SUMMARY OF THE ARGUMENT

Judge Tracy Flood was accused of various faults associated with her demeanor and administrative actions while on the Bremerton Municipal Court. Following an investigation and hearing before the CJC, Judge Flood was subject to extraordinary discipline including a lengthy suspension primarily based upon an assertion that she had not cooperated in

the hearing process and upon behavior by her original attorney that the CJC found to be offensive.

The record supports neither the CJC's findings nor the discipline imposed. The record shows that Judge Flood cooperated with the CJC process, and it is patently unfair for the CJC to issue such extraordinary discipline based upon tactical decisions made by her former attorney in a racially charged environment. The CJC also erred in ignoring a stipulation entered into between disciplinary counsel and Judge Flood as to certain specific violations of the code and facts relevant to support the stipulation. Judge Flood and disciplinary counsel had agreed to dismiss a remaining code violation charge as part of the stipulation, but ultimately disciplinary counsel backtracked on that stipulation and the CJC issued discipline upon the dismissed charge. The CJC also ignored the stipulated fact that Judge Flood had been subject to racist behavior by members of the court staff which impacted her ability to properly serve in the role.

The CJC further erred in relying upon false information and exaggerated evidence in arriving at its extraordinary discipline.

Pursuant to the evidence at the hearing and this Court's precedent in similar cases, Judge Flood respectfully asks this Court to strike the CJC's disciplinary finding and enter a lesser penalty commensurate with the reality of her case.

STANDARD OF REVIEW

This Court review CJC disciplinary decisions *de novo*.

ARGUMENT

A. Judge Flood cooperated with the CJC's investigation and proceeding.

A significant portion of the CJC's decision is premised upon its finding that Judge Flood failed to cooperate with the commission investigation and proceeding. The CJC claims two general forms of non-cooperation: motions challenging the fairness or legality of the proceeding, and Judge Flood's handling of orders to disclose her personal medical records. The CJC's

finding of non-cooperation was error; nothing Judge Flood or her attorneys did was uncooperative.

Judge Flood's first attorney, Vonda Sergeant, a black woman, vigorously defended her client, also a black woman, in a case they believed was born out of racial bias. Indeed, in the stipulation to the facts and code violations, disciplinary counsel plainly admits that Judge Flood was a victim of racism, including, "…*handling racial bias from her own staff including microaggressions, implicit bias, and tone policing …"* p. 9 7-15. While Ms. Sergeant's strident advocacy appears to have offended the CJC, it was borne out of a recognized racist environment.

As is common in litigation, Ms. Sergeant brought motions on behalf of her client. Some of these motions were standard (motions to compel discovery, motions to strike witnesses, etc.), and some were more unique (challenging the constitutionality of proceeding against Judge Flood with only a quorum of the Commission,[1] and seeking to disqualify Disciplinary Counsel for

[1] This argument is more fully addressed below.

a conflict of interest). While the Presiding Officer denied some of these motions, it never found Ms. Sergeant's motions frivolous, brought in bad faith, or in violation of ethical rules.

Further, the CJC concedes the litigation tactics and actions of an attorney cannot necessarily be imputed to their client. Commission Decision and Order ("Order"), 3-4 ("To the extent that it is fair to attribute acts of Respondent's first set of counsel to Respondent…"). Despite this acknowledgement, the CJC held Judge Flood responsible for everything Ms. Sergeant did, including the language she used in briefs:

> Both in writing and in a hearing, Respondent's first counsel articulated the likelihood that the presiding officer's rulings would "again be rubberstamping anything Commission counsel requests."… "Respondent's first set of counsel accused Disciplinary Counsel and Commission staff of unethical conduct and the Commission itself of acting unconstitutionally and intentionally unfairly, and referred to 'Judge Flood's well-founded belief that a decision has already been made, and this hearing is a sham'"… "nothing more than a railroad with a foregone conclusion before we start."

Order, 4 (citations omitted). While a litigant is generally bound by the presentation of fact and legal authority offered by her

counsel, a litigant does not exercise control over the tactical approach her counsel chooses. Plainly the CJC was upset with former counsel's innuendo (and outright accusations); the matter of Judge Flood's discipline, if any, however, must in fairness be premised not upon former counsel's invective, but rather upon the actual evidence. It is patently unfair for the CJC to cite Ms. Sergeant's choice of language as evidence of Judge Flood's non-cooperation, and CJC's obvious ire at Ms. Sergeant's tactics appears to have colored the entirety of its recommendation.

More importantly, the CJC cites nothing suggesting a judge's duty to cooperate with CJC proceedings means they cannot challenge aspects of the process, or that their attorney cannot zealously litigate the matter within the bounds of ethical rules. While "cooperate" is not defined by the rules, and Judge Flood could find no cases suggesting a definition, common sense is that "cooperate" in this context means to respond to the

charges, appear when ordered to, and to make oneself available for questioning if requested.[2]

The CJC's second area of perceived non-cooperation was Judge Flood's handling of court orders to provide it with her medical records. A review of the record belies that position.

On March 5, 2024, at a hearing in which Judge Flood was not present, according to the CJC, "Respondent's first set of counsel orally represented to the presiding officer in the gravest terms that Respondent's physical health was so compromised and vulnerable that she could not comply with the schedule set out for the parties." Order, 4. What Judge Flood's first counsel said specifically is not clear, as neither Judge Flood nor her replacement counsel were ever provided a recording or transcript of that hearing.

[2] While the CJC alleges Judge Flood was uncooperative in providing a deposition, the tactics utilized were again Ms. Sergeant's (objecting that there was no good cause for a deposition under the court rules, objecting to Disciplinary Counsel's questions and then ending the first deposition due to those questions, etc.).

The Presiding Officer ordered Judge Flood "to provide *some form of proof* of the medical crises she was experiencing." Order, 5. According to the CJC, Judge Flood's numerous declarations and records that followed did not sufficiently describe her medical situation. However, those updates included a surfeit of supporting health information:

Judge Flood informed the CJC on March 7, 2024, that on February 23, 2023, she had been refused treatment by her dentist due to her high blood pressure and was sent to the ER. *Dkt. 86.* Judge Flood was experiencing a banging headache, dizzy and lights exploding in her eyes. *Id.* CT scans were ordered and a mass was discovered in the anterior portion of her brain. She had scheduled appointments on March 7, 12, and 19 at the VA and a MRI at Seattle Cancer Care Alliance on March 18. *Id.*

On April 23, 2024, Judge Flood informed the CJC that she had scheduled appointments back to back starting with April 29 afternoon, April 30 afternoon, May 1 afternoon, May 8, May 15, and May 28, *Dkt. 91.1*.

On June 18, 2024, Judge Flood informed the CJC of her scheduled appointments on June 20, 21, 27, and July 29, *Dkt. 97.*

On July 15, 2024, Judge Flood informed the CJC of testing she completed on June 20, 21, and 27. She had additional appointments scheduled for July 29 and August 22, *Dkt. 101.1.*

On August 12, 2024, Judge Flood informed the CJC that she had surgery scheduled for August 29*, Dkt. 107.1.*

On September 9, 2024, Judge Flood informed the CJC she had a follow up appointment with her eye physician for additional testing on August 22, and had a surgical procedure completed on August 29*, Dkt. 113.1.*

On September 20, 2024, Judge Flood informed the CJC that she was being scheduled for a PET/CT and further blood work tests, *Dkt. 115.1.* She also had 10 tumors removed from her stomach and needed a follow up appointment for blood work the next week. *Id.*

The record is clear – Judge Flood provided substantial information of her ongoing medical issues. Indeed, it is telling that the CJC denied disciplinary counsel's request for a subpoena for all of Judge Flood's medical records, only to later use her response to its request as a basis for a finding of non-cooperation.

If the CJC believed some of Judge Flood's updates were unclear, there was good reason; Judge Flood's team of providers struggled to identify her ailment and arrive at a solid diagnosis. After the CJC hearing, doctors finally determined Judge Flood had MALT lymphoma, a rare, slow-growing type of non-Hodgkin lymphoma that develops in lymphoid tissue outside of the lymph nodes. *Declaration of Tracy Flood,* ¶ 2-4.

While Judge Flood declined to turn over her entire medical history to the CJC, the record clearly shows that she complied with her obligation to verify her ongoing serious medical issues and her associated healthcare obligations.

B. The CJC's fact-finding hearing and decision, conducted only by a quorum of the commission was unconstitutional.

The CJC is a creature of the state constitution, and its activities are authorized and limited by the grant. Article IV, Section 31:

> There shall be a commission on judicial conduct, existing as an independent agency of the judicial branch, and consisting of a judge selected by and from the court of appeals judges, a judge selected by and from the superior court judges, a judge selected by and from the limited jurisdiction court judges, two persons admitted to the practice of law in this state selected by the state bar association, and six persons who are not attorneys appointed by the governor.

The constitution does not authorize CJC action in a quorum. Sec. 31 goes on to describe what the "commission" must do, including holding fact finding hearings and deciding violations and discipline.

The drafters of the constitution knew how to authorize any identified group or commission to operate by quorum. Indeed, Article III, Section 2, which creates the Supreme Court, explicitly allows a quorum for this body:

> The supreme court shall consist of five judges, **a majority of whom shall be necessary to form a quorum, and pronounce a decision**. The said court shall always be open for the transaction of business except on nonjudicial days. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court.

Despite this obvious recognition of the capacity and importance of authorizing quorum work in constitutionally mandated scenarios, the drafters provided no similar authority for the CJC. Washington precedent is clear that where the legislature provides authority with specificity in some circumstances and withhold that authority in others, the absence of authority is indicative of an intent that it not be afforded. See, e.g., *Brin v. Stutzman*, 89 Wn. App. 809, 832 (1998) ("It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent.")[3] Washington applies the same rule to constitutional interpretation

[3] Citing *Seeber v. Washington State Pub. Disclosure Comm'n,* 96 Wn.2d 135, 139, 634 P.2d 303 (1981).

as to legislative interpretation. *State ex rel. O'Connell v. Port of Seattle,* 65 Wn.2d 801, 806, 399 P.2d 623 (1965).

While Sec. 31 does give the CJC authority to make its own rules, by omission the constitution prohibits the right of action in quorum, particularly where "commission" is as explicitly defined in Sec. 31 to include all members.

Given that a proper CJC recommendation is a prerequisite to this Court's determination of what, if any, sanction is appropriate, the CJC decision to proceed uncon40stitutionally on quorum renders this proceeding unripe.

C. CJC erred in denying motion to dismiss Rule 2.5(A) violation, and by subsequently finding Judge Flood in violation.

The CJC erred in pursuing a claim of violation of Rule 2.5(A) given that disciplinary counsel and Judge Flood had stipulated to its dismissal. Judge Flood raised this issue with the panel asking that the charge be appropriately dismissed. The panel erroneously denied that motion.

On October 21, 2024, the panel accepted the parties' stipulation[4]; Judge Flood agreed that she violated Canon 1, Rules 1.1 and 1.2, as well as Canon 2, Rule 2.8(B). The stipulation did not address the remaining charge, Canon 2, Rule 2.5(A), but it is clear that the parties had agreed that rule would be dismissed. The very first sentence of the stipulation states, "Disciplinary Counsel and Tracy S. Flood, Judge of the Bremerton Municipal Court ("Respondent"), stipulate and agree to the following facts and Code of Judicial Conduct Violations and *agree to proceed to a hearing as to the appropriate sanction*." (Emphasis added). Paragraph 7 further provided, "The parties agree that the *case* will proceed to hearing *on the issue of sanction,*" and that "this Stipulation and Agreement shall not limit either party's ability to present evidence *pertinent to the* Deming *factors and CJCRP 6(c)(1)(A)-(H)*." (Emphasis added). Nothing in the stipulation provides for litigation of any charge under Rule 2.5(A).

[4] The Stipulation is part of the record of this case, and so not separately attached as an exhibit.

During colloquy with the presiding officer before the panel accepted the stipulation, disciplinary counsel advocated for acceptance by representing that the stipulation narrowed the issues and allowed the panel to focus on the real issue – the appropriate sanction.[5] Disciplinary counsel also indicated she would not argue that respondent violated Rule 2.5(A). When disciplinary counsel later argued, contrary to her earlier statement, that the panel could still find violation of Rule 2.5(A), respondent objected, stating that the parties' understanding was that the Rule 2.5(A) charge was no longer in play. Despite the plain language of the stipulation, and her oral professions, during her closing argument disciplinary counsel urged the panel to find respondent in violation of Canon 2, Rule 2.5(A).

Commission on Judicial Conduct Rule of Procedure 23 permits the parties to enter a stipulated agreement, provided it is accepted by the commission, precisely what occurred here.

[5] Respondent does not at this time have a transcript or recording of the hearing.

Respondent could find no authority addressing the proper standards for interpreting a judicial conduct stipulation. Accordingly, general Washington contract interpretation case law should control. Courts "interpret a contract according to the intent of the contracting parties, [] focus[ing] on the objective manifestations of agreement." *R.J. Reynolds Tobacco*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009) (internal quotations omitted). Courts "give the language of the contract its ordinary, usual, and popular meaning." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Here, both the plain language of the stipulation and the parties' related statements make it clear that the only remaining issue, after the stipulation was accepted, would be the question of discipline based solely on the stipulated violations. Any suggested sanction premised upon violation of Rule 2.5(A), consequently, would be improper.

D. CJC's decision relied heavily on unsupported findings of fact.

The CJC's decision relied heavily on findings of facts supported by citations to the record, that in fact are not supported by the record. Without these unsupported facts, the removal recommendation is not remotely reasonable, and a reprimand or admonishment is clearly the appropriate outcome.

i. "Respondent caused the complete turnover of two entire sets of court staff."

The CJC asserted, without citation to the record, that Judge Flood "caused" her "entire" staff to turnover twice. There was no evidence to support this. Disciplinary counsel presented evidence that 19 Bremerton Municipal Court ("BMC") staff members left their positions while Judge Flood was on the bench. Of those 19, disciplinary counsel presented evidence for only six[6] as to the reason for their departure. There was no evidence

[6] The six were Ian Coen, Dawn Williams, Steven DeRosier, Jennefer Johnson, Serena Daigle, and Maury Baker (volunteer).

whatsoever about why the other 13 individuals left their positions.

The CJC's assertion is not just unsupported, it is false. For example, Ian Coen was the probation officer when Judge Flood first took the bench. When he left, he was replaced by Faymous Tyra, who was still working at BMC at the time of the Fact-Finding Hearing, itself evidence that Judge Flood did not cause "the complete turnover of two entire sets of staff." The CJC's dramatic overstatement of the evidence was likely a significant factor in its decision to exceed disciplinary counsel's recommendation.

ii. No causal connection established between Judge Flood's alleged misconduct and court function issues.

The CJC unjustifiably concluded that any mistake made by the court was caused by Judge Flood. The record was replete with testimony as to staff failures that – like all workers – were not tied to their supervisor's directions. To attribute every staff failure to Judge Flood is patently unfair.

iii. "*[H]igh caliber, focused supporting training measures had been offered [to Judge Flood] and failed, both in terms of personal coaching and in the details of court administration.*

One of the CJC's primary justifications for exceeding disciplinary counsel's request to suspend Judge Flood was its assertion that she had received "high caliber, focused" coaching and proven herself unable and unwilling to change:

> Remedial measures and guidance from experienced and motivated experts have been offered to and rejected by Respondent. The panel struggled to imagine what alternative or additional steps it would take for this Respondent to be a successful judicial officer.
> …
> [T]here was no basis to believe that Respondent has the capacity or motivation to change.

P. 31-32. These are extremely serious claims, but they are not at all supported by the record.

In its decision, the CJC states, without citation to the record, that Judge Flood "engaged in coaching and training with an expert of her choosing," a fact not in the record.

The CJC also cited Judge Flood's testimony at the hearing where she stated she brought in a "conflicts trainer" and attended a "change management course." However, the conflict training was "within the past month," and the change course was "within the past *week*." There was no evidence regarding Judge Flood's actions in the months or weeks prior to the hearing. The CJC also describes instances in which volunteers went to BMC to train *staff*.

E. CJC overruled disciplinary counsel's stipulation to racial bias, finding that it does not excuse her alleged behavior, but ignoring that racial bias slanted the accuser's experience of Judge Flood's words and actions. This is particularly relevant here where the alleged misconduct is primarily related to Judge Flood's tone and mannerisms.

In the stipulation to the Facts and Code Violations, disciplinary counsel blatantly admits that Judge Tracy Flood was a victim of racism. Specifically:

> Respondent has faced numerous hurdles in her tenure as Bremerton Municipal Court's Presiding Judge, including … handling racial bias from her own staff including microaggressions, implicit bias, and tone policing …

p. 9 lines 7-15. Judge Flood's discipline was founded primarily upon testimony of individuals subject to this stipulation. Yet the CJC failed to weight their testimony to reflect that acknowledged bias, then relied virtually exclusively upon it for its recommended sanction, forcing the harm upon her again.

F. Guidance from other CJC matters undermines the validity of the CJC recommendations.

There are many cases that are similar to Judge Tracy Flood's. However, the behavior of the judges in these cases is generally far worse than that Judge Flood and disciplinary counsel stipulated to. Moreover, none of these cases resulted in removal.

Washington State Cases

1. ***In re Disciplinary Proceeding Against Eiler***, 169 Wash.2d 340, 236 P.3d 873 (WA 2010).

In *In re Eiler*, pro se litigants and attorneys filed complaints criticizing Judge Judith Eiler's courtroom behavior and demeanor as rude, intimidating, condescending, or

demeaning. After investigating the complaints, the CJC reprimanded Judge Eiler in February 2005 for improper judicial demeanor. Nevertheless, complaints about Judge Eiler's demeanor on the bench continued and the CJC sanctioned her a second time in April 2009 for violating Canons 1, 2(A), 3(A)(3), and 3(A)(4) of the Code of Judicial Conduct. This second time, the CJC censured Judge Eiler and recommended that she be suspended without pay for 90 days. Judge Eiler's attorney contested the severity of the suspension recommendation before the Supreme Court of Washington. The Washington Supreme Court then ordered that Judge Eiler be suspended without pay for a lesser, five-day period. *Id.* at 342.

2. ***In re H.W. Felsted*** (CJC No. 913-F-19).

In *In re Felsted*, Judge Felsted was charged with dismissing criminal cases in exchange for contributions, in addition to other misconduct. The CJC sanctioned Judge Felsted by giving her a public censure.

3. ***In re Randolph Furman*** (CJC No. 3245-F-84).

In *In re Furman*, Judge Furman was charged with misusing public resources to view pornography and other non-court related images. The CJC sanctioned the judge by giving him a public censure.

4. ***In re Bobbe Bridge*** (CJC No. 4050-F-106).

In *In re Bobbe Bridge*, Washington Supreme Court Justice Bobbe Bridge was arrested for DUI and hit and run. The Justice's alcohol level was three times the legal limit. Justice Bridge had to be boxed in and held by a motorist at the scene to keep her from fleeing.

Justice Bridge retained her position on the Washington Supreme Court (she had been appointed in 2000 for a six year term). The CJC sanctioned the Justice by giving her a reprimand and corrective measures.

5. ***In re Terry M. Tanner*** (CJC No. 8889-F-180; CJC No. 11211-F-207).

In *In re Tanner*, Judge Terry Tanner was convicted twice of driving under the influence, resulting in two separate

stipulations and orders from the CJC (one in 2018 - CJC No. 8889-F-180 and one in 2023 - CJC No. 11211-F-207).

In 2018, the CJC sanctioned Judge Tanner by reprimanding the judge and ordering him to participate in five public speaking engagements related to his misconduct.

In 2023, the CJC sanctioned Judge Tanner by giving him a public censure and a 30-day suspension.

6. ***In re Thomas D. Brown*** (CJC No. 11478-F-212).

In *In re Brown*, Judge Brown berated an African American litigant who accused him of racial bias. The judge told the litigant that he had a "big mouth" and called him a "screw up." The judge also threatened to put the individual in jail for contempt. The CJC sanctioned Judge Brown by giving him a public censure.

7. ***In re Scott D. Gallina*** (CJC No. No. 9422-F-200).

In *In re Gallina*, Judge Scott Gallina committed the criminal offenses of Assault in the Third Degree with Sexual Motivation, and Assault in the Fourth Degree with Sexual Motivation against his own subordinate court staff. For these

actions, the CJC sanctioned Judge Gallina by giving him a public censure.

8. ***In re Susan Mahoney*** (CJC No. 10807-F-202).

In *In re Mahoney*, Judge Susan Mahoney used the "N-word" during a Zoom meeting with court employees and made other racially insensitive remarks, such as referring to a black employee as "loving watermelon."

Moreover, during the COVID pandemic, Judge Mahoney attributed the backlog of cases on Asian drivers, stating publicly that, "Asians don't know how to drive."

For these actions, the CJC sanctioned Judge Mahoney by giving her a public censure.

Cases Outside of Washington State

9. ***In re Ronald L. Horan***, 85 N.J. 535, 428 A.2d 911.

In *In re Horan*, the Supreme Court of New Jersey held that Judge Ronald Horan failed to preside over a court hearing in a dignified, courteous, patient and impartial manner. The Supreme

Court of New Jersey sanctioned Judge Horan by giving him a public reprimand.

10. ***In re Judicial Disciplinary Proceedings Against Michelson***, 225 Wis.2d 221, 224, 591 N.W.2d 843 (1999).

In *In re Michelson*, Judge Robert Michelson made intemperate, discourteous and undignified comments from the bench concerning the daughter of a woman appearing before him (Judge Michelson angrily told the mother, "I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut"). The Supreme Court of Wisconsin sanctioned Judge Michelson by giving him a public reprimand.

11. ***In re Complaint Against Lindner***, 271 Neb. 323, 326, 710 N.W.2d 866 (2006).

In *In re Lindner*, Judge Jack Lindner made a harsh, angry, and racially derogatory reference to a litigant who required an interpreter. The Supreme Court of Nebraska sanctioned Judge Lindner by giving him a public reprimand.

12. ***Dodds v. Comm'n on Judicial Performance***, 12 Cal.4th 163, 906 P.2d 1260, 48 Cal.Rptr.2d 106 (1995).

In *Dodds v. Comm'n*, the Supreme Court of California ruled that a public censure was too harsh of a sanction for Judge Dodds' rudeness, hostile interruptions, yelling, making biased jokes, and interfering with a law enforcement investigation.

In each of these instances the judge's behavior was worse than that attributed to Judge Flood, yet in none was the penalty as stiff. The CJC provides no cogent basis for this extraordinary discipline.

G. *In re Eiler* is on point with Judge Flood's case necessitating the court to overturn the CJC's recommendation.

In *In Re Eiler*, the CJC filed and published a Statement of Charges against Judge Judith Eiler based upon 15 complaints by litigants and attorneys who had appeared in Judge Eiler's court over several years.

The CJC charged Judge Eiler with engaging in a practice of "rude," "impatient," "undignified" and "intimidating"

treatment of *pro se* litigants and attorneys in her courtroom. Judge Eiler was further alleged to have interrupted litigants and their attorneys, addressing them in "angry," "disdainful," "condescending," and "demeaning" manners and tones. The CJC censured Judge Eiler and recommended that she be suspended without pay for 90 days. Judge Eiler's lawyer contested the severity of the suspension recommendation before this Court. This Court then ordered that Judge Eiler be suspended without pay for a lesser, five-day period.

In the *Eiler* opinion, the Court stated:

> "Judge Eiler did not cut deals with litigants behind closed doors, accept bribes, or otherwise demonstrate that her decisions were governed by anything other than the law and the facts of the cases. Her misconduct also did not undercut public perceptions of judicial integrity or impartiality. She showed no favoritism, prejudice, partiality, or bias in her courtroom - she was impolite and impatient on occasion, but not to any particular class or group of litigants."

In re Eiler at 353. Additionally, the *Eiler* Court stated that, "Judge Eiler did not … flagrantly or intentionally violate her oath

of office. Nor did she exploit her official capacity to satisfy personal desires … or undermine the integrity of the judiciary." *Id.* at 355.

The *Eiler* Court went on to say that, "Judge Eiler's cooperation with the disciplinary investigation and proceedings also somewhat lessen[ed] the need for a severe sanction …" *Id.*

In Judge Tracy Flood's case, as in *Eiler*, a complaint was filed with the CJC alleging that Judge Flood had a pattern of mistreating attorneys and court staff. More specifically, the complaint charged that Judge Flood (1) failed to treat court staff and attorneys appearing before her with patience, dignity, and respect, and (2) treated court staff in a demeaning and condescending manner.

Like *Eiler*, Judge Flood entered into a stipulation and agreement with the CJC's disciplinary counsel before her CJC hearing commenced. In the agreement, as drafted by the disciplinary counsel and agreed to by Judge Flood's attorney, Judge Flood acknowledged three violations and certain

undisputed facts. Disciplinary counsel agreed not to recommend Flood's removal from the bench, opting instead for a recommendation that would include training, coaching, and mentoring. Despite this stipulation and agreement, disciplinary counsel departed from it, and recommended a suspension of six to nine months.

Just as in *Eiler*, Judge Flood:

- Did not make deals with litigants or accept bribes;
- Did not show that her decisions were directed by anything other than the law and the facts of the cases she presided over;
- Did not damage public perceptions of judicial trustworthiness or fairness via her misconduct;
- Did not show favoritism, discrimination, or bias when carrying out her courtroom duties;
- Did not blatantly or purposely violate her oath of office;
- Did not abuse her position as a judge to satisfy her personal wants and needs;
- Did not weaken the integrity of the judiciary; and
- Fully cooperated with the CJC's disciplinary investigation and proceedings.

Based upon the remarkable similarities between *In Re Eiler* and Judge Flood's case, and in the interest of consistency and fairness, Judge Flood respectfully urges this Court to overturn the CJC's recommendations.

H. Appropriate punishment for Judge Flood: the "*Deming* factors."

The discipline of judges in Washington is determined via the application of the "*Deming* Factors" as set forth in *In re the Matter of Mark S. Deming*, 108 Wash.2d 82, 736 P.2d 639 (WA 1987).

In *Deming*, the Supreme Court of Washington stated:

> To determine the appropriate sanction, we consider the following nonexclusive 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.

Id. at 119-20.

In Judge Flood's case, this Court must prudently apply the aforementioned "*Deming* Factors" in order to arrive at a fair and just disciplinary measure for Judge Flood. The following factors are in the Judge's favor.

1. Judge Flood admitted to the facts and violations contained in the CJC stipulation and testified that she wants to accept responsibility for herself. IV 740 14-15.
2. Judge Flood has demonstrated an effort to change and modify her conduct that is the subject of this case.
3. There had been no complaints about Judge Flood's behavior prior to those made in this matter.
4. No prior disciplinary action has ***ever*** been taken against Judge Flood.
5. Judge Flood has ***never*** exploited her judgeship to gratify any of her personal wants and needs.

6. Judge Flood has abundantly cooperated with the CJC. Namely, Judge Flood both cooperated in entering into a stipulation and agreement with the CJC and in submitting substantial medical information at the CJC's request.

CONCLUSION

Judge Flood's case presents a complicated tapestry of mitigating factors, including racism against the judge in her official efforts and exaggerated findings by the CJC given the comparatively tame evidence received at the hearing. In the end the evidence does not warrant a suspension. This Court's prior forays into this arena make it clear that the recommended discipline does not suit the allegations or the evidence. Judge

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Flood has been suspended for some time; she respectfully suggests the penalty she has already paid is more than what is warranted.

I certify that this opening brief contains 7,115 words, in compliance with RAP 18.17(b)

Dated this 16th day of June, 2025.

FREY BUCK

Anne Bremner, WSBA #13269
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 points or more, and contains 7,115 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

Dated this 16th day of June, 2025.

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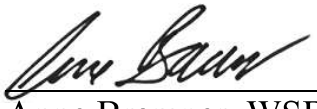

Anne Bremner, WSBA #13269
Attorney for Appellant

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I hereby certify that on June 16, 2025, I electronically filed the foregoing APPELLANTS OPENING BRIEF with the Clerk of the Court for the Supreme Court of the State of Washington by using the appellate CM/ECF System.

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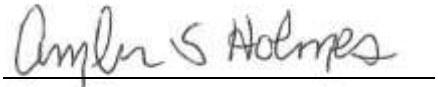

Amber Holmes
Legal Assistant

FREY BUCK, P.S.

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