

TAB 4
Tru Reed, from
Marla Greenstein
12/10/10
1 of 30

STATE OF ALASKA
COMMISSION ON JUDICIAL CONDUCT

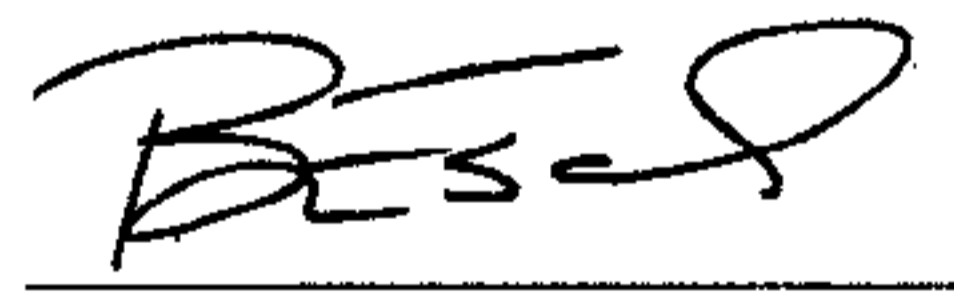
In the matter of the proceeding)
pursuant to AS 22.03.011 (a) in)
relation to:)
)
RICHARD POSTMA,)
)
Judge of the District Court)
Third Judicial District at Anchorage)
_____)

ACJC File No. 2010-005

HEARING NOTICE

The hearing in this matter will occur in Courtroom 4 of the United States District Court Courthouse, 222 West 7th Avenue, Anchorage, Alaska beginning at 8:30 a.m. on December 15, 2010 and continuing thereafter. It is anticipated that there will be a noon break of approximately one hour and the matter will commence at 8:30 a.m. on December 16th, with the same schedule on Friday December 17th, concluding that day.

DATED AT NOME, ALASKA This 6th day of December, 2010.



BEN ESCH, Chairperson
Commission on Judicial Conduct

STATE OF ALASKA

COMMISSION ON JUDICIAL CONDUCT

In the matter of the proceeding)
 pursuant to A.S. 22.30.011(a) in)
 relation to:)
)
RICHARD W. POSTMA, Jr,)
) **ACJC File No. 2010-005**
) **(referencing but not**
) **incorporating closed file**
) **#2009-004)**
 Judge of the District Court,)
 Third Judicial District at)
 Anchorage, Alaska)

To: Richard Postma
c/o Thomas Van Flein
711 H Street, Suite 620
Anchorage, Alaska 99501

COMPLAINT

The Alaska Commission on Judicial Conduct pursuant to Article IV, sec. 10 of the Constitution of the State of Alaska, AS 22.30.011, and Rule 11 of the Rules of the Alaska Commission on Judicial Conduct charges that Judge Richard Postma, engaged in the following conduct that violates of AS 22.30.011 (a) (2) and/or AS 22.30.011 (a) (3) (B) (C) (D) and (E), Canons 2A, 3A, 3B(4), and 3C(1) and the confidentiality provisions of AS 22.30.060.

Alaska Commission on Judicial Conduct
 1029 W. 3rd Ave., Suite 550
 Anchorage, Alaska 99501
 (907) 272-1033
 FAX (907) 272-9309

(1) From February 2009 through April 2010, Judge Postma, in response to perceived inequities in his case assignments and other administrative matters, engaged in e-mail correspondence and in-person confrontations with fellow judges and court staff that exhibited a level of anger and lack of judgment inappropriate to the judicial office. This conduct creates an appearance of impropriety by acting in a manner that does not promote public confidence in the integrity of the judiciary in violation of Canon 2A; violates Canon 3 B(4) through lack of patient, dignified and courteous conduct; and violates Canon 3 C(1) by failing to cooperate with other judges and court staff in the administration of court business. This conduct also constitutes willful misconduct in office, conduct prejudicial to the administration of justice, and conduct that brings the judicial office into disrepute in violation of AS 22.30.011(a) (3) (A), (C) and (D).

(2) Judge Postma has personal needs that include personal work requests, which would require unreasonable accommodations by the court system. These personal needs violate Canon 3A because they take precedence over the judge's judicial duties.

(3) Judge Postma circulated and shared the fact that he filed complaints with the Commission on Judicial Conduct against two other judges, violating the confidentiality requirements of AS

Alaska Commission on Judicial Conduct
1029 W. 3rd Ave., Suite 550
Anchorage, Alaska 99501
(907) 272-1033
FAX (907) 272-9309

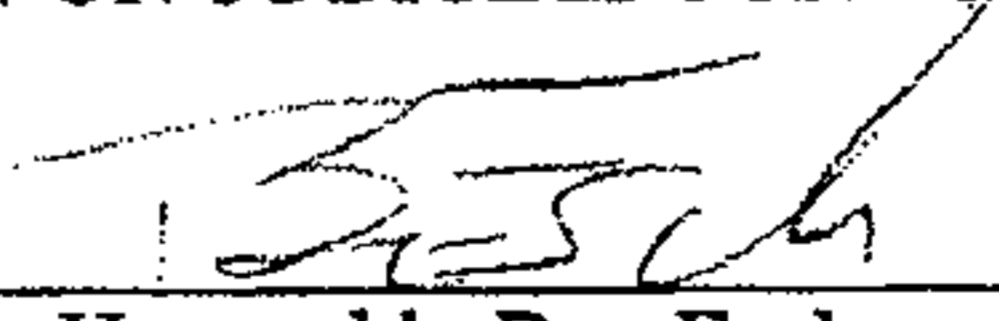
22.30.060 and constituting willful misconduct in office, conduct prejudicial to the administration of justice, and conduct that brings the judicial office into disrepute in violation of AS 22.30.011 (a) (3) (A), (C) and (D) and Canon 2A by failing to exhibit respect for the rule of law and comply with the law.

(4) Judge Postma suffers from a combination of mental health difficulties as outlined by Commission independent mental health expert Dr. M. Milner's evaluative reports of April 6, and April 21, 2010, that render him likely to be unable to fulfill the duties expected of a district court judge in Anchorage. The findings of a Commission-required independent mental health exam indicate that the judge's impairment is likely to impede his ability to function appropriately within the workplace with colleagues, peers and staff, establishing a disability that seriously interferes with the performance of duties and is or may become permanent.

Commission Rule 11 (b)(4) requires that a response be filed within twenty days.

Dated at Anchorage, Alaska this 30th day of April 2010.

ALASKA COMMISSION ON JUDICIAL CONDUCT

By: 
Honorable Ben Esch
Chair

BY ORDER OF THE COMMISSION

Alaska Commission on Judicial Conduct
1029 W. 3rd Ave., Suite 550
Anchorage, Alaska 99501
(907) 272-1033
FAX (907) 272-9309

RETURN

I served the above Complaint constituting a statement of formal charges on Judge Richard Postma, the person to whom it is addressed, on the 4th day of May, 2010, by certified mail to his attorney Thomas Van Flein.

Lauren Fee

Administrative Assistant

Lauren Fee

Signature

Title

Name

Alaska Commission on Judicial Conduct
1029 W. 3rd Ave., Suite 550
Anchorage, Alaska 99501
(907) 272-1033
FAX (907) 272-9309

STATE OF ALASKA

COMMISSION ON JUDICIAL CONDUCT

1)
 2)
 3)
 4 In the matter of the proceeding)
 Pursuant to AS.22.30.011(a))
 5)
 6 RICHARD POSTMA,) ACJC File No. 2010-005
 7)
 8 Judge of the District Court,)
 9 Third Judicial District)
 At Anchorage, Alaska.)
 10)

JUDGE POSTMA'S ANSWER

As a general matter, Judge Postma objects to the allegations and questions the legal sufficiency of the complaint. One thing is clear: no one, and certainly not the Commission, has questioned Judge Postma's abilities or behavior on the bench, in the courtroom, or in any manner pertinent to the core duties of a judge.

General Denial

While the Commission has historically addressed improper courtroom behavior by a judge,¹ as it should, it has not intervened in what appears to be personality conflicts among

¹ For example, the cases often focus on in-court misconduct primarily, such as in *In re Cummings*, 211 P.3d 1136 (Alaska 2009), wherein a judge was suspended for three months for demonstrating clear bias in court against one party and in favor of another by engaging in *ex parte* communications with the prosecutor and trying to assist the prosecutor's case; or *In re Landry*, 157 P.3d 1049 (Alaska 2007), wherein a judge was publicly censured for in-court misconduct, including *ex parte* communications, signing pre-sign bail orders, disorganization resulting in the dismissal of many criminal cases due to expired deadlines, and presiding over a case he should have recused himself from.

Clapp, Peterson, Van Flein,
 Tiemessen & Thorsness, LLC
 711 H Street, Suite 620
 Anchorage, Alaska 99501-3454
 (907) 272-9272 fax (907) 272-9586

7 of 30

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

judges or court personnel.² Nor should it as this has not and could not impact the public. According to the Commission: “the commission has the authority and responsibility to look at judges’ activities outside of the courtroom. Complaints dealing with off the bench conduct might allege: misuse of public employees or misappropriation of property or money for personal purposes; improper speech or associations, interference with a pending or impending lawsuit; lewd or corrupt personal life, or use of the judicial position to extort or embezzle funds. (ACJC 2009 Summary p. 8). The commission further notes that it has the authority to address “alcohol or drug abuse, senility; serious physical illness; or mental illness.” (ACJC 2009 Summary p. 8). Accusing a judge of a mental illness because the judge sought corrective action for a perceived wrong, if this is what occurred, is inappropriate and an abuse of authority. Accusing a judge of a mental illness for having off-the-bench disagreements with another judge or judges is also inappropriate and an abuse of authority. In view of the Commission’s jurisdictional authority, and its prior cases, there is no similar case wherein a formal accusation has been filed against a sitting judge who has no complaints about his actions on the bench, no accusations of ethical impropriety, no substance abuse,³ and no criminal conduct.

Further, even accepting the allegations as true in the Complaint, prior cases suggest that such an accusation and finding would have resulted in an informal sanction, not formal

² *In re Johnstone*, 2 P.3d 1226, 1233-34 (Alaska 2000) (“The purpose of judicial discipline is to protect the public rather than punish the individual judge.”)

³ “Anchorage Judge Publicly Reprimanded for Driving Drunk” <http://www.adn.com/2010/03/18/1189224/judge-receives-public-reprimand.html>.

8 of 30

1 public charges. The recommendations and allegations in this case have exceeded any
2 discipline imposed in prior cases.

3 **Judge Postma's Record is Exemplary**

4
5 Judge Postma's record demonstrates his fitness and abilities as a judge. For
6 example, though the average district court judge has 14 peremptory challenges per year,
7 Judge Postma averaged only 3 such challenges.⁴ Only one judge averaged fewer
8 challenges, and all but one judge (7 other district court judges) averaged far more.⁵ As
9 concluded by the Council, "Judge Postma has experienced a low number of peremptory
10 challenges since his appointment in 2007, average only three a year."⁶ Further, Judge
11 Postma has had zero recusals since his appointment through the date of the report.⁷

12
13 According to juror surveys, Judge Postma's average performance rating was 4.9—
14 out of a possible 5.⁸ Judge Postma is ranked highly by jurors, and received a 5.0 rating
15 from jurors in the category of "respectful and courteous to parties"—a direct contradiction
16 to the Commission's allegation here that Judge Postma was disrespectful to others. Juror
17 comments to Judge Postma demonstrate a clear ability to function as a judge and to excel as
18 a judge. Below is a copy of page 25 of the 2010 juror survey regarding Judge Postma:
19

20
21
22 ⁴ Alaska Judicial Council April 14, 2010 Retention Memorandum p. 10 (exhibit 1).

23 ⁵ *Id.*

24 ⁶ *Id.* at p. 12.

25 ⁷ Alaska Judicial Council April 5, 2010 Recusal Memorandum at p. 4 (Exhibit 2).

26 ⁸ Alaska Judicial Council Juror Survey Memo March 26, 2010, p. 4. (Exhibit 3).

Answer

In the matter re Richard Postma, ACJC No. 2010-005

Page 3 of 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Richard W. Postma, Jr.

Retention 2010 Juror Survey Comments

- No, the judge did a great job.
- None. He did a great job.
- The only suggestion would be to "brush up" on how different jurisdictions operate. Otherwise, I felt he was very accommodating and professional.
- No suggestions; I was very impressed with how well run the court was.
- Judge doing a good job in the courtroom.
- I was very impressed with the way Judge Postma conducted court. It was very easy to understand proceedings as presented. You felt that he really appreciated you.
- I think he did a great job. He has personality and was friendly and respectful. The experience was educational and actually interesting.
- Judge Postma was great. He was fair and had a respectful attitude towards all involved.
- Judge Postma was very cool and understanding to both parties.
- Just stay the way he is. It is refreshing to see someone so kind, caring and respectful. He also has a sense of humor which is great. He puts you at ease, and made the experience an easy one.
- I especially liked the way he handled the punishment part of sentencing. He stated that the jury found the defendant guilty and that the crime was in the past. Now we were looking toward the future to remedy the situation. He was patient, firm and yet kind in speaking to the defendant, much like a parent would be. I think that his tone was very beneficial to the defendant.
- He is really good.
- None. I was very impressed with his interactions with everyone connected with the trial.
- None whatsoever. Judge Postma explained the law so a twelve year old could understand the proceedings and clarified all questions and loose ends as soon as they arose. He is exactly what a judge should be.
- Continue to do just as he did throughout my jury experience.
- Very informative.
- Outstanding job by Judge Postma.
- Judge Postma was awesome!!!
- No suggestions. Thank you Judge Postma for the experience that I will cherish for the rest of my life.

Clapp, Peterson, Van Flein,
 Tiemessen & Thorsness, LLC
 711 H Street, Suite 620
 Anchorage, Alaska 99501-3454
 (907) 272-9272 fax (907) 272-9586

1 (Exhibit 4). The surveys demonstrate that Judge Postma is capable, ethical and diligent. In
2 terms of performing as a judge, Judge Postma is more than competent and qualified.

3 In addition to the surveys, lawyers have written to the Commission expressing their
4 surprise and disagreement with the accusations. One lawyer described how, after reading
5 the Complaint, he would have thought it was an "elaborate practical joke" as it does not
6 describe Judge Postma accurately, and this lawyer, who has worked closely with Judge
7 Postma and stays in touch with Judge Postma, stated that he has "observed absolutely
8 nothing in his demeanor, his attitude, or his affect that would lend any credence to the
9 accusation." (B. Jamieson May 6, 2010 letter p. 1) (Exhibit 5). APD Officer Rhonda
10 Street writes that she has frequently been in Judge Postma's courtroom and "I have
11 observed him first-hand on several occasions to be a very honest, intelligent and ethical
12 judge." (R. Street Letter May 7, 2010) (Exhibit 6). Attorney Kevin Clarkson wrote that he
13 is very familiar with Judge Postma's professional abilities and that he was both shocked
14 and surprised at the accusations and explained:
15
16

17 I do not know who the so-called mental health expert is that the
18 Commission consulted, but perhaps the Commission would seek a
19 second opinion, and then take both opinions with a serious grain of salt. .
20 . . . Where are the citizen complaints against Judge Postma claiming that
21 he exhibited "anger" or an inability to work well with others? Are there
22 transcripts of court proceedings where he has exhibited this alleged
23 "anger" that allegedly rises to the level of a permanent mental disability?
24 * * * I find it outrageous that a Judge can be so easily and blithely
25 defamed in this state.
26

1 (K. Clarkson Letter May 7, 2010 p. 2) (Exhibit 7). Attorney Stephanie Patel further
2 explains:

3 I have NEVER seen Judge Postma anything but courteous, humble, judicious
4 in all that he says, and fair to all he meets. If he as a "mental illness" we
5 should all be so lucky. I have heard things said about him over time that he
6 has been on the bench, and every bit of it has been positive. Far from bringing
7 the judiciary into disrepute, he has lifted the standard. * * * Not only do I
8 respect Judge Postma's courtroom demeanor, I came to respect his legal
9 reasoning.

10 (S. Patel Letter May 10, 2010) (Exhibit 8). These attorneys or police officers corroborate
11 what the Judicial Council surveys show—Judge Postma is an exemplary judge and the
12 accusations here are either exaggerated or simply mistaken.

13 For his further responses, Judge Postma states specifically relative to each
14 paragraph:

15 Paragraph (1): Denied. Judge Postma filed a complaint against a court employee for
16 actions that appeared racially or ethnically biased against Judge Postma and his in-court
17 personnel. Pointing out possible racial bias is not inappropriate or lacking in decorum.
18 Judge Postma denies being uncooperative with court staff or others and denies that his
19 actions interfered with the administration of justice.

20 Paragraph (2): Denied. To the extent the Court administration contends that any
21 accommodation, real or perceived, is a violation of any judicial canon, such an
22 interpretation of the judicial canons would violate both state and federal anti-discrimination
23 laws.
24

25 Answer
26 *In the matter re Richard Postma, ACJC No. 2010-005*
Page 6 of 13

Clapp, Peterson, Van Flein,
Tiemesen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

1 Paragraph (3): Admitted that a judicial complaint filed by Judge Postma was
 2 disclosed. Denied that such disclosure violated non-disclosure requirements as the
 3 recipients were privileged recipients and within the rubric of court management, case
 4 assignment decision-makers, and personnel management and ultimately in their capacity as
 5 *de facto* supervisors and decision makers for temporary work assignments requested by
 6 Judge Postma relative to his request for a buffer from further discrimination and retaliation.
 7 Judge Postma expressly denies that this privileged disclosure constitutes willful misconduct
 8 of office or that the disclosure constitutes conduct prejudicial to the administration of
 9 justice. All other assertions are denied.
 10

11 Paragraph (4): Denied that Judge Postma is suffering from any disability that
 12 precludes his functioning as a District Court Judge, with or without accommodation. Admit
 13 that Dr. Milner's report identifies an "emotionally charged trigger, such as racial
 14 discrimination," as being the trigger for his alleged mental health difficulties. Deny the
 15 remaining allegations.
 16

DEFENSES

17
 18
 19 1. The conduct described in paragraph 1 fails to state a claim for a violation of
 20 Canon 2A ("acting in a manner that does not promote public confidence in the integrity of
 21 the judicial"), because the conduct alleged of Judge Postma is *required* of judicial officers
 22 in order to promote public confidence on the integrity of the judiciary under:
 23
 24

Clapp, Peterson, Van Flein,
 Tiemessen & Thorsness, LLC
 711 H Street, Suite 620
 Anchorage, Alaska 99501-3454
 (907) 272-9272 fax (907) 272-9586

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- Canon 3(B)(5) ("In the performance of judicial duties, a judge shall act without bias or prejudice, and shall not manifest, by words or conduct, bias or prejudice on the basis of race, color, sex, religion, national origin, disability, age ... A judge shall not permit court room staff and others subject to the judge's direction and control to deviate from these standards in their duties."); and
- Canon 3C(2) ("A judge shall take reasonable steps to insure that court staff and others subject to the judge's directions and control ... refrain from manifesting bias or prejudice in the performance of their official duties").

There is no evidence that any member of the public was aware of Judge Postma's efforts under Canon 3B(5) and 3C(2) to address perceived bias or prejudice by court staff, or unlawful retaliation by court administration, and therefore this allegation fails to state a claim under Canon 2A.

2. The conduct described in paragraph 1 fails to state a claim for a violation of Canon 3B(4). Canon 3B(4) requires of judges and court staff to be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal with in an official capacity. Canon 3B(4) does not apply to interactions between the judge and courtroom staff. See Formal Ethics Opinion #9 ("Judges who have an overly brusque manner in dealing with court personnel do not violate the Code of Judicial Conduct").

3. The conduct described in paragraph 1 fails to state a claim for a violation under Canon 3C(1) ("A judge shall maintain professional competence in judicial administration, and should cooperate with other judges and court staff in the administration of court business. A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice."). The cooperation clause contains the

Clapp, Peterson, Van Flein,
Tiemessen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

1 aspirational "should" not mandatory "shall," so that legitimate disagreements between
2 judges will not be deemed a conduct violation, particularly those disagreements involving
3 questions of bias, prejudice, or reprisal. Judge Postma has objected to what he viewed to be
4 discriminatory and retaliatory biases and prejudices by other court personnel. Though
5 Judge Postma voiced disagreement with judges on several issues, he complied with the
6 instructions and requirements of his supervising judges and court staff. He has not refused
7 any request or requirement.
8

9 4. The conduct described in paragraph 2 fails to state a claim for a violation of
10 Canon 3A, the scope of which is defined by the standards in Canon 3B (adjudicative
11 responsibilities; Canon 3C (administrative responsibilities); Canon 3D (disciplinary
12 responsibilities); Canon 3E (disqualification); and Canon 3F (waiver of disqualification).
13 The alleged "personal needs that include personal work requests" are just that, requests, and
14 thus do not fall within any of the proscribed conduct as defined by the rest of Canon 3.
15

16 5. To the extent the conduct described in paragraph 2, i.e., "personal work
17 requests, which would require unreasonable accommodations by the court system," refers
18 to Judge Postma's requests to work in an environment free of discrimination and retaliation,
19 the allegation fails to state a claim under Canon 3A. This is because such "requests" are
20 actually encouraged under Canon 3B(5), Canon 3C(2), and permitted by the Government
21
22
23
24

1 Employees Rights Act of 1991 ("GERA"),⁹ which provides appointed state court judges
2 with a right to seek administrative relief from their employers and the EEOC. With respect
3 to civil rights laws and claims, "a State cannot employ a jurisdictional rule to dissociate
4 from federal law because of disagreement with its content or a refusal to recognize the
5 superior authority of its source."¹⁰ Therefore, the Commission cannot use Canon 3A to
6 circumvent the requirements of GERA and Title VII to categorize such requests for
7 workplace discrimination and retaliation to be a "personal work requests which would
8 require unreasonable accommodations by the court system."

9
10 6. The conduct described in paragraph 3 is a permitted and protected activity
11 under federal law and thus cannot form the basis for a claim under AS 22.30.011(a)(3) or
12 Canon 2A. Federal anti-discrimination laws such as GERA ""prevent employer
13 interference with 'unfettered access' to Title VII's remedial mechanisms."¹¹ Title VII's
14 remedial mechanisms "the EEOC, the courts, and their employers."¹² These mechanisms

15
16
17
18
19
20
21
22
23
24
25
26

⁹ 42 U.S.C. § 2000e-16a to -16c; see 29 C.F.R. §1603.100 to .306 (Procedures for Previously Exempt
State and Local Government Employee Complaints of Employment Discrimination under Section 304
of the Government Employee Rights Act of 1991).

¹⁰ *Haywood v. Drown*, 129 S.Ct. 2108, 2115 (2009); see *id.* at 2117-18 (In state litigation involving
civil rights, "[a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how
evenhanded it may appear ... New York is not at liberty to shut the courthouse door to federal claims
that it considers at odds with its local policy.")

¹¹ *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2415 (2006).

¹² *Id.*

1 include "[n]otice of the ... harassing conduct" that "triggers an employer's duty to take
 2 prompt corrective action that is 'reasonably calculated to end the harassment' to include *the*
 3 *temporary steps the employer takes to deal with the situation while it determines whether*
 4 *the complaint is justified.*"¹³ When providing notice, Title VII and other federal anti-
 5 discrimination laws require employers to enact anti-retaliation policies "that the harassing
 6 supervisor could be bypassed in registering complaints" to prevent the accused supervisor
 7 from having "virtually unchecked authority" to "directly control and supervise all aspects of
 8 [the complainant's] day-to-day activities."¹⁴

10 Judge Postma contends that the court system did not provide a procedure to bypass
 11 court management with a request for a temporary assignment to jail court to avoid further
 12 reprisal. Instead of forwarding it to another decision maker, court management and
 13 supervisor sent it to other district court colleagues, inculcating the other copied court
 14 personnel as *de facto* supervisors for this decision, but unfortunately not providing them
 15 with Judge Postma's reasons for the request. Under GERA, the federal laws it incorporates
 16 and *Burlington Northern*, Judge Postma had an "unfettered right" to inform his *de facto*
 17 supervisors of the reasons for his request. *Haywood v. Drown* prohibits the ACJC from
 18 using state laws and procedures to undermine this federal right.

23 ¹³ *Swenson v. Potter*, 271 F.3d 1184, 1192 (9th Cir 2001).

24 ¹⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2294 (1998).

Clapp, Peterson, Van Flein,
 Tiemessen & Thorsness, LLC
 711 H Street, Suite 620
 Anchorage, Alaska 99501-3454
 (907) 272-9272 fax (907) 272-9586

7. The allegations in paragraph 4 fail to state a claim for disciplinary action. Dr. Milner's report indicates that addressing Judge Postma's concerns about discrimination and retaliation may alleviate symptoms of anxiety. GERA requires the court system to address Judge Postma's concerns about discrimination and retaliation *before* taking action to remove him from office or otherwise discipline him:

Title VII comes into play *before* the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, *even one that does not seriously affect employees' psychological well-being*, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.¹⁵

For this additional reason, paragraph 4 fails to state a valid claim for relief.

In addition, the Complaint fails to set forth facts that, if true, would warrant any serious disciplinary action, much less the drastic discipline sought.

RELIEF REQUESTED

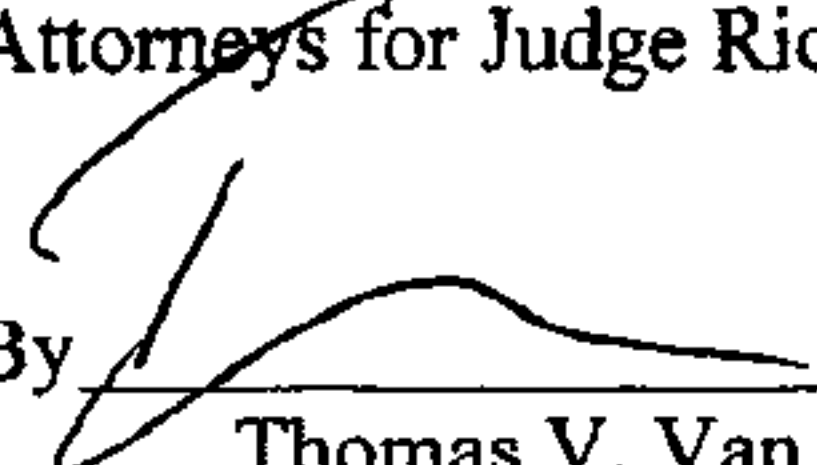
For the above stated reasons, Judge Postma respectfully requests the ACJC to dismiss Complaint No. 2010-005 in its entirety. Alternatively, he asks that the ACJC dismiss the complaint without prejudice or hold this matter in abeyance until it addresses the underlying discrimination and retaliation issues now pending.

¹⁵ *Harris v. Forklift Sys.*, 114 S.Ct.367, 371-72 (1993) (emphasis added).

18 of 30

DATED at Anchorage Alaska, this 18th day of June 2010.

CLAPP, PETERSON, VAN FLEIN,
TIEMESSEN & THORSNESS, LLC
Attorneys for Judge Richard W. Postma

By 
Thomas V. Van Flein, #9011119

Certificate of Service

I certify that a copy of this document was served
via:

- First Class Mail
- Hand-Delivery
- Facsimile
- E-Mail

to the following listed individual(s):

Marla N. Greenstein, Executive Director
Alaska Commission on Judicial Conduct
1029 W. 3rd Ave., Suite 550
Anchorage, Alaska 99501-1944
mgreenstein@acjc.state.ak.us

Matt Jamin
Jamin Law Office
323 Carolyn Street
Kodiak, AK 99615
matt@jesmkod.com

Date: 6/1/10 By: Chelsea Greene

Clapp, Peterson, Van Flein,
Tiemesen & Thorsness, LLC
711 H Street, Suite 620
Anchorage, Alaska 99501-3454
(907) 272-9272 fax (907) 272-9586

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

B. District Court⁶

Judge	2006		2007		2008		2009		Average Number Challenges per year
	Civ	Crim	Civ	Crim	Civ	Crim	Civ	Crim	
First Judicial District									
Miller Ketchikan Appt. 08/30/99	0	6 6d 0p	0	6 6d 0p	0	10 10d 0p	1 1d 0p	9 9d 0p	8
Third Judicial District									
Clark Anchorage Appt. 01/23/03	0	1 1d 0p	3 2d 1p	0	2 0d 2p	0	5 0d 5p	0	3
Easter Anchorage Appt. 06/05/08					0	2 0d 2p	2 2d 0p	0	2
Estelle Palmer Appt. 06/11/03	0	23 20d 3p	0	21 18d 3p	10 0d 10p	24 24d 0p	119 4d 115p	12 12d 0p	52
Illsley Kenai Appt. 06/14/07					1 1d 0p	444 444d 0p	5 0d 5p	106 106d 0p	278
Motyka Anchorage Appt. 07/26/91	3 3d 0p	1 0d 1p	2 2d 0p	4 4d 0p	2 2d 0p	2 2d 0p	0	1 1d 0p	4
Postma Anchorage Appt. 06/14/07			3 2d 1p	0	0	1 1d 0p	3 0d 3p	2 0d 2p	3

⁶"D" signifies "defendant" in both criminal and civil cases.
 "P" signifies "plaintiff" in civil cases and "prosecutor" in criminal cases.
 "U" signifies unknown whether challenge raised by plaintiff or defendant.

If a judge was appointed in the last six months of his or her first year, the number of challenges in that year was not used to calculate the average number of annual challenges for that judge. Blank spaces in the table represent years that preceded the judge's appointment to the current position.

Judge Estelle (Palmer): Judge Estelle experienced a higher than average number of challenges in 2006, 2007, and 2008, mostly from criminal defendants. In 2009, however, he experienced an unusually high number of challenges (115) from civil plaintiffs.

Judge Illsley (Palmer): The number of peremptory challenges filed in Judge Illsley's cases is unprecedented in recent years: 445 in 2008, and 111 in 2009. She explained in her judicial questionnaire that she was "blanket" challenged by criminal defendants for a time in 2008. In response to the peremptory challenge problem, the Kenai court instituted some changes in how it assigned judges. The number was much lower in 2009 but even that number was extraordinarily high compared to other district court judges in this term and in previous years.

Judge Motyka (Anchorage): Judge Motyka has been a judge for almost twenty years. He receives very few peremptory challenges, averaging only four a year during his current term.

Judge Postma (Anchorage): Judge Postma has experienced a low number of peremptory challenges since his appointment in 2007, averaging only three a year.

Judge Rhoades (Anchorage): Judge Rhoades has averaged twenty-one challenges per year in her most recent term. Although this number is higher than the average of fourteen for 2010 district court judges, it is not unusually high.

Judge Wolfe (Palmer): Judge Wolfe's average of seventeen is only slightly higher than the 2010 average of fourteen.

Judge Kauvar (Fairbanks): Judge Kauvar experienced an average of thirteen challenges a year in her current term, which is about average.

IV. Recusal Records - District Court Judges

Recusal Records for District Court Judges Retention Evaluation 2010				
Judge	2006	2007	2008	2009
First District:				
Kevin G. Miller (Ketchikan)	17	21	12	10
Third District:				
Clark, Brian K. (Anchorage)	1	1	1	0
Easter, Catherine M. (Anchorage)			3	3
Estelle, William L. (Palmer)	5	1	2	0
Illsley, Sharon S. (Kenai)			1	3
Motyka, Gregory J.	2	1	0	0
Postma, Richard		0	0	0
Rhoades, Stephanie L.	1	0	2	1
Wolfe, John W. (Palmer)	1	0	0	0
Fourth District:				
Kauvar, Jane F.	1	10	7	4

Aside from Judge Miller, district court judges recused themselves infrequently. This is typical. Judge Miller is the sole district court judge in Ketchikan and a long term resident there. He has relatives who are local attorneys. These circumstances likely contribute to his higher rate of recusal. From 2001-2005 Judge Miller averaged 19 recusals per year. From 2006-2009 he averaged 15 recusals per year, so his rate of recusal is declining.

22 of 30

Individual Results

Table 3 shows the mean score for each judge for each question on the survey. Individual survey results are provided for each judge in separate tables. Jurors used a five-point scale, with *excellent* scored as five, and *poor* scored as one. The closer the jurors' scores were to five, the higher that judge's evaluation by the jurors.

	Fair and impartial to all sides	Respectful and courteous to parties	Attentive during proceedings	Exercised control over proceedings	Intelligence and skill as a judge	Overall performance	
						Mean	Total
Aarseth, Eric A.	4.9	5.0	4.8	4.9	4.9	4.9	183
Bauman, Carl	4.7	4.8	4.7	4.7	4.7	4.7	55
Blankenship, Douglas L.	4.6	4.6	4.6	4.7	4.6	4.6	59
Clark, Brian K.	4.9	4.9	4.9	4.9	4.9	4.9	54
Easter, Catherine M.	4.9	4.9	4.9	4.9	4.9	4.9	57
Estelle, William L.	4.9	4.9	4.9	4.9	4.9	4.9	20
George, David V.	4.8	4.9	4.8	4.8	4.8	4.9	93
Gleason, Sharon L.	4.8	5.0	4.8	4.9	4.9	4.9	48
Hamilton III, Marvin Charles	4.6	4.8	4.4	4.6	4.6	4.6	37
Illisley, Sharon A.S.	4.5	4.7	4.7	4.6	4.7	4.7	55
Kauvar, Jane F.	4.8	4.9	4.8	4.8	4.8	4.8	38
Kristiansen, Kari	4.8	4.9	4.8	4.9	4.8	4.8	116
MacDonald, Michael A.	4.7	4.8	4.8	4.8	4.8	4.8	100
McKay, Patrick J.	4.9	5.0	5.0	4.9	4.9	5.0	304
Miller, Kevin G.	4.7	4.9	4.8	4.8	4.7	4.8	71
Moran, Anna M.	4.9	4.9	4.7	4.8	4.8	4.9	51
Motyka, Gregory J.	4.7	4.7	4.6	4.6	4.6	4.6	50
Pallenberg, Philip M.	4.9	4.9	4.9	4.9	4.9	4.9	43
Postma Jr., Richard W.	4.9	5.0	4.9	4.9	4.9	4.9	57
Rhoades, Stephanie	4.8	4.9	4.8	4.8	4.8	4.8	36
Rindner, Mark	4.9	4.9	4.9	4.9	5.0	5.0	32
Smith, Jack W.	4.9	4.9	4.9	4.9	4.9	4.9	93
Spaan, Michael	4.8	4.9	4.8	4.9	4.9	4.9	263
Stephens, Trevor	4.9	4.9	4.8	4.8	4.9	4.8	99
White, Vanessa	4.9	5.0	5.0	4.9	4.9	5.0	47
Wolfe, John	4.7	4.9	4.7	4.8	4.8	4.8	29

23 of 30

Richard W. Postma, Jr.

Retention 2010 Juror Survey Comments

- No, the judge did a great job.
- None. He did a great job.
- The only suggestion would be to "brush up" on how different jurisdictions operate. Otherwise, I felt he was very accommodating and professional.
- No suggestions; I was very impressed with how well run the court was.
- Judge doing a good job in the courtroom.
- I was very impressed with the way Judge Postma conducted court. It was very easy to understand proceedings as presented. You felt that he really appreciated you.
- I think he did a great job. He has personality and was friendly and respectful. The experience was educational and actually interesting.
- Judge Postma was great. He was fair and had a respectful attitude towards all involved.
- Judge Postma was very cool and understanding to both parties.
- Just stay the way he is. It is refreshing to see someone so kind, caring and respectful. He also has a sense of humor which is great. He puts you at ease, and made the experience an easy one.
- I especially liked the way he handled the punishment part of sentencing. He stated that the jury found the defendant guilty and that the crime was in the past. Now we were looking toward the future to remedy the situation. He was patient, firm and yet kind in speaking to the defendant, much like a parent would be. I think that his tone was very beneficial to the defendant.
- He is really good.
- None. I was very impressed with his interactions with everyone connected with the trial.
- None whatsoever. Judge Postma explained the law so a twelve year old could understand the proceedings and clarified all questions and loose ends as soon as they arose. He is exactly what a judge should be.
- Continue to do just as he did throughout my jury experience.
- Very informative.
- Outstanding job by Judge Postma.
- Judge Postma was awesome!!!
- No suggestions. Thank you Judge Postma for the experience that I will cherish for the rest of my life.

24 of 30



Brewster H. Jamieson, Esq.
Direct Dial (907) 264-3325
JamiesonB@LanePowell.com

May 6, 2010

Maria N. Greenstein, Esq.
Alaska Commission on Judicial Conduct
1029 West Third Avenue, Suite 550
Anchorage, Alaska 99501-1944

Re: *Judge Richard W. Postma*

Dear Ms. Greenstein:

I was surprised to read the article in the *Anchorage Daily News* yesterday morning regarding Judge Richard Postma. My reaction is simple and unequivocal: the allegations are untrue and the opinion of the unnamed "mental health professional" is wrong. Judge Postma is extremely fit, in every way, for his position, and any suggestion to the contrary is simply incorrect.

I have known Judge Postma for many years in many capacities. He was an associate with my office many years ago. During the years we worked together, he was good-humored, diligent and competent. I closely supervised his legal work, and came to understand his analytical abilities. I also got to know him personally, and I lived through the ups, downs and travails that accompany an intense litigation practice. Richard ultimately placed his marriage and family above his litigation career, and took a position with the State that was more conducive to family life. I respected that decision, but was truly sorry to see him go. I know that he continued to receive high marks from his supervisors, co-workers and professional colleagues—his bar poll numbers reflected the high regard in which he was (and is) held.

After Judge Postma was appointed to the bench, I have had the pleasure of seeing and interacting with him many times and in many situations: we have had coffee and meals together, and we have served on the Civil Rules Committee together. Just last week, I sat with him at a CLE at the Bar Association Convention, trading comments on the topic at hand. He is the very same person, possessing the same wry wit and the same sharp intellect, I have always known.

How can it be that he now supposedly suffers from an unidentified but debilitating "mental disability?" Frankly, if the consequences were not so severe, I would have thought the news article was an elaborate practical joke. I have observed absolutely nothing in his demeanor, his attitude, or his affect that would lend any credence to the accusation. I have

www.lanepowell.com
T. 907.277.9511
F. 907.276.2631

A PROFESSIONAL CORPORATION
SUITE 301
301 W. NORTHERN LIGHTS BLVD.
ANCHORAGE, ALASKA 99503-2648

LAW OFFICES
ANCHORAGE, AK · OLYMPIA, WA
PORTLAND, OR · SEATTLE, WA
LONDON, ENGLAND

EXHIBIT 5
Page 1 of 2

25 of 30

Maria N. Greenstein, Esq.
Re: *Judge Richard Postma*
May 6, 2010
Page 2 of 2

known colleagues who have undergone both subtle and dramatic mental status changes— Judge Postma simply has not undergone any change that I can detect, and certainly no change so severe as to warrant him being labeled “mentally unstable” or “unable to fulfill the duties” of his position. I would also urge extreme caution before taking any “diagnosis” (if, indeed, one was made) at face value. The standards used by psychologists and psychiatrists are extremely vague and imprecise, and rely on subjective judgments of the particular clinician making the diagnosis. Like lawyers, reasonable and well-credentialed psychiatrists routinely disagree.

The most troubling thing is the apparent ease with which Judge Postma’s reputation was so thoroughly destroyed by pure accusation. The inherently vague charge of “mental instability” comes with immediate and irreversible stigma attached. Before this sort of accusation is made public, there must be an extremely rigorous process. At least, the process must include hearing from those of us who have known Judge Postma for years, and who cannot detect even a slight change in his personality.

I would urge the Commission to look upon these charges with extreme skepticism: where is the rash of complaints from attorneys and litigants? Where is the transcript that shows rulings at odds with reason or in violation of clear legal principles? They simply do not exist and for good reason: Judge Postma is an excellent, professional jurist who was selected as part of an extremely rigorous merit selection process—I doubt that process was so flawed as to allow a mentally unstable applicant to win appointment over a numerous slate of other well-qualified candidates.

I fully expect that Judge Postma will be exonerated, and I truly hope that his exoneration will not be too little, too late.

Very truly yours,

LANE POWELL LLC



Brewster H. Jamieson

nlb
cc: Thomas Van Flein, Esq.
999999.1533/172579.1

26 of 30

Dear Alaska Judicial Conduct Commission:

Judge Richard Postma has been working as a District Court judge in the Court House where I worked since 2007. I am a police officer with APD and have been since 1995. I work in the Domestic Violence Unit and have been in Judge Postma's court room where I have observed him firsthand on several occasions to be a very honest, intelligent and ethical judge.

Judge Postma has been an asset to our judicial system. I would encourage you to be fair in your upcoming decisions reference the complaint against Judge Postma.

Sincerely,

Rhonda Street

27 of 30

BRENA, BELL & CLARKSON, P.C.

ROBIN O. BRENA, MANAGING ATTORNEY
JESSE C. BELL, ATTORNEY
KEVIN G. CLARKSON, ATTORNEY
DAVID W. WENSEL, ATTORNEY
ANTHONY S. GUERRIERO, ATTORNEY
LAURA GOULD, ATTORNEY

ATTORNEYS AT LAW

810 N STREET, SUITE 100
ANCHORAGE, AK 99501
TELEPHONE: (907) 258-2000
FACSIMILE: (907) 258-2001
WEB SITE: BRENALAW.COM
KCLARKSON@BRENALAW.COM

May 7, 2010

Commission Members
Marla Greenstein, Esq.
Alaska Commission on Judicial Conduct
1029 West Third Ave., Suite 550
Anchorage, Alaska 99501-1944

Re: Judge Richard W. Postma

Dear Commission Members and Executive Director Greenstein:

The words "shock" and "surprise" would understate my reaction to reading the news articles that appeared in the Juneau Empire and the Anchorage Daily News two days ago regarding the complaint that the Commission has apparently leveled against Judge Richard W. Postma. There are two aspects to my reaction. First, is the fact that the allegations against Judge Postma are completely out-of-sync with my knowledge of, and my experience with, the man. Second, is the cavalier way in which the Commission took a confidential examination of Judge Postma and the resulting opinion from a so-called mental health expert and then referenced both the examination and the report in the Commission's formal Complaint, quoting or paraphrasing the so-called expert's opinions. The Commission and its staff then apparently sent the Complaint and/or a press release to Alaska's newspapers regarding the charges (again referencing the prior confidential mental health examination and the so-called expert's opinions). This is an amazing breach of confidentiality by the Commission and its staff.

The first aspect of my shock and surprise is due to my personal knowledge and experience with Judge Postma. I first met Judge Postma several years ago while he was working at the Lane Powell law firm. At that time while I was serving as Special Bar Counsel and reviewing a bar complaint against another attorney at the request of Steve Van Goor, Richard represented the complaining individual who had filed the ethics charge against the other attorney. I found Richard's conduct in that investigative proceeding to be completely professional, courteous, polite, and quite rational. While the emotions of Richard's client ran high in the matter, Richard maintained a level head and conducted himself professionally, politely and appropriately at all times. My determination in that matter ran counter to Richard's client, but Richard nonetheless conducted himself professionally and appropriately with me at all times both then and thereafter.

I next worked with Richard on a highly publicized and politicized constitutional establishment of religion case in approximately 2006-07 while he was employed as an Assistant Attorney General (just prior to his becoming a District Court Judge). The claim was brought by the

28 of 30

Judicial Conduct Commission
May 7, 2010
Page 2

ACLU and various citizens, Richard represented the State of Alaska defending a newly passed statute that granted a property tax exemption to churches and religious schools for housing they provide to teachers, and I represented churches that intervened in the case. Once again, despite the highly charged and contentious nature of the issue and despite the publicity the case received, Richard conducted himself at all times in a professional, polite, competent and rational manner. Because Richard and I were both working to defend the statute in that case, we had many conversations and interactions. Never, ever, at any time during that case did I suspect or imagine that there was even the slightest "mental health" issue with Richard.

Following that case and his appointment to the bench I would see Richard on a fairly regular basis at the Alaska Club where we would both go to exercise. Again, at all times Richard has presented himself as a normal, mentally healthy, gentleman. Most recently, I saw Richard and spoke with him briefly at the April, 2010 Alaska Bar Convention. Again, I noticed absolutely nothing abnormal or unusual about Richard, only that he was a nice professional Judge with whom it was a pleasure to speak.

The allegation that Richard now suffers from some mental disability that may become permanent strikes me as completely incredible. In my twenty-four year career as an attorney I have met many characters, some of them attorneys, who the average person would consider to be mentally "off" or at least "odd," or who have moderate to serious "anger" issues. I have also, unfortunately, in my years run across several attorneys who are quite challenging to deal with for any number of reasons (e.g., unreasonably disagreeable, lack of civility, ethics or integrity challenges), but I have never experienced, observed or even heard anything regarding Richard that would put him even close to anyone in these categories.

I do not know who the so-called mental health expert it is that the Commission consulted, but perhaps the Commission should seek a second opinion, and then take both opinions with a serious grain-of-salt. So-called mental health experts, whether psychiatrists or psychologists use extremely vague and imprecise standards that are easily manipulated or adjusted to match a particular clinician's subjective views, impressions and biases. Where are the citizen complaints against Judge Postma claiming that he exhibited "anger" or an inability to work well with others? Are there transcripts of court proceedings where he has exhibited this alleged "anger" that allegedly rises to the level of a permanent mental disability?

The second aspect of my shock and surprise arises due to the cavalier way in which the Commission and its staff revealed to the entire world that Judge Postma was examined by a mental health professional and what that so-called professional's opinions were regarding his mental state. "All proceedings, records, files and reports of the commission are confidential and disclosure may not be made except . . . "upon filing of formal charges" and then in that case "only the charges . . . are public". AS 22.30.060(b) and (b)(3). The Commission and its staff had no right to disclose or

29 of 30

Judicial Conduct Commission
May 7, 2010
Page 3

reference the otherwise confidential mental health examination that the Commission required Judge Postma to undergo, let alone to quote or paraphrase the otherwise confidential opinions of the so-called mental health expert.

The Commission's Complaint and press release went well beyond simply making public the allegation or charge that Judge Postma suffers from a mental health disability that may become permanent. Instead, the Commission's Complaint and press release disclosed the existence of a confidential mental health examination, and then also disclosed the confidential opinions of the mental health professional who conducted the examination. Worse yet, by disclosing these facts, but nothing more, the Commission cloaked the examination, the mental health expert, and his/her opinions with an aura of credibility. I find it outrageous that a Judge can be so easily and blithely defamed and damaged in this state.

I fully expect Judge Postma to be exonerated. And, I seriously hope that the Commission examines how it and its staff handled the public versus confidential aspects of the proceeding involving Judge Postma.

Very truly yours,

BRENA, BELL & CLARKSON, P.C.



Kevin G. Clarkson

EXHIBIT 7
Page 3 of 3

30 of 30



Law Office of Stephanie Patel

310 K Street, Suite 200, Anchorage, AK 99501
907-264-6778; 907-264-6602(fax); stpatel@gci.net

To: the Alaska Judicial Council

Date: May 10, 2010

Re: Pending proceeding involving Judge Richard Postma

I was shocked to learn of the complaint against Judge Postma. I know Judge Postma not only from appearing in his courtroom, but also from playing recreational soccer with him—both on the same team and on opposing teams—over the last couple of years. I have seen those on the court bench and on the playing field who have anger issues: two places where it’s almost certain to come out. I have NEVER seen Judge Postma anything but courteous, humble, judicious in all that he says, and fair to all he meets. If he has a “mental illness” we should all be so lucky. I have heard things said about him over the time that he has been on the bench, and every bit of it has been positive. Far from bringing the judiciary into disrepute, he has lifted the standard. I have seen anger displays emanating from the bench, I have seen litigants and attorneys treated with contempt from the bench, I have seen things that I thought impaired the public respect for the judiciary—yes, I have specific instances, if anyone wants to know—but never have I seen anything of that nature from Judge Postma.

I can with all candor state that in discussing this shocking news with others who know Judge Postma in the legal community and—in my particular case—in the soccer community, I have been met with the same response from all who know him: “This is not the Richard Postma we know.” It is clear that *he* has not brought disrepute upon the judiciary in the public eye. However, the very fact that such a complaint would be pursued has already brought the judiciary into disrepute. The public cannot help but wonder what machinations are going on behind the scenes to the detriment of the public good. There are three or four local judges who, in my opinion—based solely on their performance in the courtroom or poor judgment in the public arena—do not belong on the bench. There are many judges who are adequate. And then there are the good judges. Judge Postma belongs in the latter category.

I had one written decision from Judge Postma, following an evidentiary hearing, and although it went against my position, I found it to be well thought out, supported by law, and a credible interpretation of the evidence. During the hearing he showed a very good grasp of the issues and the rules of evidence. Not only do I respect Judge Postma’s courtroom demeanor, I came to respect his legal reasoning.

It is not just Judge Postma’s reputation and career on the line here. It is the respect that the public has for fairness and consistency. I have no idea what the personnel issues are that have spawned this tempest, but I do know that if they are more important than how a judge handles himself on the bench and in public, then we’re all in trouble.

Sincerely,


Stephanie Patel