

No. 200,701-5

SANDERS, J. (concurring) — Four justices endorse suspending the Honorable Judith Raub Eiler without pay for five days. Four justices find suspension without pay for 90 days appropriate. Both choices leave much to be desired, but I believe suspension for five days without pay presents the lesser of two evils we could loose upon Judge Eiler. I endorse such a result only to avert the dissent’s undeservedly harsh sanction. Accordingly I agree with the lead opinion in result only, and I write separately to explain why I believe reprimand presents the appropriate sanction.

ANALYSIS

I agree with the lead opinion that Judge Eiler did not violate Canons 1, 2(A), 2(B), or 3(A)(4) of the Code of Judicial Conduct (CJC). *See* lead opinion at 16-17. I also agree Judge Eiler violated Canon 3(A)(3), which was proved by clear, cogent, and convincing evidence. *Id.* at 14. However, I believe the lead opinion’s unpaid five-day suspension is disproportionate with past sanctions doled out for similar conduct. I would hold Judge Eiler should suffer the sanction of reprimand for violating Canon 3(A)(3).

❖ We review Commission on Judicial Conduct (Commission)

recommendations de novo. *In re Disciplinary Proceeding Against*

Anderson, 138 Wn.2d 830, 843, 981 P.2d 426 (1999). “De novo review of judicial disciplinary proceedings requires an independent evaluation of the record as the court is not bound by the Commission’s findings or conclusions.” *Id.* (citing *In re Disciplinary Proceeding Against Turco*, 137 Wn.2d 227, 246, 970 P.2d 731 (1999)). We independently determine if the judge violated the CJC and, if so, impose the proper sanction. *Id.*

- ❖ The lead opinion imposes a sanction of suspension without pay for five days. Lead opinion at 2, 25. While this represents an improvement over the Commission’s sanction of suspension for 90 days without pay, it still departs from sanctions imposed in analogous cases. While the lead opinion notes aggravating and mitigating factors, it pins its departure primarily on Judge Eiler’s disciplinary history: A reprimand in 2005 for similar conduct. “[S]ince a reprimand has proved ineffective at changing Judge Eiler’s conduct and demeanor in the past, and since Judge Eiler has defended her conduct as a matter of judicial philosophy, the more serious sanction of suspension is warranted here.” *Id.* at 22-23.

Prior disciplinary action is merely 1 of 14 nonexclusive factors we analyze to determine the proper sanction. *See* Code of Judicial Conduct Rules of Procedure (CJCRP) rule 6(c)(2)(D);¹ *see also In re Disciplinary Proceeding Against Deming*,

108 Wn.2d 82, 119-20, 736 P.2d 639, 744 P.2d 340 (1987). The lead opinion's overreliance on this factor exaggerates its import.

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- ¹ (c) **Mitigating/Aggravating Factors.** Whenever the commission finds grounds for discipline, it shall consider the following nonexclusive factors in determining the appropriate discipline to be ordered:
- (1) *Characteristics of Misconduct.*
 - (A) Whether the misconduct is an isolated instance or evidence of a pattern of conduct;
 - (B) The nature, extent, and frequency of occurrence of the acts of misconduct;
 - (C) Whether the misconduct occurred in or out of the courtroom;
 - (D) Whether the misconduct occurred in the judge's official capacity or in the judge's private life;
 - (E) Whether the judge flagrantly and intentionally violated the oath of office;
 - (F) The nature and extent to which the acts of misconduct have been injurious to other persons;
 - (G) The extent to which the judge exploited the judge's official capacity to satisfy personal desires; and
 - (H) The effect the misconduct has upon the integrity of and respect for the judiciary.
 - (2) *Service and Demeanor of the Judge.*
 - (A) Whether the judge has acknowledged or recognized that the acts occurred;
 - (B) Whether the judge has evidenced an effort to change or modify the conduct;
 - (C) The judge's length of service in a judicial capacity;
 - (D) *Whether there has been prior disciplinary action concerning the judge;*
 - (E) Whether the judge cooperated with the commission investigation and proceeding; and
 - (F) The judge's compliance with an opinion by the ethics advisory committee shall be considered by the commission as evidence of good faith.

CJCRP rule 6 (third emphasis added) (footnote omitted).

Judge Eiler's past disciplinary record indicates that in January 2005 she stipulated that she had violated CJC Canons 1, 2(A), 3(A)(1), 3(A)(3), and 3(A)(4). The sanction in that separate proceeding, which involved violations of five canons, was reprimand. In contrast, here Judge Eiler violated only one canon: 3(A)(3). It does not make sense to impose a significantly harsher sanction for a significantly lesser violation. We should impose a sanction that is appropriate for the conduct. *Deming*, 108 Wn.2d at 117-20.

Case law supports reprimand. As the lead opinion thoroughly explains, cases involving similar conduct have generally resulted in reprimand. Lead opinion at 22 n.11 (“*See, e.g., In re Schapiro*, 845 So. 2d 170 (Fla. 2003) (judge reprimanded for belittling, embarrassing, and yelling at attorneys, including calling them ‘stupid’); *Ex parte Haymans*, 767 So. 2d 1173 (Fla. 2000) (judge reprimanded for ongoing pattern of rudeness); *In re Wood*, 720 So. 2d 506 (Fla. 1998) (judge reprimanded for rude behavior after prior admonishment); *In re Inquiry Concerning a Judge re Wright*, 694 So. 2d 734 (Fla. 1997) (judge reprimanded for two occasions of rude and inappropriate conduct, including telling a party to ‘keep your mouth shut’); *see also Miss. Comm’n on Judicial Performance v. Sutton*, 985 So. 2d 322 (Miss. 2008) (reprimand for verbally abusing litigant *and* for ex parte contact); *In re Discipline of Horan*, 85 N.J. 535, 428 A.2d 911 (1981) (per curiam) (reprimand for conducting trial in impatient, undignified, and discourteous manner, and for insulting remarks toward litigant).

The lead opinion recognizes that “even some cases in which *reprimands* have been issued involve somewhat *more serious misconduct* than that at issue here.” Lead opinion at 22 n.10 (emphasis added); see *In re Judicial Disciplinary Proceedings Against Michelson*, 225 Wis. 2d 221, 224, 591 N.W.2d 843 (1999) (reprimand for angrily telling litigant, “I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut”); *In re Complaint Against Lindner*, 271 Neb. 323, 326, 710 N.W.2d 866 (2006) (reprimand appropriate sanction for harsh, angry, and racially derogatory reference to litigant who required an interpreter).

An unpaid five-day suspension is too harsh a sanction. *Dodds v. Comm’n on Judicial Performance*, 12 Cal. 4th 163, 906 P.2d 1260, 48 Cal. Rptr. 106 (1995) (*censure* too harsh a sanction for rudeness, hostile interruptions, yelling, biased jokes, and interfering with an investigation). While Judge Eiler sometimes acted discourteously, even rudely, her conduct did not rise to that of other judges whose behavior warranted suspension. If reprimand is the appropriate sanction for egregious conduct such as racial slurs (*Lindner*, 271 Neb. 323) and personal attacks of a sexual nature (*Michelson*, 225 Wis. 2d 221), Judge Eiler—who refrained from that degree of ignobility—should not suffer suspension. While the CJCRP factors largely militate against Judge Eiler, the lead opinion’s punishment goes too far.

If I were not compelled today to concur with the lead opinion in result only, I would impose the sanction of reprimand for Judge Eiler's violation of Canon 3(A)(3).

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:
