(No. 08-CC-1 Respondent reprimanded.)

In re CIRCUIT JUDGE MICHAEL J. CHMIEL, of the Circuit Court of the Twenty-Second Judicial Circuit, Respondent.

Order entered November 19, 2010

SYLLABUS

On February 25, 2008, the Judicial Inquiry Board filed a complaint with the Courts Commission, charging respondent with willful misconduct in office and other conduct that is prejudicial to the administration of justice and brings the judicial office into disrepute in violation of the Code of Judicial Conduct, Illinois Supreme Court Rules 61, 62 and 63. In summary form, the complaint alleged that respondent's conduct on June 16, 2007, in presiding over an emergency bond hearing, constituted impropriety and the appearance of impropriety. The complaint also alleged that respondent engaged in *ex parte* communications on June 16, 2007, and that respondent gave false and misleading testimony to the Judicial Inquiry Board on October 12, 2007.

Held: Respondent reprimanded.

Sidley Austin LLP, of Chicago, for Judicial Inquiry Board.
Lupel Weininger LLP, of Chicago, for respondent.

Before the COURTS COMMISSION: FREEMAN, DE SAINT PHALLE, McBRIDE, McDADE, WEBBER, commissioners, ALL CONCUR.[1]

ORDER

On February 25, 2008, the Illinois Judicial Inquiry Board (Board) filed a three-count complaint with the Illinois Courts Commission against respondent Judge Michael J. Chmiel. The complaint alleges willful misconduct in office and other conduct that was prejudicial to the administration of justice and brought the judicial office into disrepute. Count I charges a violation of the Code of Judicial Conduct, Supreme Court Rules 61, 62, and 63(A)(1) (Code) and alleges impropriety and the appearance of impropriety as a result of conduct occurring on June 16, 2007. Count II charges respondent violated the Code, Supreme Court Rule 63(A)(4) by engaging in *ex parte* communications. Count III charges respondent gave false and misleading testimony to the Board on October 12, 2007, in violation of Supreme Court Rules 61 and 62(A).

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[1]Commissioner John A. Ward, who acted as case manager and chairperson at the hearing, did not participate in the final disposition of this matter due to his retirement from judicial office.

COUNT I

Count I of the complaint in this case stems specifically from an emergency bond hearing conducted by respondent on Saturday, June 16, 2007 in McHenry County. Respondent set a $10,000 bond for David Miller, the brother of Robert Miller, who is a friend of respondent, on the felony charge of obstructing justice. The obstruction charge arose out of an incident in which it was alleged that David Miller dumped part of an overweight truckload of materials he was carrying after a Cary, Illinois police officer directed David Miller to a weigh station.

The following background facts come from the testimony of respondent, other witnesses and exhibits presented at the Courts Commission hearing and are relevant to Count I.

Respondent graduated from law school in 1990. Upon graduation, he worked as a law clerk for a bankruptcy court judge in Rockford, Illinois. Respondent was an associate lawyer and subsequently a partner with a law firm in Crystal Lake, Illinois, from 1993 through 2002. In 2002, respondent started his own firm and a large part of his practice involved local government law. Respondent knows Robert Miller. Robert Miller's family is influential in McHenry County politics. Robert Miller has been an officer of the Algonquin County Township since 1993. Robert Miller is also an Algonquin Township Highway Commissioner. As commissioner, Miller runs the Algonquin Township Road District. At one time, respondent knew Robert Miller to be a Republican Party Committeeman. Respondent met Robert Miller in 1994 as a client of the firm where respondent worked as an associate. Respondent brought the Algonquin Township Road District as a client to his new law firm. Respondent had a political relationship with Miller, supported him in his election campaign and his law firm made donations to Miller's campaign in 2003 and 2004. Respondent and Robert Miller have served together on the Salvation Army Board. Respondent was appointed to fill a vacancy in the circuit court in 2004. Respondent ran for election and was elected a circuit court judge in 2006. In 2007, respondent was assigned as presiding judge of the Family Law division in the 22nd Judicial Circuit.

On Saturday June 16, 2007, respondent learned David Miller, Robert Miller's brother, had been arrested. Respondent knew David Miller to be Robert Miller's brother. Respondent knew that in June of 2007, the normal procedure in McHenry County for felony arrestees was to have their bond set at the next regularly-scheduled bond court, which was held Monday through Saturday at around 8:30 a.m. Respondent knew no bond court was scheduled on Sundays and that an associate judge was assigned to handle bond court. Someone who was arrested after Saturday bond court normally would remain in custody until Monday morning's bond court. Respondent was not assigned to handle bond court that day. Judge Zopp was the duty judge on June 16, 2007. Respondent first learned that David Miller was in the process of being arrested during a telephone conversation with Robert Miller. He also learned during a subsequent phone call from Robert Miller's daughter Rebecca Lee that David Miller had actually been arrested and was in custody. Respondent said there was a telephone discussion with Robert Miller about convening a bond hearing for David Miller. Before 2:44 p.m. on June 16, 2007, respondent had spoken to Robert Miller but not to Rebecca Lee, the State's Attorney's office, or anyone from the Cary Police Department. Before talking to Rebecca Lee, respondent understood that efforts were underway to find an assistant state's attorney to have a bond hearing for David Miller.

Robert Miller conveyed to respondent that there were some concerns about the charge. Respondent knew that for him to conduct the hearing at 2:45 p.m. on a Saturday was unusual. Respondent had never held an emergency rights hearing and the first time he did this was for the brother of a friend.

Respondent called and left a voicemail message for Rebecca Lee. Later he spoke to her on her cell phone. Rebecca Lee told respondent her uncle had been arrested and asked respondent if he would conduct an emergency rights hearing. Respondent said as long as there was an agreement on both sides he would do it. Respondent held the bond hearing and David Miller was released on bond. There were newspaper articles a few weeks later that were critical of respondent conducting an emergency hearing for the brother of a friend. Respondent agreed, in retrospect, that holding the bond hearing that day for the brother of a friend may have created the appearance of impropriety.

His supervising judge, Judge Michael John Sullivan, called respondent in for a meeting to discuss the matter even before the articles appeared. Several days later, Judge Sullivan called a meeting with all the circuit court judges of the 22nd Judicial Circuit. Respondent became aware that Judge Sullivan and Judge Sharon Prather were going to refer the matter to the Board for an investigation. Respondent was aware that lawyers in the community were also critical of the hearing.

Judge Prather was the presiding judge of the Criminal Division in McHenry County in June of 2007 and she learned about the emergency bond or special rights hearing from Tom Carroll, the First Assistant State's Attorney of McHenry County. The hearing raised concerns with Judge Prather because she felt it did not follow the procedure that was established in McHenry County for an associate judge to take care of any emergency arising in the county, because respondent was not the assigned judge that Saturday, and because she was aware of the relationship between respondent and Robert Miller. Judge Prather said there were circumstances that could justify holding a special rights or emergency bond hearing after regular working hours, but she had never conducted one. She opined that this was not an emergency but agreed respondent said there was some question about the charges and the next day was Father's Day. Her opinion was that the perception could be that the bond hearing was conducted as a political favor for Robert Miller by respondent. Judge Prather testified about her knowledge of the relationship between respondent and Robert Miller. Judge Prather was concerned that there was an appearance of impropriety. She relayed the information to Chief Judge Sullivan. Judge Prather forwarded a letter to the Board about her concerns involving the bond hearing.

Judge Sullivan was the chief judge of the 22nd Judicial Circuit of McHenry County in June 2007. He learned from Judge Prather about the special bond hearing conducted on June 16, 2007. Judge Sullivan was also aware that respondent and Robert Miller knew each other and were involved politically in things together before respondent became a judge. He knew respondent's prior law practice involved representing municipal entities, one of which was the Algonquin Township Road District. The conversation Judge Sullivan had with Judge Prather was about a concern of whether or not there was a violation of the Code, specifically, the appearance of impropriety. Judge Sullivan explained the normal way rights hearings were held was by an associate judge, Monday through Saturday around 8:15 or 8:30 every morning. There is no bond or rights court on Sundays. The duty judge would also typically be called for an after-hours situation. Judge Zopp was that assigned judge. An emergency situation could include a person who was going to be taken into custody but an illness or death would warrant an emergency bond or include a person that the parties did not

want to be in the jail population, like a person cooperating with the State.

Respondent told Judge Sullivan his recollection of how the rights hearing for David Miller came about. Respondent related he received a call from Rebecca Lee and that there was someone in custody and she wanted him released on bond. Respondent said he could not do anything unless there was an agreement with the assistant state's attorney. Respondent got another call from Lee and was told that there was an agreement to do the hearing with Assistant State's Attorney Tiffany Davis. The defense attorney and State had agreed to a $10,000 bond. The charges involved several traffic tickets, but the main reason for the bond hearing was the on-site arrest of a Class 4 felony. The bond hearing was conducted, the emergency was the next day being Fathers' Day.

Judge Sullivan told respondent that he thought holding the bond hearing could create a perception of impropriety. That was based on Judge Sullivan's knowledge that only David Miller had a hearing that afternoon, and that he was someone known to be a relative of a friend of respondent. Judge Sullivan had a general knowledge of the relationship between respondent and Robert Miller. Judge Sullivan called a meeting with respondent and the other circuit court judges on July 9, 2007. Most of the judges were concerned about the appearance of favoritism. The judges or some of them felt an obligation on their part under the Canons to report it as a violation of the rules. Judge Sullivan then indicated he would write the letter. Respondent indicated he was sorry for all the turmoil it had created.

Rebecca Lee is an attorney in private practice and had been an attorney with the McHenry County State's Attorney's Office before entering private practice. Robert Miller is her father, David Miller is her uncle. She was acquainted with respondent through her parents. Lee first met respondent at township events when she was a teenager. Lee agreed respondent had a professional relationship with her parents. It developed into a social relationship and she would say it also became a friendship.

On Saturday, June 16, 2007, her grandmother, David Miller's mother, first alerted her to the arrest of her uncle. Lee called the Cary Police Department and had phone conversations with various family members, including her father. Lee learned her uncle was already in custody on a felony charge and the only way he could get out of jail earlier than Monday was if a bond could be set by a judge. Lee learned from her father that he had spoken to respondent and that respondent would agree to preside over a bond hearing if the State would agree to it. Lee made a number of phone calls to assistant state's attorneys to see if one would be available for a bond hearing. Eventually, Lee spoke with Tom Carroll who said it could be done if there was a person available. Carroll and Lou Bianchi, the State's Attorney of McHenry County, would have been willing to appear but both were unavailable at that time. Tiffany Davis, however, was available and she did represent the State at the bond hearing. Lee did speak to respondent on the phone before the hearing and told him that the State's Attorney's office had agreed to a bond hearing. Respondent indicated he had some other obligations, he was at a child's baseball league game but would be available an hour later. Lee also testified that she and the State had agreed before the hearing that the bond would be $10,000, which was a typical bond for a Class 4 felony. Lee represented her uncle at the bond hearing and later through the criminal proceedings. He was found not guilty by another judge in the 22nd Judicial Circuit.

Lee had some experience with special bond courts when she was an assistant state's attorney. She recalled one situation where an attorney was arrested and another situation where a police officer

had been arrested. The officer's attorney wanted an emergency bond set because he did not want the officer to sit in jail overnight. Lee said the hearings were conducted as a professional courtesy more than anything else. Lee was aware of bond hearings being conducted after work hours and outside the courthouse where the defense attorney and state's attorney presented an agreed order to a judge.

Count I alleges that respondent's conduct on June 16, 2007 was willful misconduct, was prejudicial to the administration of justice, and brought the judicial office into disrepute. The Board alleges that respondent acted improperly in conducting a special bond hearing on June 16, 2007 and that an appearance of impropriety arose from his conduct on that date.

In its post-hearing submissions, the Board specifically argues that respondent's conduct in holding a special bond hearing for the brother of his friend Robert Miller created an appearance of impropriety and also established an act of impropriety. The Board directs our attention to the following Illinois Supreme Court Rule 62, Canon 2, which provides in relevant part:

> "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities
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> ***
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> B. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. A judge should not lend the prestige of judicial office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence the judge."

We address the appearance of impropriety first and point out that the Board bears the burden of proving this and all other allegations of the complaint by clear and convincing evidence. *In re Karns*, 2 Ill. Ct. Comm. at 33; Ct. Comm. Rule 11. In this regard, our focus is on the perception of the general public to the conduct at issue. Based upon our review of the complaint, answer, transcripts of the proceedings before the Board, the testimony before the Commission, and the exhibits admitted into evidence on August 24 and 25, 2010, we find the Board has met its burden to establish that an appearance of impropriety occurred by the conduct of respondent on June 16, 2007. We conclude that when respondent agreed to conduct a bond hearing after he received a phone call from Robert Miller, a long-time friend, former client and someone well-known in McHenry County politics, who relayed that Miller's brother David was in the process of being arrested, the public would perceive this as a favor and an impropriety.

This conclusion is supported by the following facts. First and foremost, there is no question that respondent and Robert Miller had a long-standing political, professional, and social relationship. David Miller is Robert Miller's brother and was the only person for whom a special bond hearing was held that Saturday afternoon. Respondent was not assigned to do bond hearings that day. There were procedures in place, and another judge, Judge Zopp, was the on-duty judge and was required to be available to hear emergencies that Saturday. In addition, that information was published for those in McHenry County who might need to contact the assigned duty judge to conduct an emergency hearing. There was testimony that the situation involving David Miller would not appear to some as an emergency. Also, there were the opinions of judges, criticism from local practicing attorneys, and the negative newspaper articles which all indicated concerns about the appearance of the special bond hearing. Convening a special bond hearing at the request of a friend for the friend's

brother could create an appearance with the general public that a social relationship or private interest prompted the hearing. Finally, respondent himself conceded that his conduct, in retrospect, created the appearance of impropriety.

Therefore, we conclude the Board has met its burden of proof with respect to establishing the appearance of impropriety by respondent in holding a bond hearing on June 16, 2007.

As to whether respondent committed an actual impropriety by conducting the special hearing, we conclude the Board has not established this charge by clear and convincing evidence. The issue here is not what the public perceived but whether the Board has established by clear and convincing evidence that respondent's relationship with Robert Miller influenced the judge's conduct that day.

We begin by pointing out that there is no rule that prohibits respondent from setting a bond for David Miller solely because he is the brother of the judge's friend. We also note that no court rule prevented respondent from conducting a special bond hearing that Saturday afternoon. The fact that another judge was assigned to emergency duty that day did not strip respondent of his authority to conduct a bond hearing. Further, the State's Attorney's office agreed to participate in the hearing, knowing that respondent had been contacted by Rebecca Lee and even Robert Miller. The State's Attorney's office knew that Lee was trying to get a bond set for her uncle, David Miller, so he would not have to spend Saturday and Sunday in jail. When Lee called Carroll, she told him how her uncle had been arrested. Lee explained that her uncle had been pulled over for a traffic offense and then had been directed to a weigh station because there was a question of driving an overweight vehicle. Lee said her uncle apparently decided to spill his load along or off the road. He allegedly did this so when he got weighed, his weight would not be sufficient to warrant an overweight truck citation. Lee told Carroll that her uncle thought getting a ticket for littering would be better than getting ticketed for an overweight vehicle, which tend to be very expensive. Lee said her uncle was not counting on the fact that doing so could be construed as obstructing justice, but that was why he was being held by the Cary Police Department. Although the witnesses who testified indicated that the bond hearing was somewhat unusual and probably would not qualify as an emergency to most people, there was no testimony about the violation of any rule or specific prohibition on setting a bond. In fact, there was testimony that bonds have been set under similar circumstances.

From the outset, respondent told Lee he would not conduct a hearing without the State's agreement to appear and the State's agreement on the bond amount. The testimony also established that the bond set for this felony charge was $10,000 and this amount was typical for a Class 4 felony obstructing justice charge. The sworn testimony of Carroll also established that the State's Attorney's office was aware that the request for a bond hearing had been initiated by a phone call to respondent. Aware of all these facts, the State's Attorney's office had no objection to participating in the hearing that afternoon. In fact, Carroll made phone calls himself in an effort to facilitate the bond hearing. These facts do not suggest that an impropriety occurred.

Respondent said he felt that he should respond to a request for a bond hearing and he agreed to hold a hearing only under the circumstances that the State's Attorney's office agree. In June of 2007, respondent had not been a judge for very long, only about 2-1/2 years. The real concern raised by the judges working with respondent was not that he had committed an act that was improper, but how the public would perceive his conduct in light of his relationship with Robert Miller.

In light of all the above, we conclude the Board has not established that an act of impropriety occurred in setting the $10,000 bond for David Miller.

COUNT II

In Count II of its complaint, the Board alleges that respondent's conduct on June 16, 2007, violated the proscription contained in Canon 3(A)(4) of the Code of Judicial Conduct against a judge engaging in *ex parte* communications. Canon 3 of the Code of Judicial Conduct (Ill. Sup. Ct. R. 63) provides in relevant part:

> "A Judge Should Perform the Duties of Judicial Office Impartially and Diligently.
> *** In the performance of [judicial duties], the following standards apply:
> A. Adjudicative Responsibilities.
> * * *
> (4) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:
>
> (a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
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> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
> (ii) the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond."

The Committee Comments to this provision clarify that although certain *ex parte* communication is approved under paragraph A(4) to facilitate scheduling and other administrative purposes and to accommodate emergencies, in general "a judge must discourage *ex parte* communication and allow it only if all the criteria stated in paragraph A(4) are clearly met."

In addition to the factual background already set forth, we recount additional, specific facts relevant to the allegation of *ex parte* communication set forth in Count II. Respondent testified, that although he and his wife previously had a social relationship with Robert Miller and his family, that relationship had "deteriorated over time" because respondent's wife did not garner Miller's support for a McHenry County elected position during the 2005-06 election cycle. Respondent characterized his relationship with Miller as being "basically dormant" at the time of this incident.

Respondent testified in detail regarding the events of Saturday, June 16, 2007. According to respondent, he was at a Little League baseball game with his family when he received a voice mail message on his cell phone from Miller. Telephone records show that respondent returned Miller's call at approximately 12:30 p.m. Because respondent was at a Little League game and Miller was also out with his family, respondent characterized this conversation as "disjointed." Miller told respondent that Miller's brother, David, had been arrested in connection with a traffic matter, but he was uncertain of the specific charge. As Miller received more information concerning his brother and the charges, he telephoned respondent nearly a dozen times more that afternoon. Telephone records reflect that most of these calls were of only a few seconds duration and were forwarded into respondent's voice mailbox. Respondent testified that he actually spoke to Miller a total of three

times, and that during those conversations Miller raised the possibility of respondent conducting a special bond hearing for David that afternoon, and that efforts were underway to find an assistant state's attorney to appear. Respondent recalled that during these conversations, Miller may have made an "allusion" or "suggestion" that the charge against his brother may not have been valid, but Miller never informed respondent of the exact nature of the charge. Respondent testified that his "hope and prayer was that I would not have heard further" from Miller, and that the situation concerning his brother would be cleared up.

Miller, however, called respondent again at approximately 2:30 p.m., and asked him to contact Miller's daughter, Rebecca Lee, who would be representing David. Respondent then telephoned Lee at both her home and on her cell phone, and eventually made contact with her at approximately 2:45 p.m. It was during his conversation with Lee that respondent first found out that David had been arrested on a Class 4 felony charge for obstructing justice. Lee asked respondent if he would conduct a special bond hearing that afternoon so that David would not have to spend the following Father's Day Sunday in jail. Respondent agreed to conduct the hearing "as long as there [was] an agreement on both sides." Lee told respondent that she had already been in contact with the McHenry County State's Attorney's Office, and that the Office had agreed to send an assistant state's attorney to appear at the hearing. Based upon Lee's representation that an agreement had been reached, respondent and Lee then discussed the logistics of conducting the hearing. Respondent told Lee he was only 15 minutes away from the McHenry County jail, and that the hearing could begin within the next one-half hour. Based upon notes he took at the hearing, respondent recalled that the proceeding began at 3:15 p.m. Respondent testified that during the numerous phone conversations on June 16, he discussed only the logistics of scheduling the special bond hearing, and did not discuss the merits nor substance of the felony charge against David Miller.

Respondent stated that he did not view conducting this special bond hearing as a judicial favor, even though during his prior 30 months as a judge, he had never conducted such a hearing for anyone else, and he did not have the assignment of handling the bond call on that day. Rather, respondent believed that he was doing his duty as a judge, as an individual charged with a felony has a right to be timely brought before a judge for a bond determination. Respondent stated that after conducting the bond hearing on June 16, he had no further contact with this matter in a judicial capacity.

Rebecca Lee testified that on June 16, 2007, she was an attorney in private practice. Four months earlier, she had left the McHenry County State's Attorney's Office, where she had served as an assistant state's attorney from 2003 to February 2007.

That afternoon, she was in her car with her mother and her daughter when she received a call from her grandmother shortly after 1:00 p.m. Lee described her grandmother as being "frantic" and "hysterical" as she informed her that her uncle David had been arrested. Her grandmother asked Lee to represent David, and Lee agreed. Lee then called the Cary Police Department, and discovered that David had been charged with a felony count of obstructing justice. Sometime after 1:00 p.m., Lee then called her father, who had also been trying to call her. Lee discussed with her father the option of pursuing a special bond hearing as a way to have David released earlier. Miller told her that he had already had a conversation with respondent who stated he would preside over such a hearing if the State agreed to it.

Based upon this information, Lee then attempted to arrange the hearing by calling several of her former colleagues in the State's Attorney's office. Because she had recently left the office, she still had many of their personal phone numbers saved in her cell phone. Lee first called Phil Reiman, who served on felony review, and told him that she was looking for someone from the office to appear at a special bond hearing for her uncle. Reiman replied that he was out of town and unable to attend. Lee then called the felony review number and reached Bill Stanton, who was on call that weekend. Again, she stated that she was attempting to find someone to appear for a special bond hearing for her uncle. Stanton was also out of town and therefore unavailable to appear.

It was at approximately 1:30 p.m. that Lee then contacted Tom Carroll, the First Assistant State's Attorney for McHenry County. Lee told Carroll that she was looking for someone from the office to appear at a special bond hearing for her uncle, and believed respondent would preside over the hearing if the State agreed to the arrangement. Carroll was also out of town, but offered to contact Louis Bianchi, the McHenry County State's Attorney. Lee and Carroll spoke again shortly after 2:00 p.m. Carroll told Lee that Bianchi had agreed to the special hearing, and that Bianchi himself could appear at the hearing, but because he was also out of town, he would not be able to do so until 7:00 p.m. Carroll also offered to appear, but he would not be back in town until 6:00 p.m. Because Lee wanted the hearing to take place earlier in the day, she and Carroll considered contacting other assistant state's attorneys who lived closer to the McHenry County jail. To that end, Carroll told Lee that he would send one of his investigators to his office to obtain the contact information of other employees. Lee then thought of Tiffany Davis, with whom she had previously worked, and Carroll told Lee to call her. After Lee apprised Davis of the situation, Davis agreed to appear on behalf of the State. Lee then called Carroll and told him that Davis had agreed. Lee and respondent then talked at approximately 2:45 p.m. Lee informed respondent that she had spoken with the State's Attorney's office, that they had agreed to the special bond hearing, and that an assistant state's attorney would appear. Lee and respondent then discussed setting a time for the hearing at around 3:15 p.m.

Lee testified that there was nothing extraordinary about the proceeding, including the amount of bond, $10,000, which is typical for a Class 4 felony. Lee and Davis had agreed to the $10,000 amount and presented that agreement to respondent. Thereafter, David Miller posted bond and was released. According to Lee, during her two telephone conversations with respondent, she only discussed scheduling matters, logistics and the agreement of the State's Attorney to appear and also to the setting of the amount of bond. Lee did not discuss with respondent the merits of the charge nor the substance of the case against her uncle.

Also introduced into evidence were the sworn statements of Thomas Carroll and Tiffany Davis. Carroll, the First Assistant State's Attorney for McHenry County, stated that on June 16, 2007, he was out with his family when he received a phone call from Lee that her uncle had been arrested and that she hoped to schedule a special bond hearing that afternoon. She indicated that her father had spoken to respondent, who was willing to conduct the hearing as long as an assistant state's attorney was present. Lee asked if Carroll and the State's Attorney's office "could help her out." Carroll told Lee that he would be willing to appear himself, but that he was out with his family. He also told her he would speak with McHenry County State's Attorney Louis Bianchi, to confirm his agreement to this arrangement. Carroll then discussed this matter with Bianchi, who asked him to arrange for someone from their office to appear at the hearing. Although Carroll tried

calling several assistants for whom he had phone numbers stored in his cell phone, they were out of town and unavailable. He then called one of his investigators, and asked him to go to the office and get a list of the phone contacts for other assistant state's attorneys. During his conversation with Lee, the name of Tiffany Davis came up, and he asked Lee to contact her. After Lee spoke with Davis, Davis thereafter called him to confirm that this arrangement was approved by the State's Attorney and that she could appear at the hearing. Carroll told Davis that the office had agreed, and then told her to ask for an appropriate bond so that the hearing would not be perceived as "unusual." Davis told him that the standard amount of bond for a Class 4 felony was $10,000, and Carroll believed that this amount was appropriate in light of the fact that David Miller had no prior criminal record.

Tiffany Davis stated that she received a call from Lee on the afternoon of June 16, 2007, asking if she could participate in a special bond hearing for Lee's uncle. Davis stated that she would do so if she received approval from Carroll. Lee told her that this arrangement had already been approved by Carroll, and that respondent would preside over the hearing. Davis then called Carroll, and received confirmation that she could participate. Davis then spoke with Lee again, and discussed the amount of bond. Lee told her that she would agree to the typical Class 4 bond amount of $10,000. They then agreed to that amount.

As stated, the Board alleges in Count II of its complaint that respondent's "conduct" on June 16, 2007, violated the proscription contained in Canon 3 against a judge engaging in *ex parte* communications, and that this same conduct constituted "willful misconduct in office and other conduct that was prejudicial to the administration of justice and that brought the judicial office into disrepute." Because of the grave nature and serious consequences of charges of judicial misconduct, the Board is required to prove its allegations by clear and convincing evidence, rather than merely by a preponderance of the evidence. *In re Karns*, 2 Ill. Cts. Com. 28, 33 (1983); Ill. Cts. Com. Rule 11. Where the Board alleges, as here, that a judge's misconduct is "prejudicial to the administration of justice" or is such that it "brings the judicial office into disrepute," it must present evidence to substantiate those allegations. *In re Close*, 3 Ill. Cts. Com. 72, 83-84 (1994).

Applying these principles to the matter before us, we hold that the Board has failed to present clear and convincing evidence to sustain this claim against respondent. Count II of the Board's complaint contains only a general allegation that respondent engaged in *ex parte* communications as a result of his "conduct" on June 16. Count II, however, lacks any specific allegation as to exactly *what* "conduct" constituted the *ex parte* communication, and *how* this "conduct" constituted willful misconduct, was prejudicial to the administration of justice and brought the judicial office into disrepute. The Board's general allegation is especially problematic in that this record reflects that numerous phone calls occurred between Robert Miller, Rebecca Lee and respondent on the afternoon of June 16. Rather than set forth the specific instances of *ex parte* communication and explain how each offend Canon 3, the Board has chosen to sweep the multiple conversations that took place that afternoon into one general allegation and to conclude that simply because they occurred they violate the Canon. Indeed, it was not until closing argument that counsel for the Board stated with specificity that the *ex parte* communications at issue in Count II are the conversations between Robert Miller and respondent, and not respondent's conversations with Lee. In fact, there is no suggestion from the Board that the conversations between Lee and respondent violated this Canon.

Based upon the plain language of Canon 3, it is clear that a judge is generally prohibited from initiating, permitting or considering *ex parte* communications which are made "outside the presence of the parties" concerning either a "pending or impending proceeding." Thus, the conversations between Robert Miller and respondent fall squarely within this category. Although respondent did not initiate these communications with Miller, he nevertheless permitted and participated in a series of phone calls with the brother of a defendant charged with a Class 4 felony who was requesting that respondent preside over a specially-scheduled hearing so that bond could be set and the defendant released prior to the next regularly-scheduled bond call on Monday.

This, however, does not end our inquiry. Canon 3(A)(4) sets forth a specific exception to the general rule prohibiting *ex parte* communications for those limited instances where such communication is necessary for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, so long as: (1) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication; and (2) the judge makes provisions promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond. Respondent contends that his communications with Robert Miller on the afternoon of June 16 concerning the special bond hearing fall within this exception. We agree. The record contains no evidence that the *ex parte* communications between Robert Miller and respondent had any impact on respondent's ruling concerning the setting of bond for David Miller, or affected the overall outcome of the case. To the contrary, the evidence supported the conclusion that no party gained a procedural or tactical advantage resulting from the *ex parte* communication. Tom Carroll, Tiffany Davis and Rebecca Lee all testified that the $10,000 amount set for David Miller's bond was the standard bond amount for a Class 4 felony, and that it was appropriate in light of the fact that he did not have a prior criminal record. In addition, both the State and the defense agreed to this bond amount prior to the bond hearing, and presented this agreement to respondent. Respondent also testified that he would not have conducted the special bond hearing nor set a bond absent the agreement of the State. The record further reflects that respondent had no further contact with this case in a judicial capacity after conducting the bond hearing on June 16.

In addition, the record shows that all parties were aware of the *ex parte* communication and were allowed an opportunity to respond. Respondent testified that he told both Miller and Lee that he would conduct the special bond hearing only upon the agreement of the State. To that end, Lee - who had recently left the McHenry County State's Attorney's Office - used her personal contacts within that office to not only inform her colleagues of respondent's willingness to conduct this hearing upon agreement, but also to actually obtain the consent of both the McHenry County State's Attorney and his First Assistant to engage in this proceeding. In fact, both men indicated their willingness to personally appear at the special bond hearing, but could only do so later in the evening. In addition, both parties arrived at the hearing fully advised of the premises, and also in full agreement as to the amount of bail to be set. Thus, there was no secret that the *ex parte* communication had occurred, nor was the content of that communication a secret. Indeed, if the State had wished to object, it had numerous occasions to voice its disagreement and did not do so.

The Board, nevertheless, contends that the limited exception allowing *ex parte* communications contained in Canon 3(A)(4) does not apply because respondent's *ex parte*

conversations also included a discussion concerning substantive matters regarding the nature and merits of the felony charge against David Miller. In support of this assertion, the Board points to respondent's testimony that Robert Miller had made an "allusion" or "suggestion" that the charge against his brother may not have been valid. We find that such a fleeting reference during the conversation between Miller and respondent does not provide the clear and convincing evidence required to support this claim. The Board additionally relies upon an email message sent by respondent to his colleague, Judge Sharon Prather, who was assigned to hear David Miller's case subsequent to the bond hearing conducted by respondent. After Judge Prather inquired of respondent as to whether an "emergency" required that the special bond hearing be conducted, respondent replied: "With the agreement [of the parties], I did not delve into it much, other than to understand that there was some question about the charge and that it was Father's Day weekend." The Board contends that respondent's reference to "some question about the charge" establishes that the *ex parte* communications involved respondent engaging in discussion of substantive matters in connection with the case. Again, we conclude that this isolated and vague reference does not provide clear and convincing evidence to support the Board's allegation. The record contains no suggestion of bias on the part of respondent to establish that the bond hearing was conducted on any basis other than upon the evidence presented in the case. In addition, respondent testified that his communications regarding this matter with Robert Miller and Rebecca Lee were limited only to discussions of the logistics of conducting the hearing, and did not involve the merits of the case.

In sum, we conclude that the Board has failed to meet its burden of proof in regards to Count II of its complaint against respondent.

COUNT III

Finally we turn to the charge, set out in Count III of the Complaint, that respondent violated Rule 61, Canon 1 and Rule 62 (A) of the Code of Judicial Conduct by "making false statements to and misleading the Board." The three specific allegations of wrong-doing all relate to respondent's testimony before the Judicial Inquiry Board on October 12, 2007. They are:

"58. Respondent's conduct on October 12, 2007, constituted willful misconduct in office and other conduct that was prejudicial to the administration of justice and that brought the judicial office into disrepute.

59. Respondent's conduct on October 12, 2007, violated the Code of Judicial Conduct, Illinois Supreme Court Rule 61, Canon 1, which provides:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

60. The Respondent's conduct on October 12, 2007, violated the Code of Judicial Conduct, Illinois Supreme Court Rule 62(A), which provides:

> A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Thus, in considering this charge against respondent we focus solely on assessing the truthfulness and forthrightness of the testimony given by him during the October 12, 2007, proceeding.

This investigative appearance was initiated by a letter sent to respondent on September 18, 2007. That letter advised, in pertinent part:

> "The purpose of your appearance is to respond to questions regarding allegations of misconduct in connection with the matter of *People of the State of Illinois vs. David W. Miller, 07 CF 730.* Specifically, it is alleged that on Saturday, June 16, 2007, Attorney Rebecca Lee called you and advised you that her uncle, David Miller, had been arrested on a felony charge. Because the arrest occurred after the normal bond court had been completed for the day, Attorney Lee asked you to preside over a bond hearing for her uncle. In response, you conducted a special bond hearing at the McHenry County Correctional Facility for the defendant, who is a relative of individuals with whom you have long-standing social and political relationships. Additionally, it is alleged that at the time you conducted the special bond hearing, you were assigned to Juvenile Court, had no involvement in criminal cases pending in the county; were not assigned to criminal rights/bond court; and were not the assigned 'duty' judge."

As delineated in the letter, the focus of the Board's inquiry appears to be a special bond hearing conducted by respondent for a man "who is a relative of individuals with whom you have long-standing social and political relationships" -- a hearing sought by Rebecca Lee, the niece of and attorney for defendant, David Miller, at a time when respondent had no responsibility for conducting such hearings. Put another way, the letter directed respondent's attention to his communications with the niece/attorney of the defendant and the claimed impropriety of respondent going outside of his judicial purview to hold a special bond hearing for a relative of a friend.

During the course of the appearance on October 12, 2007, it became evident that the Board was also concerned about whether the *ex parte* conversations with Rebecca Lee were wrongful under the Code. It also was evident that both respondent and the Board were aware that Robert Miller was the social/political individual in question, but that the Board was, and remained, unaware that there had been a telephone conversation between Robert Miller and respondent earlier in the day on June 16, because respondent did not tell them.

From a careful review of the transcript of the October 12, 2007, investigative interview, we discern the following defensive stances taken by respondent in response to the letter and to questions from the attorney for and members of the Board:

- He admitted the communications with Rebecca Lee occurred and agreed that she had called him without appearing to recognize or acknowledge any particular importance concerning which of them had called the other.
- He asserted the communications with Rebecca Lee involved only logistics – that is, the who, where, and when of the bond hearing – and were thus exceptions to the *ex parte* prohibitions.

- He acknowledged that Robert Miller had been a client, a political ally prior to respondent's appointment and subsequent election to the bench, and a social friend, although not the kind of close personal friend with whom he and his wife shared vacations, holidays, or intimate couple or family dinners.
- He contended that he had assisted with bond hearings and warrant prove-ups in the past, that he had, as a full circuit judge, voluntarily served a rotation as "duty judge," and that he felt performing such services was part of his duty as a judge. He asserted that in the past he had responded to such requests from others (including Rebecca Lee when she was with the State's Attorney's office) through a sense of duty and that his accommodation in this instance was part of that practice and was not motivated by favoritism for a friend.
- In an apparent attempt to bolster this latter contention and to minimize any appearance of favoritism, respondent:
  - ♦ Denied anything more than a passing acquaintance with David Miller, indicating that he was not a friend or former ally or former client.
  - ♦ Reported that David and Robert Miller were "estranged" from one another and had been "at odds" for many years because of the way their father had left an inheritance.
  - ♦ Reported that after he became a judge, his world changed "in the sense that...the telephone stopped ringing on January 1st or 2nd. And *as a part of that*, the relationship with Mr. Miller slowed and at times and often times was fairly dormant. It was a professional relationship. I wasn't doing any work with him. I would see him on occasion at a meeting or so, talk to him on occasion." (Emphasis added.)
  - ♦ Related that the *quality* of his relationship with Robert Miller had also changed following the failure of Robert Miller and his wife to fulfill a long-standing promise to support respondent's wife, Marie, for selection as McHenry County auditor. After that, their "relations, communications or whatever to whatever extent they were continuing with Mr. Miller and his wife, they essentially cooled down and just about stopped and pretty much did stop."

With regard to these representations, the Board has charged that respondent (1) lied when he said that Rebecca Lee had called him about holding the special bond hearing; (2) lied or attempted to mislead through his omission to tell the Board that the first information he had about David Miller's arrest was from Robert Miller, not Rebecca Lee; (3) lied or attempted to mislead through his omission to tell the Board that he had told Robert Miller about the possibility of a special bond hearing; (4) lied or attempted to mislead the Board into believing his relationship with Robert Miller had deteriorated; and (5) lied or attempted to mislead the Board when he reported an estrangement between Robert and David Miller.

BURDEN OF PROOF

It is the Board's burden to prove the allegations of Count III through proof of the

underlying factual claims by clear and convincing evidence. *In re Vecchio,* 96-CC-1 (Feb. 19, 1998), citing *In re Karns*, 2 Ill. Cts. Com 22, 33 (1983).

ANALYSIS

The charge that respondent made false and misleading statements to the Board presents a different *kind* of question than the issues we have considered in Counts I and II. The allegations related to this count require our consideration of intent, of perceptions of relevance and materiality, of the validity of inferences drawn, of the spirit and the atmosphere of the specific appearance of October 12, 2007, and of the way perceptions about that appearance may have been informed by the two subsequent appearances on December 13, 2007, and January 11, 2008, and by interviews done and sworn statements taken prior to the formulation of the charges and the filing of the Board's Complaint on February 25, 2008.

PERSPECTIVE

Prior to rendering our decision with regard to whether the Board has proven each of the allegations of false and misleading statements by clear and convincing evidence, we set out *our* perceptions and understandings that form the foundation for those decisions. We do this to avoid as much duplicative analysis and explanation as possible.

The Board's Initial Inquiry

The letter sent to respondent by the Board on September 18, 2007, framed the issues that would be explored at the October 12, 2007, appearance and, thus, suggested the thrust of the necessary defense. Taking that letter as our own point of departure and trying to determine what was reasonably communicated by its content, it is clear that the concern being addressed by the Board was respondent's conducting of a "special bond hearing" for David Miller at a time when such a hearing was outside the scope of his judicial responsibilities. The letter stated as specific allegations that David Miller was "a relative of" a long-time social/political ally of respondent, that Rebecca Lee had called respondent to advise him of her uncle's arrest and to ask him to preside over a special hearing to set bond for him, and that he had held such a hearing despite the fact that it was outside of his current judicial assignment.

It is clear that David Miller's relevant "relative" was his brother, Robert Miller, and that this fact was known to all of the involved players *and* to the Board at the time the letter was sent. Indeed, that relationship was the basis for and thrust of the allegations of favoritism appearing in the newspaper articles that had precipitated Chief Judge Sullivan's second meeting with respondent and the meeting with the other circuit judges, had led to the judges' consensus that Judge Sullivan should forward a letter to the Judicial Inquiry Board, and had formed the factual basis for the allegations of wrong-doing specified in the Board's letter.

It also appears that, although the Board was unaware of the earlier conversation between Robert Miller and respondent, its members felt that what was known to them was enough to initiate an investigation for impropriety. The letter suggests that the fundamental focus in the investigation

was *whether* respondent acted improperly in conducting the special bond hearing and not *who* had asked him to hold it. The letter focused on the conduct and not on the motive.

A perceptive reader might have anticipated from the letter a concern that the *ex parte* communications with Rebecca Lee were improper, but there was nothing in the letter, including the cited sections of the Code of Judicial Conduct, that should reasonably have alerted respondent that the allegations or their seriousness would change if he had been informed of David's arrest and asked about a bond hearing by someone other than Rebecca Lee.

Meetings With Chief Judge Sullivan and Circuit Judges

The Board has attempted, we believe, to establish a pattern of deception in respondent's failure even before the October 12th hearing to advise Chief Judge Sullivan, Judge Prather, and the other circuit judges that his first information about David Miller's arrest and the first request for a bond hearing came from Robert Miller and not from Rebecca Lee. As was the case with the letter, we believe that it was the "special" nature of the hearing itself and the relationship between respondent and Robert Miller that led to the publication of the newspaper articles and ultimately caused the second meeting with Judge Sullivan and the meeting with the other circuit judges. Allegations of impropriety and concerns about any appearance of impropriety were spreading without any knowledge of Robert Miller's phone call. We believe it unlikely that respondent would have thought it necessary at that time to make that disclosure as being material to the accusations swirling around him.

The Evidentiary Value of the Phone Records and Phone Logs

Through apparent yeoman efforts, the Board was able to distill a veritable blizzard of telephone and cell phone records into some extremely helpful color-coded exhibits reflecting times, origin, recipients, and duration of calls during the relevant period. Exhibit 51A is one such exhibit. It is a log of calls occurring between 12:13 p.m. and 5:10 p.m. on June 16, 2007. While it is invaluable for what it tells us, there is much that it does not. For example, Rebecca Lee and Thomas Carroll indicated under oath that their first conversation took place at different times -- she thought approximately 1:30 - 1:40 p.m., he opined it was about noon or 1:00 -- but neither estimate can be verified because that call does not appear on the log at all. More critically, the log shows that it is possible that 24 calls were made but not completed. Of those, 10 definitely went to voice mail and it is"unknown" what happened with the remaining 14. It is clearly shown that 16 of the calls were completed.

We also, of course, have no record of what messages were left in the voice mails, and we are left to piece that information together through testimony given in appearances, through sworn statements, and at the hearing before the Commission in August 2010 – more than three years after the fact.

The most immediate and pertinent question that these facts pose for us is whether a voice mail message constitutes a "call." In other words, if Rebecca Lee had called respondent's cell phone and left him a message telling him that her uncle had been arrested and charged with a felony and

asking if he would be available to handle a bond hearing that day, would that be "calling him?" Or does "calling" him require that the two of them actually converse? We are of the opinion that a pertinent voice mail message is sufficient to constitute "a call."

We are also asked to rely on phone records to assess whether respondent was attempting to mislead the Board when he stated that his relationship with Robert Miller had gone dormant and had cooled off. The telephone records of both men show a significant number of contacts between 2006 and July 2007, and that fact is certainly suggestive. Again, however, the records do not show us definitively who was participating in the conversations, what the content of each conversation was, or whether the calls were cordial, business oriented, or perfunctory. It may be that testimony has provided some of these details but the records themselves cannot.

Best Evidence of Robert and David Miller

We note that Robert Miller and David Miller, who figure so prominently in several of the claims and much of the evidence related to these charges, did not testify before the Commission. And, although a sworn statement of Robert Miller was listed as Exhibit 4 on one of the early exhibit lists provided to us in August, it was never tendered or entered into evidence. Consequently, neither of these key figures has shed any light on what happened on that June day.

Activities of Principals on June 16, 2007

We are mindful that the events relevant to these charges occurred on a June Saturday when everyone involved was extremely busy. Respondent was monitoring and trouble-shooting a series of Little League baseball games. He was scheduled to manage a game at 4:30 and was attempting to mesh the requested bond hearing with his obligations as a member of the Little League board and the father of a player.

Rebecca Lee had taken her mother and one-year-old daughter to the market and was on her way home when her grandmother called to tell her of her uncle's arrest. She was first in her driveway and then, having gotten her daughter and purchases out of the car, was in her home as she spoke with her father and several persons from the McHenry County State's Attorney's office. She continued trying to coordinate arrangements for the hearing as she joined the rest of her family at her sister's home prior to a planned birthday party for her young nephew.

Thomas Carroll was driving his wife, children, and parents to Glencoe for a pool day that was part of a planned Father's Day weekend get-together when he received the first call from Rebecca Lee. He thought it was around noon, possibly one o'clock. She told him about her uncle's arrest and that her father had spoken with respondent who had indicated a willingness to conduct a bond hearing as long as an assistant state's attorney would be present. He called the State's Attorney and, having learned that he was amenable to their participation in such a hearing, made several calls trying to find someone who was available to represent the State. A second call around 2:10 fit within his "mental timeline of what was taking place that day." He reported running back and forth between the swimming pool and the parking lot to make and receive calls and recalled his wife asking him what he was doing and trying to explain it to her. He was trying to get the arrangements made so he could go back to his family activities.

Tiffany Davis, the Assistant State's Attorney who ultimately appeared for the State at the bond hearing, was wrapping up a garage sale when Rebecca Lee reached her the first time and asked her for "a favor or a huge favor." She had to arrange for the care of her infant twins, to coordinate the time of the hearing, assure herself that Tom Carroll was in agreement with her handling the hearing, and secure an agreed bond – all within a very short window of time.

We note the activities in which people were involved because it accounts for some inconsistencies in the sequences and timing of events as recalled by witnesses and because it provides some explanation for the great number of unsuccessful or uncompleted calls.

Atmosphere of the Inquiries and the Hearing

Lastly, before analyzing the issues, we feel constrained to note that our consideration of Count III has been made significantly more difficult than necessary by what appears to be some acrimony that has developed between respondent and the Board.

Our review of the transcript of the October 12th appearance reveals an appropriate probing by the Board for details pertinent to the allegations set out in the September 18th letter and an air of cautious cooperation on the part of respondent.

Following that appearance, the Board apparently learned about the conversations between respondent and Robert Miller and sought telephone records. Respondent reviewed those records and seemingly realized that they did not square with his earlier testimony regarding the events. Through his attorney he tried to secure or review a copy of the transcript of the October appearance and was refused. The two subsequent appearances are noteworthy for increasingly confrontational conduct on both sides.

At the hearing before the Commission, attention to the very precise detail of each question and each answer and an apparent mutual distrust of honesty and fairness impeded a clear exposition of the facts and has hampered our resolution of the actual issues. Questions and answers that seemed relatively clear or essentially irrelevant to us were the subjects of endless nit-picking on both sides and a resulting loss of clarity. Sifting through minutia to uncover the actual facts has been tedious and needlessly frustrating.

It is within the context of those perceptions and understandings on our part that we examine the specific allegations of wrong-doing by respondent.

FINDINGS AND CONCLUSIONS

1.

Did the Board prove by clear and convincing evidence that respondent lied at the October 12th appearance when he stated that (a) Rebecca Lee had called him and (b) had asked him to hold a special bond hearing?

Considering all of the evidence available to us, we conclude that it did not.

At the October 12th appearance, respondent was asked twice by counsel for the Board about the calls he received from Rebecca Lee. He responded that he had gotten both calls while he was on the Little League baseball fields. He indicated that in the first call, which he thought he had

gotten about 2:00, she inquired about his availability for a special rights hearing for David Miller. He told her he had to manage a game at 4:30 but could do it at another time as long as there was an agreement by the State's Attorney's office to appear. She said she would call a contact in that office to set a time.

Questioning about the second call picked up after a lengthy discussion about special or unusual bond-setting formats. Respondent indicated that he got a second call from Rebecca Lee about ½ hour later at roughly 2:30 saying that the State's Attorney was sending somebody to cover the hearing. He told Rebecca Lee he would call the jail to advise them and that was the end of the call. The questioning about the phone calls was relatively brief during this initial appearance.

Following the close of his examination by Mr. Gallo, respondent was questioned by three members of the Board. All of their questions concerned his recognition of the appearance of impropriety and how he would act if a similar situation would arise in the future.

He was never asked anything else about the phone conversations – not whether he had spoken with anyone else about the situation; not if Rebecca Lee's call provided his first knowledge of David Miller's arrest; not whether he had spoken with Robert Miller. It seems quite clear that the Board was totally focused on the actual and apparent impropriety of the special rights hearing and on the possibility of an improper *ex parte* communication. The questioning was consistent – as were respondent's responses – with the concerns expressed in the September 18th letter to respondent.

Rebecca Lee testified that when she first spoke with her father on June 16th at 1:13 they were exploring various options for securing David's release. She acknowledged that at some point she learned from her father that respondent was willing to do a bond hearing if the State's Attorney would agree to be present and participate, but she could not say during which call or at what time that occurred. She thought that her first call to Tom Carroll, in which she told him her father had spoken with respondent about a bond hearing, had occurred between 1:30 and 1:40.

In general, her testimony suggests that she and her father did not even begin discussing the possible option of a bond hearing until after she received the call at 1:07 from her grandmother and spoke with her father at 1:13. Miller told her that he had already had a conversation with respondent who stated he would preside over such a hearing if the State agreed to it.

Tom Carroll indicated in his sworn statement that he thought his first conversation with Rebecca Lee was about noon or 1:00. He seemed to settle more firmly on noon as his statement continued. But at noon, Rebecca Lee did not know that her uncle had been arrested, nor had she spoken with her father about a bond hearing or respondent's availability. Tom Carroll was sure, however, that she had told him in this first call that her father had spoken with respondent and he had indicated his conditional availability for a bond hearing that day. Mr. Carroll stated that in his second conversation with Rebecca Lee at 2:10, she told him that she had spoken with respondent. His actual statement was: "At some point there was a discussion, and I would think it was this call, where she made an indication that she had spoken to respondent about the bond hearing....I just remember that I believe at this time she made some indication that she had spoken to His Honor." In the third call at 2:27, they did not speak of respondent at all.

At 2:14, Rebecca Lee firmed up her arrangement for Tiffany Davis to cover the hearing. She testified that she called Tom Carroll at 2:27 to confirm that she had finalized the hearing. And she started trying to contact respondent. She testified that she called him twice without success – *possibly on her father's cell phone* – before he finally reached her. She stated that although the calls

from respondent to her were reflected on Exhibit 51A, the ones she had placed to him did not. She testified that her first "*direct*" conversation with respondent took place around 2:30, and Exhibit 51A shows a *completed* call from Robert Miller's phone to respondent's at 2:33. It is also worthy of note that while she testified that was her first *direct* conversation with respondent, she never testified that she had not "spoken" with him by voice mail message prior to that time.

Respondent testified at the hearing before the Commission in August that although he had indicated to Robert Miller his *conditional* willingness to handle a bond hearing that Saturday, he only actually agreed to do it when Rebecca Lee confirmed that all of the arrangements had been made for the State's Attorney's office to participate, that there was an agreed-upon bond, and asked him to handle it inasmuch as his conditions had been met. This is also consistent with her testimony that he told her that he had a matter to cover at 4:30 and would like to have the hearing after that, but she asked that it be held immediately and he agreed.

We do not believe the Board has produced clear and convincing evidence that Rebecca Lee did not make and complete a call to respondent on June 16, 2007, in which she confirmed that David Miller was being held on felony charges and confirmed his willingness to hold the special bond hearing. Nor do we believe that the Board has shown that Ms. Lee did not leave voice mail messages for respondent that would have conveyed that same information or that would have requested that he return her calls. We do not, therefore, find clear and convincing evidence that respondent lied when he testified that Rebecca Lee did make one or more such calls to him.

2.

Did the Board prove by clear and convincing evidence that respondent lied or attempted to mislead the Board when he (a) described the nature of his relationship with Robert Miller after he assumed the bench and (b) described the quality of their relationship after the Millers failed to support Marie Chmiel's bid to become county auditor?

Considering all of the evidence available to us, we conclude that it did not.

Respondent described his relationship with Robert Miller after he was appointed and subsequently elected to the bench as "fairly dormant." He said that he would see him on occasion at meetings and talk to him on occasion. He also testified in October 2007 that after the Millers had reneged on their promise to support his wife Marie's application for selection as county auditor their relationship "essentially cooled down and just about stopped and pretty much did stop."

The telephone records of Robert Miller and respondent and the logs produced from them show numerous phone calls exchanged between 2006 and July 4, 2007, and beyond. One could reasonably infer from those records that the two men maintained an active and on-going relationship. However, such an inference is disputed through the testimony of respondent.

Thus, while the records are highly suggestive, they are not dispositive of the issue. They do not tell us if or how the current number of calls compares to earlier years. They do not tell us what is being discussed or the reasons for the calls. They tell us nothing about the tone of the calls. The records, taken alone, can neither confirm nor refute respondent's evaluation of any changes in the extent and quality of the relationship between the two men.

Robert Miller could, and perhaps would, have added dimension and perspective to the inquiry but, as previously noted, he did not testify orally or by way of sworn statement. Nor was anyone else

questioned about the nature of their relationship during the times alleged.

With regard to attempts to mislead, it would certainly be in respondent's interest to minimize the cordiality of his relationship with Robert Miller. However, we believe intent to mislead, at least in this situation, requires an effort to "sell" a falsehood and, as we have indicated above, we do not find that the Board has proven that the statements are untrue.

Faced with nothing except the telephone records and respondent's characterization of their relationship, we do not find that the Board has proven by clear and convincing evidence that respondent either lied to the Board or attempted to mislead it when he described changes in his relationship with Robert Miller.

3.

Did the Board prove by clear and convincing evidence that respondent lied or attempted to mislead the Board when he testified in October 2007 that the relationship between Robert Miller and David Miller had been one of estrangement for many years?

Considering all of the evidence available to us, we conclude it did not.

Respondent testified that David and Robert Miller has been estranged for many years because of the way an inheritance had been handled by their father. Again we note that it would be in respondent's interest to minimize the strength of Robert Miller's ties with his brother and thereby reduce the likelihood that Robert would make special efforts to get David released from jail for Father's Day.

Rebecca Lee testified, however, that her grandmother, Robert and David's mother, was "frantic" about having David remain in jail on felony charges over the weekend and that her aunt, David's wife, was upset and unhappy about him being away from his children on Father's Day. Robert's motive was the happiness of his mother and sister-in-law and the estrangement, although respondent could not have known that at the time, would not have mattered.

More importantly, however, as with the preceding section, there is no evidence that the assertion of estrangement by respondent is untrue. There is no testimony from David or Robert Miller that either confirms or denies the impaired relationship, nor was Rebecca Lee asked about it when she testified.

There is nothing before us to permit a finding that the Board has proven by clear and convincing evidence that respondent lied or attempted to mislead the Board when he testified to an estrangement between David and Robert Miller.

4.

Did the Board prove by clear and convincing evidence that respondent lied or attempted to mislead the Board through his omission to tell the Board about his phone conversation with Robert Miller at about 12:30 on June 16, 2007?

Considering all of the evidence available to us, we conclude that it did not.

As we have previously indicated, we do not believe that the September 18th letter directed respondent's attention to any issue that would have made the fact of his conversation with Robert relevant or material. The Board's focus was appropriately attuned to his conduct, which constituted

the only grounds for discipline. Consequently, we find no motivation for him to lie or attempt to mislead or deceive the Board with regard to whether he had been asked and by whom he had been asked to conduct the hearing. It can certainly be argued fairly and reasonably that he was not forthcoming with that information, but we do not find that a failure to volunteer facts that do not appear to be germane to the investigation at hand is tantamount to lying or an attempt to mislead. One need not, as a requirement of honesty and forthrightness, submit extraneous information which, even though it is immaterial to the inquiry, could conceivably be used in a harmful manner.

We also note another consideration in addressing this allegation of Count III. It is quite possible that between the phone calls concerning the bond hearing and all of the Little League activity, respondent simply forgot that call -- particularly since his attention had been directed to the communications with Rebecca Lee. The Board has failed to discount or negate that possible alternative explanation for respondent's failure to advise it of that call and its content.

We find that respondent's omission to tell the Board about his conversation with Robert Miller at around 12:30 on June 16th was neither a lie nor an attempt to mislead the Board in its inquiry about the possible impropriety of his conducting of the special bond hearing for David Miller.

SANCTION

For the foregoing reasons, it is the judgment of the Commission that the conduct of respondent in holding a bond hearing on June 16, 2007 created the appearance of impropriety and warrants the imposition of reprimand. NOW THEREFORE, it is hereby ordered that respondent is reprimanded.

Respondent reprimanded.