

In the
Indiana Supreme Court



IN THE MATTER OF THE HONORABLE)
DIANNA L. BENNINGTON,) Cause No. 18S00-1412-JD-733
JUDGE OF THE MUNCIE CITY COURT)

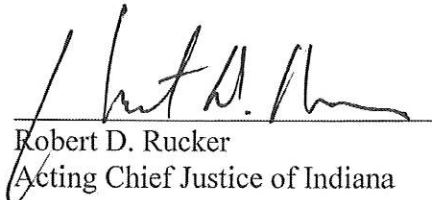
ORDER ACCEPTING AGREED DISCIPLINE

On December 11, 2014, the Indiana Commission on Judicial Qualifications (“the Commission”) filed a “Notice of the Institution of Formal Proceedings and Statement of Charges” against Dianna L. Bennington (“Respondent”), Judge of the Muncie City Court, pursuant to Admission and Discipline Rule 25(VIII)(F). Respondent did not file an Answer. On December 15, 2014, the Commission filed a Verified Petition for Interim Suspension” pursuant to Admission and Discipline Rule 25(VII)(E), which the Court granted on December 18, 2014.

On January 21, 2015, the Commission and Respondent tendered a “Statement of Circumstances and Conditional Agreement for Discipline” (“Conditional Agreement”) for review by the Court pursuant to Admission and Discipline Rule 25(VIII)(H). Having reviewed the Conditional Agreement, the Court ACCEPTS its facts and agreed discipline. A copy of the Conditional Agreement is attached to and is made a part of this order.

Accordingly, Dianna L. Bennington is hereby PERMANENTLY BANNED from serving in any judicial capacity of any kind, including but not limited to service as a judge *pro tempore*, temporary judge, or private judge. Within five (5) days of this Order, Respondent shall submit her resignation to the Governor, which resignation shall be effective immediately. Respondent shall also be assessed certain costs agreed to by the parties, which shall be set forth in a separate order taxing costs. An opinion of the Court will follow.

Done at Indianapolis, Indiana, on January 23, 2015


Robert D. Rucker
Acting Chief Justice of Indiana

All Justices concur.

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DIANNA L. BENNINGTON)	Case No. 18S00-1412-JD-733
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JUDGE OF THE)	
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MUNCIE CITY COURT)	

STATEMENT OF CIRCUMSTANCES

AND

CONDITIONAL AGREEMENT FOR DISCIPLINE

The Indiana Commission on Judicial Qualifications, by counsel and with the Chief Justice not participating, and the Honorable Dianna L. Bennington, in person and by counsel, submit their Statement of Circumstances and Conditional Agreement for Discipline, and show the Court as follows:

STIPULATED FACTS

1. On December 11, 2014, the Indiana Commission on Judicial Qualifications (“Commission”) filed its Notice of the Institution of Formal Proceedings and Statement of Charges.
2. On December 15, 2014, the Commission filed a Verified Petition for Interim Suspension of Judge Dianna L. Bennington (“Respondent”), pursuant to Admission

and Discipline Rule 25(VIII)(E).

3. On December 18, 2014, the Indiana Supreme Court unanimously granted the Verified Petition for Interim Suspension and ordered Respondent suspended with pay until further order of the Court.
4. Respondent elected to not file a permissive Answer to the Statement of Charges.
5. At all times pertinent to the Charges, Respondent was Judge of the Muncie City Court.
6. Respondent has been a member of the Indiana bar since 2003.

Stipulated Facts as to Count I

7. On August 27, 2013, defendant John W. Ewing (“Ewing”) appeared before Respondent, without counsel, for a bench trial on one count of cruelty to an animal, a Class A misdemeanor, in case #18H01-1306-CM-00972. Ewing had made a request for a public defender prior to the bench trial, but Respondent denied that request.
8. After hearing testimony on August 27, 2013, Respondent found Ewing guilty and ordered him to meet with a probation officer for a presentence investigation to be completed.
9. On November 19, 2013, Ewing appeared before Respondent, again without counsel, for sentencing in *State v. Ewing*, #18H01-1306-CM-00972.
10. At the November 19, 2013 hearing, Ewing testified and was questioned by both the prosecutor and Respondent about the current whereabouts of the dog at issue on the convicted count. During this testimony, Ewing also referred to other dogs in his

possession or under his control.

11. Respondent made several inquiries to Ewing about the other animals in his possession or under his control but was not satisfied with Ewing's responses to her requests for information.

12. Respondent did not complete the sentencing of Ewing on November 19, 2013, and instead found him in contempt of court and ordered Ewing remanded to the Delaware County Jail until further of the court.

13. At the time Respondent ordered Ewing jailed, she did not sentence him to a set time in jail for contempt or indicate when Ewing would be released.

a. Respondent did not appoint Ewing an attorney before ordering him jailed for contempt nor did she inform Ewing of his right to appeal a contempt sentence.

b. Respondent did not reduce her November 19, 2013 order to writing, as required by I.C. §34-47-2-4.

14. Respondent acknowledges that by not imposing a determinate contempt sentence, by not reducing her order to writing (as required by statute), and by not affording Ewing other due process considerations before jailing him for an alleged contemptuous act, Respondent abused her contempt powers and, thereby, violated Rule 1.1 of the Code of Judicial Conduct, which requires judges to comply with the law; Rule 1.2 of the Code of Judicial Conduct, which requires judges to act at all times in a manner that promotes confidence in the independence, integrity, and impartiality of the judiciary; Rule 2.2 of the Code of Judicial Conduct, which

requires judges to uphold and apply the law and to perform their judicial duties fairly and impartially; Rule 2.5(A) of the Code of Judicial Conduct, which requires judges to perform judicial and administrative duties competently, diligently, and promptly; and committed conduct prejudicial to the administration of justice.

Stipulated Facts as to Count II

15. On November 20, 2013, Respondent ordered Ewing transported from the Delaware County Jail to Muncie City Court to continue Ewing's sentencing hearing in *State v. Ewing*, #18H01-1306-CM-00972.
16. Respondent did not provide notice to the Delaware County Prosecutor's Office that Ewing's sentencing had been continued to November 20, 2013, nor did Respondent ensure that a member of her court staff provide such notice to the prosecutor's office.
17. As a result of this lack of notice, no prosecutor was present for the November 20, 2013 sentencing hearing.
18. Respondent proceeded with Ewing's sentencing hearing on November 20, 2013, although no prosecutor was present.
19. Indiana Criminal Rule of Procedure 10.1 requires that a prosecutor be present for all felony or misdemeanor hearings (except the initial hearing).
20. Respondent acknowledges that by conducting a sentencing hearing in *State v. Ewing*, #18H01-1306-CM-00972, on November 20, 2013, without the prosecutor present, Respondent violated Rules 1.1, 1.2, 2.2, 2.5(A) of the Code of Judicial Conduct; violated Rule 2.6(A) of the Code of Judicial Conduct, which requires

judges to accord every person (or party) who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law; and Rule 2.9(A) of the Code of Judicial Conduct which requires judges not to initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending matter.

Stipulated Facts as to Count IV

21. On February 10, 2014, Curtis L. Westbrook ("Westbrook") went to Muncie City Court with letters he had prepared detailing defendants' right to request a jury trial as well as information about Respondent's term in office and her alleged failure to advise individuals about the right to a jury trial. The letters were titled "One Term Bennington."
22. Westbrook entered the courtroom before Respondent took the bench and handed out approximately twenty (20) to twenty-five (25) letters to individuals seated in the courtroom.
23. Several minutes after Westbrook passed out the letters, the court's bailiff requested that Westbrook accompany him outside the courtroom and requested that Westbrook show him the letter.
24. After reviewing the letter, the bailiff told Westbrook he was not permitted to pass out the letters and instructed Westbrook not to go back into the courtroom. Westbrook then left the building.
25. The bailiff then went into the court office and reported to Respondent what had occurred with Westbrook.

26. On February 11, 2014, Westbrook came back to Muncie City Court, as Westbrook's son had a hearing scheduled that day.

27. On February 11, 2014, Westbrook was arrested for contempt of court, and Westbrook was held in the Delaware County Jail for ten (10) days.

- a. At no time from February 10, 2014 through February 21, 2014 did Respondent bring Westbrook before her to inform him of the alleged nature of the contempt or to otherwise provide him with an opportunity to explain, apologize, or give additional information about the alleged contemptuous act(s).
- b. At no time from February 10, 2014 through February 21, 2014 did Respondent inform Westbrook of his right to appeal a contempt sentence.
- c. At no time from February 11, 2014 through February 21, 2014 did Respondent orally inform Westbrook of the length of his contempt sentence.
- d. Respondent also did not verify that Westbrook was given a copy of a written contempt order that was inputted on the CCS on February 11, 2014.

28. Respondent acknowledges that by ordering Westbrook arrested and jailed for contempt without bringing Westbrook before Respondent to inform Westbrook of the alleged nature of the contempt or to give him an opportunity to explain, apologize, or given additional information about the alleged contemptuous act(s) and by not providing Westbrook with other sufficient due process prior to ordering him jailed for contempt, Respondent abused her contempt powers and, thereby, violated Rules 1.1, 1.2, 2.2, 2.5(A), and 2.6(A) of the Code of Judicial Conduct and

committed conduct prejudicial to the administration of justice.

Stipulated Facts as to Count V

29. On February 10, 2014, defendant Tory M. Gillenwater (“Gillenwater”) appeared before Respondent in *State v. Gillenwater*, #18H01-1401-CM-00015, on one count of cruelty to an animal, a Class A misdemeanor
30. On February 10, 2014, the deputy prosecutor offered Gillenwater a plea agreement, which Gillenwater accepted, and the parties tendered the plea agreement to Respondent.
31. Respondent accepted Gillenwater’s guilty plea but rejected the plea agreement and *sua sponte* ordered Gillenwater to meet with the Muncie City Court probation officer for a presentencing investigation and set a sentencing date for February 25, 2014.
32. Neither the deputy prosecutor nor Gillenwater requested a presentence investigation or to set a sentencing hearing after Respondent rejected the plea agreement.
33. During the hearing, Respondent made derogatory statements about the charged count and the proposed sentence in the plea agreement.
34. Under I.C. § 35-35-3-3 and related case law, a guilty plea must either be accepted or rejected by the court as filed. The court has no authority to *sua sponte* alter or otherwise change the agreement.
35. Respondent acknowledges that by engaging in the conduct described in ¶¶ 31-33, she violated Rules 1.1, 1.2 and 2.2 of the Code of Judicial Conduct and Rule 2.8(B)

of the Code of Judicial Conduct, which requires judges to be patient, dignified, and courteous to litigants, lawyers, and others with whom the judge deals with in an official capacity.

Stipulated Facts as to Count VI

36. From 2012 through June 1, 2014, Respondent did not require guilty plea and sentencing hearings in misdemeanor cases to be recorded, as required by Indiana Rules of Criminal Procedure 5 and 10.

37. Respondent acknowledges that by not abiding by the legal requirement that guilty plea and sentencing hearings be recorded in misdemeanor cases, she violated Rules 1.1, 1.2, 2.5(A) of the Code of Judicial Conduct and committed conduct prejudicial to the administration of justice.

Stipulated Facts as to Count VIII

38. On June 14, 2012, defendant Jonathan Proctor ("Proctor") appeared before Respondent in *State v. Proctor*, #18H01-1203-IF-01528, for a bench trial on one count of illegal possession of tobacco, a C infraction.

39. After hearing evidence, Respondent found in the State's favor, and disposition was scheduled for June 26, 2012.

40. At the hearing, Respondent assessed Proctor a \$50 fine and \$115 in court costs which was to be paid by August 31, 2012; ordered Proctor to complete 20 hours of community service by August 3, 2012; and ordered Proctor to write a report on the dangers of tobacco use by August 3, 2012.

41. Under I.C. § 34-28-5-4, the penalty for a Class C infraction that is a non-moving

violation is a judgment of up to \$500. There is no authority in that statute or elsewhere in the Indiana Code for a judge to impose a sentence of community service or other terms of judgment for a non-moving infraction.

42. On October 12, 2012, Respondent authorized the issuance of a bench warrant for Proctor's arrest because he had not paid the fine and court costs and had not completed community service or written the report on the dangers of tobacco use. A warrant was issued that same day.

43. On the night of October 2, 2014 or the early morning of October 3, 2014, Proctor was arrested on the bench warrant and taken to the Delaware County Jail, where he spent the night. The next day a judge *pro tempore* released Proctor on his own recognizance.

44. Respondent acknowledges that by imposing a sentence of community service and writing a paper on defendant Proctor on a C infraction charge of illegal possession of tobacco, when she had no legal authority to impose such terms of sentence, and then by authorizing the issuance of an arrest warrant when Proctor did not comply with these unauthorized sentencing terms, Respondent violated Rules 1.1, 1.2, 2.2, and 2.5(A) of the Code of Judicial Conduct and committed conduct prejudicial to the administration of justice.

Stipulated Facts as to Count IX

45. J.W. is the biological father of Respondent's twin children, who were born on May 30, 2013.

46. Prior to the children's births through July 2013, Respondent and J.W. had

discussions about his ability to pay child support, and Respondent was unhappy with J.W.'s responses.

47. On August 2, 2013, Respondent visited J.W.'s Facebook page and saw a picture of J.W. with his girlfriend, A.S., from a trip in April 2013.

48. On August 2, 2013, Respondent posted the following comment to the picture displayed on J.W.'s Facebook page: "Must be nice to be able to take such an expensive trip but not pay your bills. Just sayin'."

49. Respondent's comment was visible to and seen by other Facebook users who had access to J.W.'s page. Several other Facebook users posted comments in reaction to Respondent's statements.

50. Respondent's posted remarks were visible for at least an hour before the comments were deleted by Respondent.

51. Respondent acknowledges that by making an injudicious comment on the Facebook page of J.W. on August 2, 2013, she violated Rule 1.2 of the Code of Judicial Conduct.

Stipulated Facts as to Count X

52. On Tuesday, August 19, 2014, J.W. was supposed to have visitation from 5:00 p.m. to 8:00 p.m. with Respondent's twin children, pursuant to a parenting time order in case #05C01-1406-JP-000034 out of Blackford Circuit Court.

53. As this was the first scheduled visitation since the paternity hearing (which had been held on August 14, 2014), J.W. was unsure where he was supposed to pick up the children for visitation.

54. During the afternoon of August 19, J.W. made several phone calls and sent texts to Respondent's cellphone and also attempted to call the Muncie City Court office, but Respondent did not respond to J.W.'s messages.
55. J.W. went to the Little Scholars Daycare in Delaware County, where the children were being cared for, around 4:50 p.m. J.W. had a sheriff's deputy accompany him to the daycare to make sure there were no issues with the custody exchange.
56. Respondent arrived at the daycare shortly after J.W. and the other sheriff's deputy arrived.
57. For approximately fifteen (15) to twenty (20) minutes, Respondent yelled at J.W. in the daycare and in the daycare parking lot, making various derogatory comments about J.W. At that time, Respondent believed, per her understanding of the paternity order, J.W. should have picked the children up at her house rather than the daycare.
58. Respondent's conduct was disruptive and was observed by daycare employees and other parents who had come to pick up their children from the daycare.
59. Respondent acknowledges that by engaging in the conduct described in ¶¶57-58, she did not conform to the high standards of conduct expected of judges in public and, thereby, violated Rule 1.2 of the Code of Judicial Conduct which requires judges to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

Stipulated Facts as to Count XI

60. On Sunday afternoon, September 21, 2014, J.W. went to Respondent's home to

pick up the children for a scheduled visitation. Respondent had a verbal confrontation with J.W. in her driveway.

61. After J.W. secured the children in his car, he began to drive to A.S.'s home, which is a few blocks away from Respondent's home. Respondent got in her car and followed J.W.'s vehicle.

62. Around 1:10 p.m. on September 21, 2014, J.W. pulled into A.S.'s driveway and got out of the car.

a. Respondent parked her vehicle on the other side of the street (directly across from A.S.'s driveway), got out of her car, and began yelling at J.W.

b. J.W. asked Respondent why she was following him; at that time, A.S. came out of the house.

c. J.W. told Respondent that she needed to go home, but Respondent continued to yell at both J.W. and A.S., insisting that A.S. not be around Respondent's children and making other injudicious comments.

d. Respondent and A.S. then had a verbal altercation in which A.S. told Respondent to leave or she was going to call the police. In response, Respondent used profanity and referred to A.S., who is African-American, with a racial slur.

e. J.W. recorded the entire episode on a video pen.

63. J.W. and A.S. then left A.S.'s house to go to J.W.'s sister house, which was approximately three (3) miles away. Respondent followed the car containing J.W., A.S., and Respondent's children for approximately 10-15 minutes.

64. When J.W. turned to take the street where his sister's house was located, Respondent drove past, yelling a profane statement out the window to A.S. A.S. recorded the interaction on her computer tablet.
65. Respondent acknowledges that by engaging in the conduct described in ¶¶60-64, she did not conform to the high standards of conduct expected of judges in public and, thereby, violated Rule 1.2 of the Code of Judicial Conduct which requires judges to act at all times in a manner that promotes public confidence in the integrity of the judiciary.

Stipulated Facts as to Count XIII

66. Respondent submitted a response, dated May 20, 2014, to an April 11, 2014 Amended Notice of Commission.
- a. The Commission deemed a number of Respondent's answers to the Commission's requests for information incomplete, so the Commission sent a follow-up letter to Respondent on June 24, 2014, at the Muncie City Court address, requesting clarification on several statements in her response.
 - b. When the Commission received no response to its June 24, 2014 letter, the Commission sent a follow-up letter to Respondent on August 8, 2014, providing another copy of the June 24 letter and requesting that Respondent contact Commission staff upon receipt of the letter to inform the Commission as to when a response could be expected.
 - c. Respondent did not contact Commission staff and, instead, just prior to her deposition on September 3, 2014, submitted a response to the Commission,

dated August 28, 2014, but which was not received by the Commission until late Tuesday, September 2, 2014.

67. Respondent never submitted a response to a subpoena duces tecum issued by the Commission on August 29, 2014 to Respondent, via the Muncie City Court address, for any materials Respondent reviewed before imposing contempt sentences on John Ewing in *Ewing v. State* and Curtis Westbrook in *Muncie City Court v. Westbrook*.

68. On October 8, 2014, the Commission issued an Amended Notice of Investigation to Respondent, at her home address and also to the Muncie City Court address. Although a response to the Notice was due by October 27, 2014, Respondent never tendered a response to the Commission.

- a. During a November 13, 2014 deposition, the Muncie City Court secretary indicated that there was an unopened piece of mail from the Commission, marked “personal and confidential,” on Respondent’s desk at the Muncie City Court.
- b. The secretary indicated that, when this mail was delivered to the Muncie City Court in early October 2014, both she and the court reporter contacted Respondent to alert her that this letter had arrived.
- c. In response to this notification from her employees, Respondent said something to the effect of – “[The Commission] knows that I’m not allowed back in the office, so it must have not been important” and “if [the Commission] needs to reach me, [it] could have mailed [the letter] to my

house.”

- d. On November 13, 2014, after her deposition, the Muncie City Court secretary personally delivered the letter that had been laying on Respondent’s desk to Respondent.
- e. Even after the secretary personally delivered the letter to Respondent, Respondent still did not provide a response to the October 8, 2014 Amended Notice of Investigation.

69. On October 21, 2014, the Commission issued a Notice of Video Deposition and subpoena to Respondent at her home address, scheduling the deposition of Respondent to take place at 10:00 a.m. on Wednesday, November 12, 2014, at Smith Reporting in Muncie, Indiana.

- a. Respondent never appeared at the video deposition, despite several attempts by Commission staff to contact Respondent.
- b. Respondent’s home address was verified by previous correspondence sent by Respondent, the white pages, a Google address search, and an internet search of tax and property records.

70. In mid-November 2014, the Commission issued a second Notice of Video Deposition and subpoena to Respondent at her home address, scheduling the deposition to take place at 10:00 a.m. on Tuesday, December 2, 2014, at Smith Reporting in Muncie, Indiana.

- a. Commission staff sent the Notice and subpoena, by Federal Express (with signature requested), on November 12, 2014 to Respondent’s home address.

Federal Express made three (3) attempts to deliver the package and then provided notification at Respondent's address that Respondent could pick up the package at the local Muncie Federal Express hub, but Respondent did not pick up the package.

- b. On November 18, 2014, Commission staff sent another copy of the Notice of Deposition and subpoena, by Federal Express (without signature required), to Respondent's home address. Delivery was confirmed on November 19, 2014.
- c. Commission staff also sent Notice of the Deposition and subpoena, by letter, to the Muncie City Court address. Respondent received a copy of this letter from her court secretary, who personally delivered it to Respondent.
- d. Respondent did not appear for her December 2, 2014 deposition and provided no explanation for her failure to attend.

71. Respondent acknowledges that, by delaying responses or not responding at all to lawful requests by the Commission for information and by not appearing for scheduled video depositions for which she had been properly noticed, she violated Rule 2.16(A) of the Code of Judicial Conduct, which requires judges to cooperate and be candid with judicial and lawyer disciplinary agencies.

AGREED SANCTION

The parties agree that the appropriate sanction in this matter on Counts I, II, IV, V, VI, VIII, IX, X, XI, XII, and XIII is a permanent ban from judicial office but that Respondent should be permitted to retain her license to practice law.

1. If the Court accepts this agreement, the parties agree that, within five (5) days of the Court's acceptance of this Agreement, Respondent will submit her resignation to the Governor, effective immediately, and that she will from that time forward no longer be eligible for judicial service, including as a judge *pro tempore*, temporary judge, or private judge.
2. The parties further agree that Respondent will pay the Commission's costs associated with the two scheduled video depositions on November 12, 2014 and December 2, 2014, which Respondent did not attend. Respondent also will pay all the Commission's costs for its attempts to communicate with Respondent, via Federal Express and certified mail, since November 11, 2014.
3. The Commission agrees to dismiss Counts III, VII, and XII.

WHEREFORE, the parties, with the Chief Justice not participating, respectfully ask the Court to adopt their stipulated facts, to accept the agreed sanction, to impose upon Respondent the sanction of a permanent ban from judicial office but allow her to retain her law license (assuming she adheres to all other requirements with respect to that license), and to assess costs against Respondent as outlined above.


1/16/15

DATE

DIANNA L. BENNINGTON

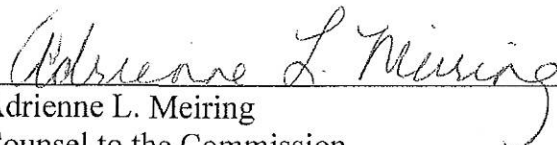
Respondent Dianna L. Bennington
Muncie City Court

1/16/2015
DATE



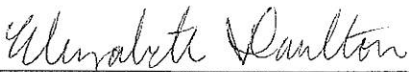
Robert G. Forbes
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1/21/15
DATE



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1/21/15
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