

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**INQUIRY CONCERNING JUDGE A.P. FULLER**

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**APPEAL FROM THE REPORT OF THE COMMISSION ON JUDICIAL  
QUALIFICATIONS FOR THE STATE OF SOUTH DAKOTA**

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**JUDICIAL QUALIFICATIONS COMMISSION'S  
ANSWERING BRIEF**

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## **PRELIMINARY STATEMENT**

This Brief is submitted on behalf of the Judicial Qualifications Commission (Commission). Reference to the transcript of the show cause hearing held on September 30, 2010, will be denoted by “SC” followed by the page number. Reference to the transcript of the hearing held on December 13, 2010, will be denoted by “HT” followed by the page number. Reference to Exhibits received by the Commission at the hearings will be by their assigned exhibit letter or number. Reference to the Complaint dated September 7, 2010, will be denoted by “Complaint”. Reference to the investigative report prepared by attorney Dave Nelson and submitted to the Commission on or about August 7, 2010, will be denoted by “Investigative Report”. The Commission’s Report to the Supreme Court including its Findings, Conclusions and Recommendations will be referred to as “Report” with the appropriate paragraph designation. Judge Fuller’s Objections and Responses to the Report of the Judicial Qualifications Commission will be referred to as “Objections” with the appropriate paragraph designation. Correspondence and other documents that are a part of the record will be referred to by appropriate description, i.e., “Letter by Mr. Schaffer dated December 14, 2010.”

## **JURISDICTIONAL STATEMENT**

On January 28, 2011, the Commission issued its unanimous certification, recommending the retirement or removal of Judge A.P. Fuller from his position as Circuit Court Judge in the Seventh Judicial Circuit. *See*, SDCL 16-1A, Appx., III, 27. Judge Fuller served and filed with this Court his Petition for Modification or Rejection of the Recommendation of the Judicial Qualifications Commission and Request for Appointment of Referee on or about February 18, 2011. The ultimate disposition of this matter and the burden of imposing the appropriate sanction rests on the Supreme Court. SDCL 16-1A, Appx., III, 29; *Matter of Heuermann*, 90 S.D. 312, 317, 240 N.W.2d 603, 606 (1976).

## **LEGAL ISSUES**

### **I. Whether Judge Fuller was afforded due process from the Judicial Qualifications proceedings against him.**

Judge Fuller was apprised, with reasonable certainty, of the allegations against him and could prepare his response. He was provided adequate notice of the allegations against him through the Complaint and Investigative Report that was incorporated into the Complaint by reference. He was also provided the identity of the Commission's witnesses; his attorneys had an opportunity to interview any witness; the Commission's witnesses at the Formal Hearing were subject to cross-examination; and Judge Fuller could call any witness he so chose. Judge Fuller was provided adequate notice and an opportunity to be heard.

*In Re Kunkel*, 88 S.D. 269, 218 N.W.2d 521 (1974)

SDCL §15-6-10(c)

*In Re Inquiry Concerning Holien*, 612 N.W.2d 789 (Iowa 2000)

*Matter of Storie*, 574 S.W.2d 369 (Mo. 1978)

**II. Whether Judge Fuller was afforded due process when the Honorable Jeff Davis sat on the Commission in the proceedings against Judge Fuller.**

Neither Judge Fuller, nor his attorneys, ever requested that Judge Davis recuse himself from these proceedings and he has waived any right to request recusal by failing to raise the issue at the earliest opportunity. There is also no evidence of prejudice or that Judge Davis had a pecuniary or personal interest in the outcome of this proceeding. Finally, the Report and Recommendation provided to this Court was based upon a unanimous decision of the Commission, and no evidence was presented that Judge Davis' recusal would have in any way altered the proceedings or ultimate report or recommendations.

*In re Lokuta*, 11 A.3d 427 (Pa. 2011)  
*Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975)  
*In Re Tinklenberg*, 2006 S.D. 52, 716 N.W.2d 798  
*In Re Elliston*, 789 S.W.2d 469 (Mo. 1990)

**III. Whether the Commission's recommendations for retirement or removal is appropriate under the circumstances.**

The Commission's Report recognized that Judge Fuller's conduct was not a mere isolated incident, but an ongoing pattern of misconduct that adversely affected the public's perception of the judiciary. A unanimous Commission, after considering Judge Fuller's pattern of inappropriate conduct, recommended removal or retirement. The ultimate sanction rests with this Court.

*Matter of Heuermann*, 90 S.D. 312, 240 N.W.2d 603 (1976)  
*Kloepfer v. Commission on Judicial Performance*, 782 P.2d 239 (Cal. 1990)  
*In Re Inquiry Concerning Holien*, 612 N.W.2d 789 (Iowa 2000)



**IV. Whether the Court should appoint a referee to take testimony and make additional findings and recommendations.**

The Judicial Qualification's Commission provided adequate and impartial consideration. The fact that the investigatory and adjudicatory roles are combined in no way violates due process or otherwise prejudiced Judge Fuller. Moreover, Judge Fuller had a full opportunity to rebut evidence or provide evidence at a hearing, but now simply disagrees with the recommendation. The appointment of a referee is unnecessary because an additional hearing would lead to no different facts, and the Commission's recommendation is not binding on this Court.

SDCL 16-1A, Appx., III, 29  
*Matter of Del Rio*, 256 N.W.2d 727 (Mich. 1977)  
*In Re Kunkel*, 88 S.D. 269, 218 N.W.2d 521 (1974)  
*In Re Hanson*, 532 P.2d 303 (Alaska 1975)

## STATEMENT OF THE CASE

The Judicial Qualifications Commission received a Complaint on May 19, 2010, alleging that Judge Fuller violated the Code of Judicial Conduct. (Complaint, Ex. 1.) The Complaint was filed by the Pennington County State's Attorney Glenn Brenner, the Rapid City Chief of Police Steve Allender and the Pennington County Sheriff Don Holloway. *Id.* The Complaint asserted that Judge Fuller violated Canons 1, 2, and 3 of the Code of Judicial Conduct through statements made by him during an April 28, 2010, proceeding, in which he referred to law enforcement as a "bunch of racists" from the bench during a legal proceeding. (Complaint, ¶3, Ex. 1.) The Complaint was served upon Judge Fuller on or about June 24, 2010. (Complaint, ¶2, Ex. 1.) Judge Fuller responded to the Commission with a letter dated June 28, 2010, stating simply "the allegation is correct." (Complaint, ¶5, Ex. 2.) The Commission commenced an investigation into Judge Fuller's judicial demeanor and directed then Commission counsel, Dave Nelson, to conduct that investigation. (Complaint, ¶10.) Attorney Nelson interviewed Court employees, attorneys, and law enforcement officers as part of his investigation and issued a report dated August 7, 2010. (Complaint, ¶11.)

Following the investigation and receipt of the investigative report, the Commission voted to institute formal proceedings against Judge Fuller. (Report, Finding 18.) The Commission thereafter appointed as Commission counsel attorney Michael J. Schaffer and directed him to issue a written Notice and Complaint to Judge Fuller advising him of the institution of formal proceedings. *Id.* at 19. The formal Complaint was dated September 7, 2010, and a copy of that Complaint was served upon Judge Fuller on September 9, 2010. *Id.* at 20. A copy of attorney Nelson's Affidavit and the

Investigative Report was attached to the formal Complaint submitted to Judge Fuller and incorporated into that Complaint by reference. (Complaint, ¶11, Ex. 4.)

On September 9, 2010, the Commission issued an Order to Show Cause why the Commission should not recommend to the Supreme Court that Judge Fuller be suspended from office with pay during the pendency of the matter. (Report, Finding 22.) A hearing on the Order to Show Cause was held in Rapid City, South Dakota, on September 30, 2010, with Judge Fuller being personally present. *Id.* at 23. After the hearing, the Commission voted unanimously to recommend to the Supreme Court that Judge Fuller be suspended during the pendency of the proceedings against him. *Id.* at 24. On or about October 6, 2010, this Court issued an Order directing Judge Fuller to be suspended with pay during the pendency of the proceedings against him. *Id.* at 25.

Judge Fuller submitted an Answer to the formal Complaint dated October 15, 2010. *Id.* at 27. Judge Fuller and his attorneys of record received a timely notice of formal hearing to be held on December 13, 2010, in Rapid City, South Dakota. *Id.* at 29. Prior to the hearing, counsel for the Commission and Judge Fuller stipulated and agreed that the prior testimony and exhibits received at the Order to Show Cause hearing on September 30, 2010, would be received into evidence for purposes of the hearing on December 13, 2010. *Id.* at 32.

The Commission, in order to expedite discovery for the hearing, authorized counsel for Judge Fuller to contact any of the individuals identified in the Investigative Report. The Commission directed its counsel to notify the attorneys identified in the Investigative Report that Judge Fuller's attorneys were free to talk to them if contacted. Further, the Commission directed that any Court personnel could be interviewed by

Judge Fuller's attorneys, but that in interviewing those people, Commission counsel was entitled to be present or on the phone when those interviews were conducted. (Letter by Mr. Schaffer dated December 15, 2010.) Counsel for Judge Fuller were also advised that they were free to contact any other individuals not referred to in the Investigative Report.

Commission counsel and counsel for Judge Fuller were also directed by the Commission to exchange witness lists on November 24, 2010, approximately three weeks in advance of the hearing. This mutual exchange of witness lists occurred on that date. Commission counsel's witness list included the names of a number of Court personnel, including Carol Foster, Judd Thompson, Tonia Fischer, and Jeffrey Krattenmaker. (Commission Counsel's Witness List.) While Judge Fuller's attorneys had this list of Court personnel well in advance of the hearing, they only requested to interview one of those witnesses, Jeffrey Krattenmaker. That interview was conducted over the phone with Commission counsel present. Counsel for Judge Fuller indicated that their "decision to interview or not interview witnesses was based on the Complaint and the Investigative Report[.]" (Letter by Mr. Nicholson dated December 15, 2010.)

The hearing was held in Rapid City, South Dakota, on December 13, 2010. Following the hearing, by a letter dated December 14, 2010, Commission counsel moved the Commission to allow the Complaint to be amended to conform to the proof presented at hearing. (Letter by Mr. Schaffer dated December 14, 2010.) Judge Fuller's attorneys objected to the Motion on the ground that "evidence was presented that took Judge Fuller and his attorneys by surprise." (Letter by Mr. Nicholson dated December 15, 2010.) The two examples of surprise were claims that Judge Fuller's attorneys were not advised that Mr. Krattenmaker would testify concerning a request for a thousand dollar contribution

by Judge Fuller and the failure to correct, on direct examination, a statement in the Investigative Report by the Pennington County Chief Deputy State's Attorney which alleged that Judge Fuller referred to a state witness as a "whore." *Id.* The Commission made no finding in its Report to this Court concerning this statement in the Investigative Report.<sup>1</sup> By letter dated December 29, 2010, the Commission granted the Motion to amend to conform to the proof, specifically noting that with respect to Mr. Krattenmaker's testimony: "the Commission is not addressing the substance of the allegations for purposes of making any finding with regard to violation of the Judicial Canons inasmuch as Judge Fuller has admitted violations; but is considered specifically and solely for purposes of credibility." (Letter by Commission Chairman Palmer dated December 29, 2010.) In that same letter, the Commission enclosed its proposed Findings, Conclusions and Recommendations. *Id.* On January 20, 2011, Judge Fuller served his Objections and Responses to the Report of the Judicial Qualifications Commission. On January 28, 2011, the Commission, sustained Judge Fuller's Objections to Findings 68 and 69, deleted those from the draft Report, and submitted its Final Report and Certification to the South Dakota Supreme Court. (Letter by Commission Chairman Palmer dated January 28, 2011.)

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<sup>1</sup> The witness testified that she had reviewed a portion of the actual transcript of trial at which she was told Judge Fuller had made the comment. She testified that the reference to "whore" was never made by Judge Fuller. HT 96-103. Exhibit H (partial transcript).

## **STATEMENT OF FACTS**

Judge Fuller was appointed to the bench in March 2003 (HT 303). He ran for election in 2006 (HT 86). This Court suspended him from office with pay on October 6, 2010, following a hearing on the Commission's Order to Show Cause. (Report, Finding 24 and 25)

The Commission made ninety detailed findings in its Report. The majority of the findings based upon witnesses appearing before the Commission cite to the specific page of the transcript from either the Formal Hearing or Show Cause Hearing. (Report, Findings 34-71; 73-87) The Commission found "that the inappropriate conduct engaged in by Judge Fuller was not an isolated incident or incidents, but a pattern of conduct on his part. Judge Fuller admitted to that at the Order to Show Cause Hearing." (Report, Finding 89; SC 111.) Judge Fuller's pattern of conduct considered by the Commission is summarized below.

### **1. Reference to Law Enforcement as Racists**

Judge Fuller has admitted that he uttered the statement "bunch of racists" while a police officer from Rapid City was testifying in a legal proceeding in his Court. He acknowledges that such conduct was totally inappropriate. (SC 94.)

### **2. Violation of Confidentiality**

Judge Fuller admitted that on or about July 13, 2010, before a proceeding in his Court in discussions with an Assistant Attorney General, he indicated that he had been the subject of a complaint with the Commission, specifically stating that he had his "ass in a sling," and also made a number of other comments regarding the Complaint in the presence of the Assistant Attorney General and a number of student interns and anyone

else who may have been in the Courtroom. (Report, Finding 16; Objections No. 16 – no objection.) He also admitted that these comments were made in violation of the Rules of Procedure of the Judicial Qualifications Commission that the matter shall be kept confidential until “the accused requests that the matter be made public,” and the Commission found that Judge Fuller at no time had requested that this matter be made public and that his comments in the Courtroom in the presence of others on or about July 13, 2010, violated the confidentiality provisions of the Rules. (Report, Finding 17; Objections No. 17 – no objection.)

**3. Disparaging Remarks about Juveniles**

Judge Fuller admittedly referred to juveniles as “little peckerheads” on a number of occasions. (Report, Finding 56.) Further, a woman was heard coming out of his Court, upset and wondering how her child could get a fair shake in his Court with such prejudicial references coming from Judge Fuller. (Report, Finding 57.) Judge Fuller admitted this Finding. (Objections No. 57 – no objection.)

**4. Inappropriate Comments and Gestures**

Judge Fuller admitted to flipping the bird to an attorney from the bench during a legal proceeding at which the attorney and his client were present some time prior to October of 2007. (Report, Finding 75 and 80.) Judge Fuller also admitted to referring to an attorney as “an asshole” in his chambers. (Report, Finding 76)

**5. Conduct Toward Fall River and Custer County Court Personnel**

The Commission made the following Findings with respect to Judge Fuller’s treatment of Court personnel in Fall River and Custer County:

33. Judge Fuller has engaged in a pattern of misconduct showing an utter lack of courtesy and total disrespect to Court personnel over a period of years.

34. In 2004, Judge Fuller made degrading comments, swore at clerks, and exhibited such anger and disrespect for the deputy clerks in Fall River County that those deputies refused to go into his courtroom. H.T. 18-24.
35. The deputy clerks in Fall River County had indicated to the Clerk of Courts that Judge Fuller had subjected them to hostile treatment in the courtroom, and the Clerk of Courts was concerned about a hostile work environment in the courthouse, such that she reported it to the Seventh Circuit Court Administrator. H.T. 21-24; Exhibit E.
36. Following the mistreatment of the deputy clerks, the Clerk of Courts for Fall River County, Carol Foster, thereafter assumed the courtroom duties, to protect her staff. *Id.* at 24.
37. While she was in Court with Judge Fuller, Judge Fuller openly swore at her in Court from the bench, while the public was there. H.T. 25-26.
38. He would use the terms “the goddamn clerk, the goddamn schedule,” or the “goddamn calendar.” H.T. 25. This would happen virtually every time Judge Fuller was in Fall River County. H.T. 25-26.
39. Judge Fuller’s comments referring to the Clerk as a “goddamn clerk,” made Ms. Foster feel very belittled. *Id.* at 26.
40. Judge Fuller would often laugh and make the comments as though they were supposed to be a joke, but according to Carol Foster it didn’t feel like a joke. *Id.*
41. Further, Judge Fuller was overheard in chambers, which were very close to the Clerk’s office, and audible to everyone in the Clerk’s office, yelling and swearing and using the “F” word, apparently in a private conversation. *Id.* at 26-27.
42. Judge Fuller also was observed to swear at a lawyer in open Court and told one attorney when she attempted to read a statute to the Court “to shut the damn statutes, he had already made his decision and he didn’t need to be told what the law was.” *Id.* at 27-28.
43. While Judge Fuller’s attorney in his opening statement indicated Judge Fuller was not contesting what happened, H.T. 13, and while at one point he interposed an objection regarding the references to “Goddamn Clerk” in open Court as if Judge Fuller was admitting that that had occurred. H.T. 223-24. Judge Fuller at the hearing denied ever making those comments. H.T. 304-05.



44. The Commission finds the testimony of Carol Foster to be credible and finds the testimony of Judge Fuller regarding his use of that language not to be credible. Judge Fuller claimed not to be aware until he enrolled in an anger management program recently that his actions were offensive to others. H.T. 307-08, 333. This admission, in and of itself, calls into question Judge Fuller's credibility concerning his denial of the use of the swear words attributed to him by Carol Foster. Further, Carol Foster's credibility is bolstered because she is regarded as one of the best Clerks in the State of South Dakota, (H.T. 56) something even Judge Fuller admits. H.T. 388.
45. Judge Fuller, nevertheless, now admits that he treated Carol Foster and her staff rudely and disrespectfully. H.T. 305.
46. Judge Fuller also berated the Clerk of Courts in Custer County, becoming red faced, angry and pointing his finger at her and telling her, "you will do as you are told." OTSC. 63-64. [ internal footnote omitted ]The incident occurred in 2007. *Id.* at 62. His conduct and demeanor toward that Clerk was belittling and demeaning. *Id.* at 67. That Clerk reported to the Court Administrator that she preferred not to work with Judge Fuller because of his treatment but acknowledged that she would do as she was told, since it was her job. *Id.*
47. As a result of the Complaints from those two Clerks of Courts, Judge Fuller was never put back in the regular rotation for those counties. H.T. 58-59.

Carol Foster, the Clerk for Fall River County testified to the substance of the Commission's Findings 33 through 42. (HT 13-31.) The Investigative Report attached to the Complaint, and which Judge Fuller had on September 9, 2010, laid out the substance of Carol Foster's complaints regarding Judge Fuller. The only instances not referred to in the Complaint were instances set out in Findings 41 and 42 of the Commission. Those Findings relate to specific instances where Judge Fuller swore in his chambers and at an attorney in open Court. They are similar to the other references to him swearing set out in the Investigative Report. While Judge Fuller denied having used the language Carol Foster testified to, the Commission found Carol Foster to be credible

and found the testimony of Judge Fuller not to be credible. (Report, Finding 44.) Judge Fuller himself admitted that referring to Court personnel as “goddamn Clerk”, had he said it, is “beyond rude. That’s terrible”. *Id.* at 83.

The conduct relating to Judge Fuller’s treatment of the Custer County Clerk of Courts was set forth in her testimony at the Show Cause hearing. (SC 60-86.) Counsel for Judge Fuller stipulated that that testimony would become part of the record and considered by the Commission. (Report, Finding 32.) The Commission Finding relating to the specific conduct is Finding 46.

**6. Treatment of Court Services Officers**

The Commission’s Findings concerning Judge Fuller’s treatment of court services officers are set forth as follows:

48. Judge Fuller dealt with Court Service Officers quite often in an irritated, stern voice in open Court. [*H.T.*] at 35. He became disrespectful, demeaning and rude toward them. *Id.* at 34.
49. His comments were such that on one occasion even a juvenile and his parents felt sorry and apologized for Judge Fuller’s treatment of a Court Services Officer. *Id.* at 36-37.
50. Court Services Officer also had expressed concern for their safety in his Courtroom, based upon the number of people packed into the Courtroom and the logistics. *Id.* at 37-38. At times, he would have close to 100 people in his Courtroom for juvenile proceedings. *Id.* at 41.
51. When the safety concerns were brought to Judge Fuller’s attention by Judd Thompson, the Chief Court Services Officer for the Seventh Circuit Court, Judge Fuller’s comment was, “well wait until something happens.” *Id.* at 45.
52. The safety concern was never addressed, other than a comment made by Judge Fuller that he could take all day and go late if he had to. *Id.* at 46-47.

53. The Court Services Officers complained to Judd Thompson about the tone of Judge Fuller's voice and the context in which things were said. *Id.* at 47.

All of these allegations were laid out in the Investigative Report at pages six through eight. (Complaint, Ex. 4) Judge Fuller was notified of the Court Services Officers that would testify at the hearing well in advance. He had the opportunity to have his attorneys interview them, if they so chose. He had a full and fair opportunity to cross-examine them. He offered his own testimony in response.

**7. Judge Fuller's Comments Regarding Hanging Indians**

The Commission made the following Findings:

54. Judge Fuller was also heard to describe portraits of Native Americans in his Courtroom in the following terms: "This is where I hang my Indians." H.T. 57-58.
55. This comment was completely inappropriate and Judge Fuller acknowledged that it was. H.T. 352-53.

This allegation was not a part of the Investigative Report, but when Judge Fuller's attorney interviewed Mr. Krattenmaker, the Court Administrator, Mr. Krattenmaker told him about the incident in advance of the hearing. Thus, Judge Fuller was advised of the nature of Mr. Krattenmaker's testimony and Mr. Krattenmaker was listed as a potential witness well in advance of the hearing. Furthermore, Judge Fuller acknowledged that the comment was inappropriate. (HT 352-53.) He did not deny having said it and was permitted to testify to the circumstances during which the comment was made. *Id.* Clearly, Judge Fuller had notice of the allegation in advance of the hearing and an opportunity to rebut it, if he chose.

**8. Judge Fuller's Request For a Campaign Contribution**

The Commission made the following Findings with respect to Judge Fuller:

- 58. Further, during the judicial election, Judge Fuller requested of Jeffrey Krattenmaker, the Court Administrator for the Seventh Judicial Circuit, a contribution for \$1,000. *Id.* at 64-65. Mr. Krattenmaker was prohibited from doing that under the Rules. *Id.*
- 59. Judge Fuller denied ever making such a request. H.T. 311-12.
- 60. The Commission finds Mr. Krattenmaker's testimony to be credible and finds Judge Fuller's testimony on this subject not to be credible.

The attorneys for Judge Fuller objected to the testimony presented and objected to a motion to amend the pleadings to conform to the proof on this and one other ground. (Letter by Mr. Nicholson dated December 15, 2010.) The Commission, indicated in its letter concerning this testimony, that it was not addressing the substance of the allegation for purposes of making any finding with regard to violation of the Judicial Canons, but considered it specifically and solely for purposes of credibility. (Letter by Chris Palmer dated December 29, 2010.) The Commission, thus, made no determination whether the purported conduct would have violated the Canons regarding judicial elections, but considered it solely for purposes of credibility. *Id.*

**9. Chief Deputy State's Attorney**

The Chief Deputy State's Attorney in Pennington County had an encounter with Judge Fuller early in his judicial tenure outside of the Courthouse concerning the license plates on his vehicle. The Commission made the following Findings concerning that colloquy:

- 61. Judge Fuller, in extra judicial comments to the Chief Deputy State's Attorney regarding his probable cause license plate (P-r-o-b-c-o-z) stated to her "let the sons-of-bitches remember that when they pull me over," referring directly to law enforcement. H.T. 75.

62. Judge Fuller denies making the comment. H.T. 312.
63. The Commission finds the statement of the Chief Deputy State's Attorney for Pennington County to be credible and finds Judge Fuller's denial of having made that statement not to be credible.

The allegations by the Chief Deputy State's Attorney were set forth in the Investigative Report which was attached to the Complaint. (Investigative Report at p. 4) Counsel for Judge Fuller had three weeks notice that Commission Counsel intended to call the Chief Deputy State's Attorney as a witness in this proceeding. While Judge Fuller denied making the comment, the Commission did not find his testimony credible. Counsel for Judge Fuller was given ample opportunity to cross-examine the Chief Deputy State's Attorney to attack her credibility and reference was made to other comments that she purportedly made to Attorney Nelson that were included in his Investigative Report.

**10. Juvenile Matter Involving Polygraph**

Judge Fuller takes issue with the Commission's Findings regarding a juvenile proceeding in which he either ordered or directed a juvenile defendant and juvenile victim in a juvenile rape adjudication to both undergo a polygraph, claiming it would be very unfair for him to have to make a decision based on the testimony that he heard in Court.

The Commission's Finding on that matter are set forth as follows:

64. Further, the Commission finds that Judge Fuller either ordered or directed a juvenile defendant and juvenile victim in a juvenile rape adjudication to be polygraphed, claiming in an angry tone of voice that it was very unfair for him to have to make a decision based only on the testimony that he heard in Court. *Id.* at 80-82.
65. Judge Fuller denied that he ordered a polygraph, but admitted that his conduct was improper. H.T. 316-17.

The substance of the allegation was contained in the Investigative Report at page 10 and 11. The Commission never did find that Judge Fuller ordered the polygraph, but simply that he either ordered or directed the parties to submit to one. Further, he admitted that his conduct was improper. (HT 317.)

**11. Judicial Evaluation**

The Commission made the following Finding regarding a judicial evaluation:

66. The Commission also finds credible the Chief Deputy State's Attorney's testimony regarding a judicial evaluation that Judge Fuller had taped to his wall and his response to that evaluation indicating that he was not receptive to criticism. H.T. 83-84.

Judge Fuller was permitted to submit the Affidavit of retired Judge Marshall Young concerning judicial evaluations and how they were handled.

**12. Deputy State's Attorneys' Complaints**

The Commission made the following Finding regarding complaints from Deputy State's Attorneys:

67. Further, the Commission finds that many of the Deputy State's Attorneys who had appeared in Judge Fuller's Courtroom continually complained about how they were treated. *Id.* at 109. And also complained that they were not treated with respect. *Id.* at 107.

Judge Fuller made no objection to this Finding, but alleged that no such complaints were ever brought to his attention. (Objections No. 67.) The substance of those allegations were contained in the Investigative Report. (Investigative Report at pp. 4-5.)

**13. Comment to Intern**

The Commission made the following Findings related to comments that Judge Fuller made during a break in a legal proceeding in his Courtroom.

68. Judge Fuller, at a break during a legal proceeding in his Courtroom, made a statement to a student intern, now a third year law student, that the legal profession was better off before women belonged and that he had wished that the profession would go back the way it was in 1916 or 1918. *Id.* at 126. Ex. I.
69. Even though the comment was made in what appeared to be a joking manner, it was nevertheless offensive to the student intern. *Id.* at 126-27.
71. Judge Fuller admits having made the statement. H.T. 319-20.
72. The Commission finds such statement to be totally inappropriate and demeaning to the judiciary.

This testimony came from a law student who was disclosed as a witness three weeks in advance of the hearing. Judge Fuller and his attorneys clearly could have interviewed her and contacted her. More importantly, Judge Fuller admitted the allegations made by the law student. (H.T. 319-20; Objections No. 72 – no objection) Commission Counsel moved on the day after the evidence was submitted to amend the Complaint to conform to the proof and this motion was granted. Further, in its Conclusions, the Commission made a specific Conclusion that reads as follows:

10. The foregoing Findings demonstrate that Judge Fuller has also violated this Canon by his comments regarding women in the law, Native Americans, and references to law enforcement. These extra judicial comments, some of which actually occurred in his Courtroom, but not during an actual proceeding, have no place in the judicial system and cast doubt on Judge Fuller's fitness to serve as a Judge.

(Report, Conclusion 10.) Judge Fuller's response, in relevant part, is that he "does not object to the Conclusions, but does object to the Recommendations." (Objections at p. 39).

#### **14. Civil Attorneys' Complaints**

The Commission made the following Findings:

72. Judge Fuller has engaged in a pattern of misconduct showing utter lack of courtesy and disrespect for attorneys who have appeared before him over a period of time.
73. At the hearing on the Order to Show Cause, the Commission received testimony from a well respected trial lawyer who participated in a jury trial during which Judge Fuller treated opposing counsel with disrespect. OTSC 56-60. In that trial Judge Fuller expressed irritation with opposing counsel and displeasure with him before the jury. He became very upset with opposing counsel and told opposing counsel that when he practiced law "he considered the judge an enemy, so, don't let me push you guys around." *Id.* at 57-58.
74. Judge Fuller also treated another attorney impatiently, aggressively, and in a rude and condescending manner, such that it caused his clients to believe that they would not be treated fairly and upset them very much. H.T. 263-65.

Judge Fuller alleges that Finding 73 does not involve matters alleged in the Complaint. It involves matters that were testified to at the Order to Show Cause hearing, which his attorneys agreed to be received into evidence at the hearing on December 13, 2010. Furthermore, that information was also set forth in the Investigative Report which was attached to the Complaint. (Investigative Report at pp. 9-10.) Finding 74, was based on testimony presented by an attorney called on behalf of Judge Fuller. It was also, again, the subject of the Investigative Report that was attached to and incorporated into the Complaint. (Investigative Report at p. 11.)

**15. The Powdered Wig**

The Commission made the following Finding:

77. Judge Fuller admitted to wearing a powdered wig in Court. [H.T.] at 309.

At the hearing on the Order to Show Cause, which was received into evidence at the December 13, 2010, hearing, testimony was presented by a witness who observed Judge Fuller wearing a powdered wig one or more times, banging his gavel on the bench



and saying something to the effect, “let’s get serious here.” (SC 46-47.) This was also set forth in the Investigative Report. (Investigative Report at p.10.) At the hearing on December 13, 2010, Judge Fuller acknowledged having worn a powdered wig, but claimed that it was a gift from Judge Delaney and that he wore it only one time at the beginning of juvenile Court on Halloween. (HT 310.)

Counsel for Judge Fuller makes an issue about certain art work that Judge Fuller nailed to the bench in his Courtroom after the Complaint in this matter was filed, but the Commission made no findings regarding that.

### **STANDARD**

In this type of proceeding, this Court has held that “the proper standard of proof is by ‘clear and convincing evidence.’” *Matter of Heuermann*, 90 S.D. 312, 240 N.W.2d 603, 606 (1976). This Court also determined that the proper scope of review of the Commission’s findings and recommendation places on this Court an obligation to undertake an independent evaluation of the evidence and recommendation. *Id.* “[T]he act puts the burden of imposing the sanctions squarely on the Supreme Court; The Commission has power only to recommend.” *Id.* Therefore, “in every case brought to this Court on a recommendation from the Commission, [this Court] must determine whether the evidence clearly and convincingly proves that the petitioner engaged in conduct which, upon our independent inquiry, merits the imposition of the sanction recommended.” *Id.*

This Court’s decision in *Heuermann*, does not indicate what weight or deference is given to the Commission’s credibility determinations. Other courts, however, have addressed this issue and have concluded that the Supreme Court gives special weight to

the factual findings of those before whom the evidence was presented because they are better able to evaluate the credibility of the witnesses. *See e.g., In Re Elliston*, 789 S.W.2d 469, 476 (Mo. 1990) (“it is appropriate to give weight to the Commission’s determinations of credibility where there are stark conflicts in the evidence”); *Kloepfer v. Commission on Judicial Performance*, 782 P.2d 239, 241 (Cal. 1990).

## **ARGUMENT**

### **I. Whether Judge Fuller was afforded due process from the Judicial Qualifications proceedings against him.**

Judge Fuller now alleges that any testimony or allegations against him that were not specifically included in the formal Complaint against him violate his due process rights. The Investigative Report was made a part of the formal Complaint, was attached to it and incorporated into by reference as Exhibit 4. (Complaint, ¶11.) Judge Fuller was served with the original Complaint on September 9, 2010, and the Complaint included the entire Investigative Report. His attorneys were well aware of the individuals who made allegations concerning Judge Fuller in the Investigative Report, and were also well aware of the witnesses to be called at the Formal Hearing. (Commission Counsel’s Witness List.) Counsel for Judge Fuller indicated that their decision “to interview or not interview witnesses was based on the Complaint and the Investigative Report.” (Letter by Mr. Nicholson dated December 15, 2010.)

In the formal Complaint against Judge Fuller, it is alleged that Judge Fuller violated Canons 1, 2, 3B(4), 3B(5), and 3B(7) of the Code of Judicial Conduct. (Complaint, ¶¶21-25.) Each of those allegations specifically states: “the allegations of the original Complaint against Judge Fuller, and the subsequent investigation by Commission Counsel concerning the conduct of Judge Fuller indicate that Judge Fuller

has violated Canons 1, 2, 3, 3B(4), 3B(5), and 3B(7)” of the Code of Judicial Conduct. (Complaint, ¶¶ 21-25.) The Complaint makes clear that the allegations are based on the investigation by the Commission, which was set forth in the Investigative Report attached to that Complaint. Judge Fuller has either admitted or failed to make a substantive objection to most of the Findings of the Commission concerning his misconduct.

Judge Fuller now claims that any allegation or evidence which was not specifically set forth in the body of the formal Complaint cannot be used as the basis for the Commission’s Report and Recommendation. He claims that evidence presented that was set forth in the Investigative Report and testified to by witnesses at the hearing violates his right to due process. He also alleges that allowing the Complaint to be amended to conform to the proof, which is permitted under Rule 12, violates his rights to due process. His arguments are misplaced.<sup>2</sup>

This Court has recognized: “[d]ue process requires notice and an opportunity to be heard.” However, we have also stated that “the sufficiency of the notice and opportunity required under due process is flexible and ‘requires only such procedural protections as the particular situation demands.’” *State v. I-90 Truck Haven Service, Inc.*, 2003 SD 51, ¶15, 662 N.W.2d 288, 292 (citations omitted). Further, in regard to the adequacy of notice, this Court, in an attorney disciplinary proceeding, noted that:

[R]egardless whether the proceedings against petitioner are considered to be of a civil nature, . . . or quasi-criminal in nature . . . Even in criminal cases the charge is sufficient if it enables a person of common understanding to know what is intended from the language contained therein and if it apprises a defendant with reasonable certainty of the accusation against him so that he may prepare his defense.

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<sup>2</sup> Judge Fuller’s Counsel does not provide legal authority addressing the appropriate standard in a procedural due process claim.

*In Re Kunkel*, 88 S.D. 269, 218 N.W.2d 521, 524 (1974)(internal citations omitted).

Judge Fuller was adequately apprised of the accusations and could certainly prepare his response.

Rule 6, which forms the basis of Judge Fuller's due process claim, provides:

"The notice and complaint shall specify in ordinary and common language the charges against the judge and the alleged facts upon which such charges are brought[.]" SDCL 16-1A, Appx. III 6(b). The charges and facts were set forth in the Complaint in ordinary and common language that Judge Fuller and his lawyers review every day. In fact, consistent with common pleading standards, the Investigative Report was incorporated by reference into the Complaint to provide further detail, a common pleading practice in actions in both Circuit Court and in Federal Court. "A copy of any written instrument which is an exhibit to a pleading is part thereof for all purposes." SDCL §15-6-10(c); Fed. R. Civ. P. 10(c). "A complaint is deemed to include documents attached to it as an exhibit or documents incorporated in it by reference." *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 904 F.Supp. 753, 757 (N.D. Ill. 1995) (citing Fed.R.Civ.P. 10(c)). Judge Fuller has cited no authority for the proposition that the Commission could not supplement the factual allegations by incorporating the Investigative Report into the Complaint by reference and attachment. This certainly complied with standard pleading practices and with procedural due process standards. *Levos v. Columbus Civil Service Commission*, 335 N.W.2d 262, 266-67 (Neb. 1983) (rejecting police officer's claim he was provided inadequate notice of charges where notice incorporated by reference affidavits that provided a detailed description of the conduct); *Edwards v. State*, 747 P.2d 968, 970 (Okla. Crim. App. 1987) (holding due

process requirements were satisfied where information was incorporated by reference into the application to accelerate criminal defendant's deferred sentence).

In fact, the immediate disclosure of the Investigative Report with the Complaint expedited Judge Fuller's access to information, provided the source of the complaint, and identity of people involved and interviewed. *In re Inquiry Concerning Holien*, 612 N.W.2d 789, 791 (Iowa 2000), a decision where the Iowa Supreme Court removed a district court judge, provides guidance here. The *Holien* Court considered an argument by a judge that she was prejudiced by the Iowa commission's actual refusal to disclose the names of the persons who brought the complaints against her and the details of the complaints. The Court concluded that the commission's failure to allow discovery of the complaints did not prejudice the Judge and concluded: "[T]he commission's failure to allow discovery of the complaints in this case did not prejudice Judge Holien because all of the charges were set forth in detailed and precise allegations of events in which she was personally involved." *Id.* at 791.

Here, Judge Fuller was personally involved in events, as was Judge Holien. He was also made aware of the allegations through the Formal Complaint, the original complaint, and the incorporation of an Investigative Report further detailing his conduct and identifying the witnesses who provided information regarding his conduct. All Commission witnesses were identified and he had the opportunity to interview, cross-examine and call any witness. Under the circumstances here, his unsupported argument that he received inadequate notice is misplaced.

The Complaint also set forth the specific violations of the Cannons. Paragraph 23 of the Formal Complaint alleges as follows:

The original complaint and subsequent investigation conducted on behalf of the Judicial Qualifications Commission reveal that Judge Fuller has violated Canon 3 of the Code of Judicial Conduct which provides in pertinent part:

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

Canon 3B(4).

(Complaint ¶23.) (underlining added).

Judge Fuller now claims that his conduct toward the Fall River and Custer County Court personnel, and the Court Services Officers was never alleged to constitute a violation of the Judicial Canons.

Clearly, the court personnel who testified at the Formal Hearing and the Order to Show Cause Hearing were others with whom Judge Fuller dealt in an official capacity. His treatment of subordinate court employees violated Canon 3 of the Code of Judicial Conduct, and Judge Fuller as much as admitted that when he acknowledged that he treated these people rudely and disrespectfully. These allegations were contained within the Investigative Report.

There are a handful of specific items of evidence and testimony that were not included in the Complaint or Investigative Report. Findings 41 and 42 relate to testimony of Carol Foster. In substance, she testified that Judge Fuller swore in his chambers, using the "F" word in such a loud voice that she had to close the office door to prevent others from hearing the outburst. (HT 26-27.) She also testified to an incident where Judge Fuller swore at an attorney in Court. (HT 27-28.) These specific instances were not referred to specifically in the Investigative Report, although the Investigative

Report contained information of the same nature in which Carol Foster indicated that Judge Fuller swore in court. Although Judge Fuller now claims he was not fully apprised of his use of improper language in the courthouse, this is simply not a situation where the Commission was considering one isolated incident of a judge using improper language, but instead involved a pattern of behavior. Judge Fuller and his attorneys were certainly aware this would be an issue at the Formal Hearing.

Furthermore, Counsel for Judge Fuller were aware some three weeks before the hearing that Carol Foster was going to be called as a witness and had they interviewed her they could have learned of those additional incidents of swearing. While Judge Fuller disputes that the instances of swearing to which Carol Foster testified occurred, his attorneys were afforded ample opportunity to cross-examine her and he was afforded the opportunity to testify to rebut those accusations. The Commission, having heard the testimony of the witnesses and observed their demeanor, found Carol Foster to be credible and Judge Fuller not to be credible.

In regard to Judge Fuller's statement with respect to Indian portraits and stating in effect that this where I hang my Indians, this was disclosed when counsel for Judge Fuller interviewed Jeffrey Krattenmaker in advance of the hearing. Counsel for Judge Fuller was well aware of this anticipated testimony prior to the hearing and did not object to it. He was provided notice and an opportunity to refute this information. He admitted to both making the comment and that his comment was improper. His admission effectively waives any due process claim of lack of notice. *See e.g., Counts v. State*, 197 P.3d 1280, 1284 (Wyo. 2008) (recognizing admission effectively waives any due process claim based on lack of notice).

When counsel for Judge Fuller interviewed Jeffrey Krattenmaker, Mr. Krattenmaker indicated that he had declined to get into the subject of elections and campaign contributions. Counsel for Judge Fuller, however, was apprised that Mr. Krattenmaker would testify that Judge Fuller had requested a one thousand dollar campaign contribution from him during a judicial campaign. (HT 63; Letter by Mr. Schaffer dated December 15, 2010.) Mr. Nicholson disputes this. (Letters by Mr. Nicholson dated December 15, 2010.)

Regardless, this issue has merely been used to create a tempest in a teapot in later briefing. The Commission, in its ruling following the hearing, concluded that the testimony regarding this matter would not be used for substantive purposes concerning a violation of the Judicial Canons, but only for purposes of a credibility determination. In order to prevail on a due process claim, courts typically require a party to show prejudice. *Matter of Storie*, 574 S.W.2d 369, 372 (Mo. 1978) (en banc) (rejecting disciplined judge's argument in judicial disciplinary proceeding that he received inadequate notice where no prejudice established); *Olson v. South Carolina Department of Health*, 663 S.E.2d 497, 504 (S.C. App. 2008) (recognizing party alleging denial of due process must establish substantial prejudice). Judge Fuller can establish no prejudice.

Another piece of evidence that was not set out in the Investigative Report of the formal Complaint was the testimony by the Chief Deputy State's Attorney concerning a judicial evaluation that Judge Fuller had in his office. (Report, Finding 66.) Again, this witness was identified almost three weeks before the hearing. Counsel for Judge Fuller had the opportunity to interview the witness. Judge Fuller was permitted to rebut her testimony and was also allowed to introduce the hearsay Affidavit of Judge Young



concerning how these judicial evaluations were handled and how Judge Fuller treated them. Again, there is no showing of prejudice.

Finally, the last piece of evidence that was not specifically set out in the Investigative Report and Complaint related to the comments of a summer intern and law student. This testimony related to sexist comments that Judge Fuller made during a break in a legal proceeding in his Courtroom. The witness was disclosed to Judge Fuller some three weeks before the hearing. His attorneys could have interviewed her and had they done so she would have disclosed the sexist comments Judge Fuller made to her. Further, this is again a situation where the allegations relate to Judge Fuller's personal knowledge. Judge Fuller's attorney's could have contacted their client and asked him why this person was identified and they likely would have discovered what their client told the witness. In fact, Judge Fuller in response to her testimony fully admitted to everything that she testified to at the hearing. (HT 319-20.) In any event, by his admission he waived any alleged due process claim. *Counts, supra*, 197 P.3d at 1284.

**II. Whether Judge Fuller was afforded due process when the Honorable Jeff Davis sat on the Commission in the proceedings against Judge Fuller.**

Judge Fuller also contends that his due process rights were violated, because Judge Davis, the Presiding Judge of the Seventh Circuit who sits on the Judicial Qualifications Commission, did not recuse himself. Judge Fuller points to no actual bias on the part of Judge Davis. The decision of the Commission was unanimous. Further, Judge Fuller did not make a motion to the Commission to have Judge Davis recuse himself from hearing the matter.

The Supreme Court of Pennsylvania held that a party waives his claim that a member of the body hearing a complaint involving judicial discipline should have recused or disqualified himself, because the issue was not raised at the earliest possible moment. *In re Lokuta*, 11 A.3d 427, 437 (Pa. 2011). Here, neither Judge Fuller nor his attorneys raised an issue with Judge Davis sitting on the Judicial Qualifications Commission until submitting their brief to this Court.

In *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456 (1975), the United States Supreme Court observed in the context of a due process claim that an aggrieved party “must overcome a presumption of honesty and integrity in those serving as adjudicators[.]” *Id.* at 47. “Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.” *Id.* at 55. This Court, in review of a license revocation proceeding before the Division of Insurance, similarly recognized:

‘Administrative officials are presumed to be objective and capable of judging controversies fairly on the basis of their own circumstances.’... The presumption may be overcome when the record establishes either 1) actual bias, or 2) the existence of circumstances that lead to the conclusion that an unacceptable risk of actual bias or prejudgment inhered in the proceeding. ... “Pre-decision involvement ‘is not enough to overcome the presumption of honesty and integrity in policy makers with decisionmaking power.’”

*In re Tinklenberg*, 716 N.W.2d 798, 805, 2006 SD 52, ¶23 (internal citations omitted).

What Judge Fuller alleges with respect to Judge Davis is nothing more than speculation. Further, the Commission does not sit in the true sense as adjudicators, but makes findings and a recommendation that this Court must then review.

In a case where a member of the Judicial Qualifications Commission had charges filed against him and moved to recuse other members of the Commission, the Supreme Court of Missouri held that recusal was not required. *In Re Elliston, supra*, 789 S.W.2d at 473-74. There the Court observed:

Unless the disqualifying interest is manifest, the decision about whether to recuse or to participate is one which the challenged officer must make personally. The regular members of the specially constituted tribunal have a duty to participate in its business, absent unusual circumstances. A member should recuse only if there is a substantial appearance of prejudice, or if the member doubts his ability to function impartially. We sense absolutely no compulsion for recusal in the case at hand.

*Id.* There has been no showing of prejudice or personal or pecuniary interest on the part of Judge Davis in these proceedings and he was not required to recuse himself from his appointed duties.

### **III. Whether the Commission's recommendations for retirement or removal is appropriate under the circumstances.**

Judge Fuller does not dispute that his misconduct violates the Judicial Canons 1, 2, and 3 of the Code of Judicial Conduct. Moreover, he took no exception and made no objection to the specific Conclusions of the Commission. Judge Fuller admitted that clear and convincing evidence exists that he violated Canons 1, 2, and 3 of the Code of Judicial Conduct. *In the Matter of Heuermann, supra*, this Court held that the proper standard of proof in a proceeding such as this is by clear and convincing evidence. 240 N.W.2d at 606. That burden has been met here and Judge Fuller admits it. He argues, however, that the "punishment recommended by the Commission" for his violations is too harsh when compared against sanctions handed down by other tribunals. (Brief at 26.)

The Commission made the following Findings which bear on what this Court might determine an appropriate sanction to be:

- 33. Judge Fuller has engaged in a pattern of misconduct showing an utter lack of courtesy and total disrespect to Court personnel over a period of years.
- 72. Judge Fuller has engaged in a pattern of misconduct showing utter lack of courtesy and disrespect for attorneys who have appeared before him over a period of time.
- 81. Judge Fuller testified that he did not realize that he was offending any of the people to whom his conduct was directed. He claims he did not have a clue he was offending them. *Id.* at 307-08.
- 82. Further, Judge Fuller, admitted that the first time he ever considered apologizing to any of the people who were offended by his conduct was when the subject of apologizing to them was raised by Commission counsel at the Order to Show Cause hearing. *Id.* at 385.
- 88. Further, the Commission finds it incredible that Judge Fuller could claim that he did not know that he was offending the people that he offended by his comments until these proceedings and until he went through anger management. Many of the comments that he made and that this Commission finds credible are such that if he did not realize he was offending someone, serious questions must be raised about his lack of insight and judgment.
- 89. Further, the Commission finds that the inappropriate conduct engaged in by Judge Fuller was not an isolated incident or incidents, but a pattern of conduct on his part. Judge Fuller admitted to that at the Order to Show Cause hearing. OTSC 111.
- 90. Further, the Commission finds that the misconduct by Judge Fuller as detailed in this Report represents a number of serious transgressions, that adversely affect the public's perception of the system. See Preamble to South Dakota Code of Judicial Conduct.

The California Supreme Court, in *Kloepfer v. Commission on Judicial Performance*, 782 P.2d 239 (Cal. 1990), upheld the removal of a judge from office based on, among other things, a pattern of rude, abusive and hostile behavior. In doing so, the Court addressed similar arguments that have been made here. For example, in *Kloepfer*,

several witnesses including judges and attorneys testified to the unquestioned honesty and integrity of Judge Kloepper. *Id.* at 262. The Court there made the following observation regarding that testimony:

Honesty and good legal knowledge are minimum qualifications which are expected of every judge. (Code of Judicial Conduct, canons 1 and 3). Neither these qualities nor a judge's administrative skills can mitigate either "willful misconduct" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

*Id.* at 262-63. With respect to that testimony, the Court also observed:

The testimony of persons who were not present, and cannot assess the serious nature of the incidences of misconduct, but nevertheless believe petitioner can be a fair and patient person whose judicial temperament is appropriate, also is not persuasive.

*Id.* at 263. In determining that removal was the appropriate sanction, the California Supreme Court stated:

Our role is to determine, in the individual case, the action necessary to protect the public and the reputation of the judiciary. The evidence fully supports the conclusion of the Commission that this purpose requires the petitioner be removed from the bench.

*Id.* at 264.

By way of defense, Judge Fuller contends that no one brought many of these matters to his attention prior to the institution of these proceedings. (Objections No. 33, 34, 35, 46, 48, and 90.) The inference appears to be that this somehow constitutes a defense or a mitigating factor. A Judge, however, is presumed to know what the Code of Judicial Conduct proscribes and there is nothing in the Canons that suggest that a warning of misconduct is a pre-requisite to a determination that a Canon was violated. In determining an appropriate sanction in this case, this Court is also entitled to consider that the Commission made a number of Findings in which it was called upon to judge the

credibility of various witnesses and Judge Fuller. The Commission specifically found the testimony of Carol Foster to be credible and the testimony of Judge Fuller not to be credible concerning his swearing in open court, in which he used the terms “goddamn clerk” and “goddamn schedule.” (Report, Finding 38 and 44.) These statements were made from the bench while the public was present. *Id.*

The Commission also found the extra-judicial comments that Judge Fuller made to the Chief Deputy State’s Attorney in Pennington County concerning law enforcement and his license plates “let the sons-of-bitches remember that when they pull me over,” to be credible and found Judge Fuller’s denial to not be credible. (Report, Finding 61 and 63.) The Commission, comprised of seven members, including two Judges, three attorneys, and two lay people, were in a position to observe the witnesses and judge their credibility.

Understandably, Judge Fuller has remorse and shame at this juncture. This of course was considered, but the Commission concluded this did not excuse his conduct. The California Supreme Court’s observation about a judge’s later remorse seems applicable here:

Nor are petitioner’s expressions of remorse especially persuasive. As in *Wenger*, “The difficulty with his professed enlightenment is its delayed arrival.”

*Furey v. Commission on Judicial Performance*, 743 P.2d 919, 930-31 (Cal. 1987) citing *Wenger v. Commission on Judicial Performance*, 630 P.2d 954, 976 (Cal. 1981)

One can find any number of cases with differing sanctions imposed for similar conduct. Annotation, *Disciplinary Action Against Judge on Ground of Abusive or Intemperate Language or Conduct Toward Attorneys, Court Personnel, or Parties to or*

*Witnesses in Actions, and the Like*, 89 ALR 4<sup>th</sup> 278 (1991). In addition, the American Judicature Society has published a study discussing judicial sanctions for various conduct. Cynthia Gray, *A Study of State Judicial Discipline Sanctions*, American Judicature Society (2002).<sup>3</sup> A number of cases have found removal to be an appropriate sanction for complaints involving inappropriate judicial demeanor. *See, In Re Inquiry Concerning Holien, supra*, 612 N.W.2d 789; *Matter of Esworthy*, 568 N.E.2d 1195 (N.Y. App. Div. 1991). *In Re Crowell*, 379 S.2d 107 (Fla. 1980); *but see, Matter of Bennett*, 267 N.W.2d 914 (Mich. 1978) (rejecting recommendation for removal and ordering suspension for a period of one year without pay).

A number of Courts have also arrived at different and lesser sanctions for similar conduct. It is up to this Court to determine the appropriate sanction in this unique factual situation. As this Court observed in *Heuermann*:

Our duty, imposed by the state legislature and by the state constitution, is to maintain a judiciary which is both respected and trusted. We must be vigorous in uncovering the actions of an errant judge, but we must at the same time be careful not to find error and impose punishment merely to appease the public and a bar which are now demanding more of their judiciary than ever before. We share this duty with the Commission, whose proceedings reveal to us a high degree of competence and dedication to duty.

240 N.W.2d at 608.

#### **IV. Whether the Court should appoint a referee to take testimony and make additional findings and recommendations**

Judge Fuller argues that if this Court is unwilling to reject or modify the Commission's recommendation, it should refer the matter to a referee. Rule No. 29 provides in part:

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<sup>3</sup> Study available at: [www.ajs.org/ethics/pdfs/Sanctions.pdf](http://www.ajs.org/ethics/pdfs/Sanctions.pdf) (last visited 3/10/11).

Based upon the report and recommendations of the Commission, the Supreme Court may establish such procedures as it deems appropriate, including referral of said matter for the taking of testimony and making of findings and recommendations. ...

SDCL 16-1A, Appx., III, 29.

Judge Fuller claims that the appointment of a referee is the only option that affords him, or any judge, impartial consideration. (Judge Fuller's Brief at 38) He goes on to argue that the combination of investigatory and adjudicatory functions in the Commission is unfair. *Id.* Judge Fuller appears to raise a due process claim because the investigative and adjudicatory roles of the Commission are combined.<sup>4</sup> *Id.* at 38.

Numerous courts have considered this claim in judicial disciplinary proceedings and have rejected the argument. The reasoning is supportive here and should be considered by this Court in determining whether the established procedures for the use of the Judicial Qualifications Commission is a fair process for the judiciary of South Dakota. In *Matter of Del Rio*, 256 N.W.2d 727 (Mich. 1977), the Michigan Supreme Court rejected a similar claim and observed: "The authority is legion in support of the proposition that combining the investigative and adjudicative roles in a single agency does not necessarily violate due process in administrative adjudications such as judicial fitness hearings." *Id.* at 736 (Citations omitted). The Michigan Supreme Court noted that the Commission's role is limited to submitting its recommendations to the Supreme Court and that the Supreme Court exercises the disciplinary function. *Id.* Other Supreme Courts have also recognized that this process complies with due process.

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<sup>4</sup> Although this issue appears to be raised in briefing, no supporting legal authority is cited. This would appear to violate this Court's rule requiring citation to supporting legal authority for purposes of an appeal. SDCL 15-26A-60 (6). Recognizing the Court's duty of inquiry in this unique action, this issue is fully briefed with supporting legal authority.



*Mosley v. Nevada Commission on Judicial Discipline*, 22 P.3d 655, 659-61 (Nev. 2001); *Kloepfer, supra*, 782 P.2d at 242-43; *Matter of Storie, supra*, 574 S.W.2d at 373; *In Re Hanson*, 532 P.2d 303, 306-307 (Alaska 1975) (holding that the combination of judicial and investigative functions in the judicial commission did not violate petitioner's due process rights under either the federal or the state constitution). This reasoning is consistent with this Court's consideration of the similar argument raised by an attorney subject to a disciplinary action. *In Re Kunkel, supra*, 218 N.W.2d at 526-28. (holding disciplinary proceedings against attorney did not violate due process rights because it included investigatory and adjudicatory functions).<sup>5</sup>

In addition, Judge Fuller fails to point out what additional evidence he would present to a referee concerning the allegations against him, most of which he has admitted. More importantly, his argument for a referee ignores the functions of the Commission and of this Court. It is for this Court to determine the appropriate sanctions; the Commission has power only to recommend. *Matter of Heuermann, supra*, 240 N.W.2d at 606.

### **CONCLUSION**

Judge Fuller was provided adequate notice and an adequate opportunity to be heard that was consistent with the procedures established for the Commission. This was certainly consistent with due process. The seven members of the appointed Commission found that Judge Fuller engaged in a pattern of misconduct over the course of his performance as a judge that adversely affected the public's perception of the judiciary. It is undeniable that it is difficult for witnesses, largely attorneys and court staff, to provide

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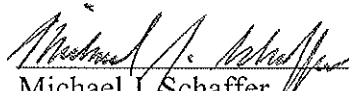
<sup>5</sup> Similar to the situation here, the *Kunkel* Court was not bound by the referee's findings in a disciplinary proceeding. *In re Kunkel*, 218 N.W.2d at 523.

testimony about a Circuit Court Judge's inappropriate conduct. This has already been done and no facts would change if this Court were to appoint a referee. Judge Fuller simply disagrees with the Commission's recommendation.

As the proceedings stand, the Commission has considered Judge Fuller's conduct and it has unanimously recommended to this Court the Retirement or Removal of Judge Fuller. The ultimate decision now rests with this Court.

Respectfully submitted this 14<sup>th</sup> day of March, 2011.

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#### CERTIFICATE OF SERVICE

The undersigned, Commission Counsel, hereby certifies that two true and correct copies of the foregoing "Brief of Judicial Qualifications Commission" was served by mail upon:

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on this 14<sup>th</sup> day of March, 2011.

