

JUDICIAL CONDUCT BOARD OF PENNSYLVANIA NEWSLETTER

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MESSAGE FROM THE CHAIR

It is my pleasure, as Chairman of the Judicial Conduct Board, to provide you with the Board's inaugural NEWSLETTER. We hope to provide this service to the Bench on a quarterly basis and to provide timely information about the Board and matters of interest and concern to the Bench and the judicial disciplinary process in Pennsylvania.

As reflected in the Board's "Mission Statement," the members and staff of the Judicial Conduct Board take their duties to the citizens and judiciary of Pennsylvania very seriously. The Board is committed to preserving the honor, dignity, independence, and integrity of Pennsylvania's judiciary. In our periodic newsletters, we hope to address topics that will advance the Board's mission and assist the judiciary in understanding the Board's role and its processes and the rules governing the standards of conduct for judicial officers.

We hope that this NEWSLETTER is helpful to you and that you will provide feedback to the information that we provide.

With best personal and professional regards, I am

Most
respectfully,

Jim

James E. McErlane
Chairman
Judicial Conduct Board

The Judicial Conduct Board of Pennsylvania NEWSLETTER is intended to inform and educate members of the Bench regarding activities and initiatives of the Judicial Conduct Board. To ensure that you receive each NEWSLETTER and announcement from the Judicial Conduct Board, please add us to your "safe recipients" list in your email system. Please do not reply to this email. Send any comments or questions to ContactUs@jcbpa.org.

JUDGES MUST "RESPECT AND COMPLY WITH THE LAW"

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What an odd comment! Judges must respect and comply with the law. Of course they must. Canon 2 of the Code of Judicial Conduct and Rule 2 of the Rules Governing Standards of Conduct of Magisterial District Judges impose this obligation on the Commonwealth's judicial officers. But only recently has the requirement been clarified so that it now applies to conduct both on and off the bench. This article will review the language of the canon and the rule, the historic interpretation given to that language by the Supreme Court, and the new (and now binding) interpretation recently announced by the Supreme Court.

The Language

Canon 2A of the Code of Judicial Conduct ("Code" or "Canons") states:

Judges should respect and comply with the law and should conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Rule 2A of the Rules Governing Standards of Conduct of Magisterial District Judges ("MDJ Rules" or "Rules") provides, in pertinent part:

Magisterial district judges shall respect and comply with the law and shall conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

A quick read of these provisions shows that they are virtually identical.¹ The Code provision applies to judges of the Philadelphia Municipal Court, the judges of the Courts of Common Pleas, the judges of the Superior and Commonwealth Courts, and the justices of the Supreme Court. The provision in the MDJ Rules applies to judges of the Philadelphia Traffic Court² and the magisterial district judges throughout the Commonwealth. The only difference in wording is the substitution of the word "shall" in the Rule for the word "should" in the Canon.³

The words of these provisions seem straight-forward. All judges must "respect and comply with the law" and all judges must "conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."⁴ Despite the apparent clarity of these provisions, their initial interpretation by the Supreme Court did not give effect to all of their words.

¹ In 2013, the Supreme Court described the language of Rule 2A as "similar" and "nearly identical" to Canon 2. *In re Carney*, ___ Pa. ___, ___ and ___, 79 A.3d 490, 498 (2013).

² Responding to the indictment of a number of Traffic Court judges in early 2013, the General Assembly has taken steps to eliminate the Philadelphia Traffic Court, both legislatively and through a proposed constitutional amendment. If the constitutional amendment passes at the next session of the legislature, the earliest that it can be presented to the Commonwealth's voters is at the 2015 primary election. The legislation reorganizing the Traffic Court as a division of the Philadelphia Municipal Court became effective in 2013. See 42 Pa.C.S. §§ 1121, 1321.

³ This slight difference in wording between "should" and "shall" has never been interpreted as changing the obligatory command of the Canon or the Rule.

⁴ The Supreme Court has said that Rule 2A and nearly identical Canon 2A "requires" judges to "respect and comply with the law ... and conduct [themselves] at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." *In re Carney*, ___ Pa. ___, ___, 79 A.2d 490, 503 (2013).

The Historic Interpretation

In 2000, the Supreme Court was asked to interpret and apply Canon 2 in the case of *In re Cicchetti*.⁵ Then-Common Pleas Judge Cicchetti was charged by the Judicial Conduct Board with several violations of the Canons and the Constitution, including sexual misconduct. The most significant of the complaints came from a female probation officer assigned to the judge's courtroom. As described by the Supreme Court, the Court of Judicial Discipline ("CJD") found that the judge repeatedly called the probation officer into his robing room where he discussed personal matters with her, including asking her to "get together" with him. She repeatedly refused him and he responded by telling her he could help her get ahead and threatening her father's government job. The CJD concluded that Cicchetti's conduct did not violate Canons 1 or 2 of the Code.⁶

The Board appealed and the Supreme Court reviewed the CJD's determination of whether the alleged conduct violated Canons 1 and 2. In ruling that it did not, the Supreme Court majority decided that both Canons 1 and 2 related to the judicial decision-making process.⁷

The Court first examined Canon 1. That canon requires a judge to uphold the integrity and independence of the judiciary, stating that a "judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved" and states that the Canons should be "construed and applied to further that objective." According to the *Cicchetti* Court, "the phrase 'independence and integrity of the judiciary' as used in Canon 1 relates to the judicial officer's impartiality and independence in the judicial decision-making process."⁸

The Court then reviewed Canon 2. It did not, however, engage in any independent examination of that Canon. Rather, the Court simply declared, without further explanation, that, "Canon 2 similarly addresses the judicial decision-making process and seeks to avoid the appearance of influence over judicial activities."⁹ Two justices dissented from this portion of the *Cicchetti* opinion. Justice (now Chief Justice) Castille, joined by then-Justice Nigro, noted that the majority had cited no authority to support its conclusion that a violation of Canons 1 and 2 must implicate the judicial decision-making process and opined that the majority's interpretation of these canons was too narrow. The *Cicchetti* dissenters asserted that the focus should simply be on whether the conduct affected the integrity of the office.¹⁰

The *Cicchetti* majority clearly limited Canon 2 to conduct implicating the judicial decision-making process. However, it did not squarely address the question of whether criminal conduct could violate the requirement that judges must "respect and comply with the law" regardless of whether their conduct implicated the judicial decision-making process. The Court would address that question six years later in a *per curiam* order issued on an appeal from a CJD decision the case of *In re Harrington*.¹¹

Harrington involved a magisterial district judge ("MDJ") who repeatedly parked at expired meters and placed a parking ticket issued to another person on her windshield so that she could park for free. The CJD concluded that this uncharged criminal conduct violated Rule 2A. The CJD also decided that it did not matter that the criminal conduct was uncharged. The CJD found that since Judge Harrington admitted that she failed to comply with the law and since that is specifically prohibited by Rule 2A, she violated the Rule.¹²

⁵ 560 Pa. 183, 743 A.2d 431 (2000)

⁶ 560 Pa. at 189-193, 743 A.2d at 435-37.

⁷ 560 Pa. at 200-01, 743 A.2d at 440-41.

⁸ *Id.*

⁹ *Id.* at 201, 743 A.2d at 441.

¹⁰ 560 Pa. at 211-12, 743 A.2d at 446-47 (Castille, J. (now C.J.), concurring and dissenting, joined by Nigro, J.).

¹¹ 587 Pa. 407, 899 A.2d 1120 (Pa.2006) (*per curiam* order).

¹² *In re Harrington*, 877 A.2d 570, 575 (Pa.Ct.Jud.Disc.2005).

On appeal, the Supreme Court affirmed the sanction imposed by the CJD upon Judge Harrington in a per curiam order.¹³ The Supreme Court agreed with the CJD that the judge's actions violated the Disrepute Clause of the Pennsylvania Constitution.¹⁴ However, it "disapproved" the CJD's conclusion that Judge Harrington's conduct violated Rule 2A. In its per curiam order, the Supreme Court simply stated that the CJD's determination in this regard was improper because the conduct "did not implicate the judicial decision-making process" and cited its *Cicchetti* opinion in support of this conclusion.¹⁵

This interpretation of Canon 2 and Rule 2 remained the law for seven years despite the Board's continuing to bring charges of "failure to comply with the law" alleging violations of the Rule and Canon.¹⁶ It changed on October 30, 2013. On that date, the Supreme Court issued its opinion in *In re Carney*. In so doing, it re-examined its decisions in *Cicchetti* and *Harrington* and overruled them.¹⁷

The Current Interpretation

Judge Carney was involved in a road rage incident in which he waved a gun out the window of his car at another vehicle as he was travelling along an interstate highway. The State Police stopped him and initially filed four misdemeanor charges against Judge Carney: terroristic threats, simple assault, disorderly conduct, and recklessly endangering another person. After this initial set of charges was dismissed, the State Police re-filed the same charges. In 2009, Judge Carney, as part of a negotiated disposition, pled guilty to two summary offenses of disorderly conduct and was sentenced to pay fines and costs. In exchange for the plea, the district attorney dropped the misdemeanor charges.

The Board filed a complaint against Judge Carney in the CJD based on the gun-waving incident.¹⁸ The Board alleged that the displaying of a handgun out of his car window was a violation of Rule 2A, as well as the Disrepute Clause of the Pennsylvania Constitution.¹⁹ The CJD dismissed the complaint against Judge Carney. Citing the Supreme Court's *per curiam* order in *Harrington* and its opinion in *Cicchetti*, the CJD concluded that even if the gun-waving conduct violated some law, it did not violate Rule 2A because that conduct "did not implicate the [j u d i c i a l] decision-making process."²⁰

The Board appealed the CJD's decision to the Supreme Court and the Court acceded to the Board's request to "reconsider prior decisions interpreting Rule 2A [*Cicchetti* and *Harrington*] and to clarify that criminal acts committed by an MDJ, whether on or off the bench, may be subject to discipline."²¹ The Supreme Court summarized the Board's argument as follows:

The Board points out that the plain language of Rule 2A clearly requires an MDJ to "respect and comply with the law." The Board recognizes the *Cicchetti* Court's interpretation of Canon 2A of the Code of Judicial Conduct (the provision similar to Rule 2A applied to MDJs), which limits application of Canon 2A to instances where the misconduct implicates the actual judicial decision-making process. The Board submits, however, that this non-textual limitation frustrates the purpose of the rule and has effectively deprived the CJD of the power to enforce it. The Board asserts that *Cicchetti* has led to incongruous results in judicial disciplinary matters in the form of repeated determinations that a judicial officer violated Article V, Section 18 of the Constitution [the Disrepute Clause], but did not violate Canon 2 or Rule 2A. The Board concludes that [Judge Carney] committed a crime when he displayed the handgun, that it proved by clear and convincing evidence that he did not comply with the laws of Pennsylvania, and that he

¹³ *In re Harrington*, 587 Pa. 407, 899 A.2d 1120 (2006).

¹⁴ See Pa. Const., art. V, § 18(d)(I).

¹⁵ 587 Pa. 407, 899 A.2d 1120.

¹⁶ At least one member of the CJD recognized the limitations brought about by the Supreme Court's decision in *Harrington* and suggested that the Rule 2A (and presumably Canon 2) be amended to make it clear that a criminal conviction established a failure to comply with the law whether or not related to the actual judicial decision making-process. *In re Murphy*, 10 A.3d 932, 940-941 (Pa.Ct.Jud.Disc.2010) (Morris, J. concurring).

¹⁷ ___ Pa. ___, ___, 79 A.3d 490, 507 (2013).

¹⁸ The Board also filed other charges based on other alleged misconduct. Those charges (which too were dismissed by the CJD) are beyond the scope of this article.

¹⁹ While the CJD failed to find that the MDJ's conduct brought the judiciary into disrepute, the Supreme Court reversed that conclusion and remanded the case to the CJD for a determination of the appropriate sanction for that misconduct.

²⁰ *In re Carney*, 28 A.3d 253, 268 (Pa.Ct.Jud.Disc. 2011).

²¹ *In re Carney*, ___ Pa. at ___, 79 A.3d at 498.

therefore was in violation of the plain language of Rule 2A. Finally, the Board notes that it continues to pursue charges under Rule 2A and Canon 2 because it is unconscionable that criminal conduct by judicial officers should not be disciplined under these Rules merely because the criminal conduct does not implicate the decision-making process.²²

For his part, Judge Carney asserted that *Cicchetti* and *Harrington* should be reaffirmed, arguing that it was “not necessary that Rule 2A be available to impose sanctions upon offending judges for out-of-court conduct.”²³ He emphasized the point “that MDJs are subject to election every six years and may be voted out if off-duty conduct brings the judicial office into disrepute.”²⁴

The Court described the Board’s argument as “straightforward,” based on the “plain language of Rule 2A.”²⁵ While expressing its concern for precedent and the doctrine of *stare decisis*, the Court found the Board’s request reasonable, saying:

irrespective of the ultimate correctness of the holdings in those cases because, correct or not, neither the opinion in *Cicchetti* nor the *per curiam* order in *Harrington* offered developed reasoning in support of its construction of the conduct rules at issue. As explained below, we believe that the conclusion in *Cicchetti* is in tension with the plain language of the conduct rule. Moreover, the construction is problematic in that it did not promote the objective of the Canons, as required by Canon 1.²⁶

Relying on the rules of statutory construction which it said provided a logical starting point for its analysis, the Court explained that it had to look first at the plain meaning of the language of the Code and the Rules and that “any interpretation must be consonant with the overarching purpose of the Code of Judicial Conduct expressed in Canon 1 (and MDJ Rule 1), which is to preserve the integrity and independence of the judiciary.”²⁷ The Court then examined its prior *Cicchetti* opinion saying that it “did not address the plain language of Canon 2, which states that a judge must act in a certain way ‘in all his activities’ or ‘at all times,’ without mentioning the decision-making process.”²⁸ The Court continued:

The *Cicchetti* majority's referral back to its construction of Canon 1 is no more enlightening, since Canon 1, by its plain terms, likewise never mentions the judicial decision-making process. Instead, the Canon requires a judge to observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." Canon 1 also provides that the Canons as a whole should be "construed and applied to further that objective."²⁹

The Court went on to explain that the plain language of the canon was not as limited as *Cicchetti* had construed it, but that, instead, Canon 1 simply imposed high standards of conduct on judges to preserve the integrity and independence of the judiciary. There was no limitation to the judicial decision-making process and a judge’s conduct “may bear upon the independence and the integrity of the judiciary regardless of whether the conduct implicates the decision-making process.”³⁰

The Court then turned to the *per curiam* order in *Harrington*. The Court observed that *Harrington* “simply applied the *Cicchetti* Court’s conclusion without any further explanation or independent examination.”³¹ The Court explained:

by its plain terms, Rule 2A requires an MDJ to "comply with the law" and does not limit such compliance to conduct involving the judicial decision-making process. Such a plain meaning

²² *Id.* (citations omitted).

²³ *Id.* at ____, 79 A. 3d at 500.

²⁴ *Id.*

²⁵ *Id.* at ____, 79 A.3d at 503.

²⁶ *Id.* at ____, 79 A.3d at 505.

²⁷ *Id.* at ____, 79 A.3d at 505-06.

²⁸ *Id.* at ____, 79 A.3d at 506.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at ____, 79 A.3d at 507 (footnote omitted).

construction of Rule 2A is not only consonant with the rules of statutory construction and common sense, but to read it differently would also be contrary to MDJ Rule 1's stated purpose of upholding the integrity of the judiciary.³²

Concluding that the constructions of Rule 2A and Canon 2 flowing from *Cicchetti* and *Harrington* were “unsustainable,” the Court overruled those decisions and held that judges “may be subject to discipline for illegal conduct which affects the integrity of the office, within the discretion of the CJD, and subject to this Court's review, whether or not the conduct occurred within the judicial decision-making process.”³³

Because the Court was changing the law, and because Judge Carney may have relied on the *Cicchetti/Harrington* rationale in deciding to plead guilty to the summary disorderly conduct charges as part of his plea bargain, due process required that the Court make its decision prospective only. Accordingly, the new rule announced in *Carney* applies only to actions committed on or after the date of the decision: October 30, 2013.³⁴

Conclusion

Judges are required to respect and comply with the law, 24 hours a day/seven days a week. This obligation is not tied to the judicial decision-making process. It applies to all aspects of a judge's behavior. There are no exceptions. Any violation of the law may subject a judge to disciplinary action pursuant to Canon 2 or Rule 2 in addition to other provisions of the Pennsylvania Constitution, the Code, the MDJ Rules and other rules adopted by the Pennsylvania Supreme Court.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at ____, 79 A.3d at 508.

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