

**GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
JUDICIAL COMMISSION**

**Mary Roberts, Tribal Justice
Quinton Walker, Tribal Justice
Matthew Fletcher, Tribal Justice**

**2605 N. West Bay Shore Drive, Peshawbestown, MI 49682
(231) 534-7050, Main tribalcourt@gtbindians.com**

**IN THE MATTER OF:
John A. Kern**

CASE NO. 2014-2331-CV-CV

I, Dana M. Greensky , being duly sworn, deposes and says that on the date below I sent by:

[X] first class mail, [] certified, [] restricted, [] inter-office mail, or [X] personal service

addressed to their last known address by placing a copy of the same in the United States Postal Service Mail in Omena, Michigan.

Proof of mailing for: **JUDICIAL COMMISSION FINDINGS OF FACT AND DETERMINATIONS**

To:	Court File	Original
	Hon. Mary Roberts	Hand delivery
	Hon. Matthew Fletcher	Email
	Hon. Quinton Walker	305 W. Upright, Charlevoix, MI 49720 (6/30/14)

I declare that the statements above are true to the best of my information, knowledge, and belief.

Date: 6/27/14

Dana M. Greensky
Dana M. Greensky, Clerk of the Court

BEFORE THE TRIBAL JUDICIARY
FOR THE
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

IN THE MATTER OF JUDGE JOHN KERN

No. 2014-2331-CV-CV

Respondent.

The Grand Traverse Band Tribal Judiciary hereby removes Chief Judge John Kern for unethical conduct, persistent failure to perform duties, and gross misconduct that is clearly prejudicial to the administration of justice in accordance with Article V, Section 8 of the Grand Traverse Band Constitution.

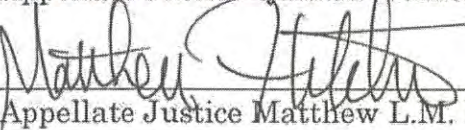
For the Tribal Judiciary*:


Chief Justice Mary Roberts

6-27-14
Date


Appellate Justice Quintin Walker *by permission*

6-27-14
Date


Appellate Justice Matthew L.M. Fletcher

6/27/14
Date

* Associate Judge Michael Long recused.

BEFORE THE JUDICIAL COMMISSION
FOR THE
GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

IN THE MATTER OF JUDGE JOHN KERN

No. 2014-2331-CV-CV

Respondent.

JUDICIAL COMMISSION FINDINGS OF FACT AND DETERMINATIONS

Introduction

For the first time in our history, the Grand Traverse Band Judiciary is charged with administering its duty under Article V, Section 8 of the Tribal Constitution to consider the removal of one of our own – a sitting tribal judge.

The tribal justice system of the Grand Traverse Band has a relatively short history, but a storied one. The court's founding Chief Justice, Michael D. Petoskey, who served for over a decade, is the most influential tribal judge in Michigan, and is one of the most well-known tribal judges nationally. Adrea Korthase, *Michael Petoskey: Focusing on the Common Ground*, in "OUR CAUSE WILL ULTIMATELY TRIUMPH": PROFILES IN AMERICAN INDIAN SOVEREIGNTY 173, 173-82 (2014). In 2000, the Harvard Project on American Indian Economic Development recognized the tribal court under the leadership of Chief Judge Petoskey for the development of a Peacemaker program. See Tribal Court of the Grand Traverse Band, Honoring Nations: 1999 Honoree, Harvard Project on American Indian Economic Development, John F. Kennedy School of Government, Harvard University. Cambridge, Massachusetts (2000), <https://nnidatabase.org/db/text/grand-traverse->

band-tribal-court. One of his successors as Chief Judge, JoAnn Cook, is the current Vice-Chair of the tribe. Another of his successors is counsel for the Respondent, Wilson D. Brott.

Importantly for our purposes today, the tribal court is a national leader in successfully implementing and preserving the independence of the tribal judiciary from interference by other branches of tribal government. Grand Traverse Band's constitution, ratified in 1988, is the first tribal constitution in Michigan to guarantee judicial independence. *See* Michael D. Petoskey, *Tribal Courts*, 67 MICH. B.J. 366, 366-68 (1988). Tribal leadership has testified before Congress on the value and contours of judicial independence in relation to tribal economic development. *See* Ardith (Dodie) Chambers, Testimony and Prepared Statement, in Indian Tribal Good Governance Practices as They Relate to Economic Development, Hearing Before the Senate Committee on Indian Affairs, 107th Cong., 1st Sess. (2001) (discussing *In re McSauby*, No. 97-02-001, 1997 WL 34691849 (Grand Traverse Band Tribal Court, July 29, 1997) (en banc)). Judicial independence does not come easy, and at times there have been clashes between the judiciary and the tribal council, so far resolved through negotiation, cooperation, and compromise. *See Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court Administrator*, No. 02-09-1351-CV, 2003 WL 25838644 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, May 22, 2003) (adopting Memorandum of Understanding between tribal council and tribal court).

Perhaps the most solemn obligation imposed on the judiciary by the tribal constitution is the duty to self-police. Article V, Section 8 governs the removal of a Tribal Judge. That section provides:

The Tribal Judiciary may remove any judge by an affirmative vote of a majority of all other members of the Judiciary for:

- (a) Unethical conduct, as defined by the American Bar Association Code of Judicial Conduct;
- (b) Physical or mental disability which prevent the performance of judicial duties;
- (c) Persistent failure to perform duties;
- (d) Gross misconduct that is clearly prejudicial to the administration of justice; or
- (e) Ineligibility, under Section 5 of this Article, to serve as a member of the Tribal Judiciary.

Section 8 is unusual in the realm of tribal judicial discipline. Typically, tribal constitutions provide for the removal of tribal judges by the tribal council. *E.g.*, *LaRance v. Hopi Tribe*, 10 Am. Tribal Law 345 (Hopi Tribe Appellate Court 2010) (adjudicating tribal council's termination of tribal judge's employment). *Cf.* *Chapman v. Little River Band of Ottawa Indians*, Nos. 07-164-CC, 08-034-AP, 2008 WL 6928160 (Little River Band of Ottawa Indians Tribal Court, Aug. 5, 2008) (adjudicating matter involving tribal council's authority to ratify tribal judiciary's recommendation to remove tribal judge). In legal structures where an outside political entity like a tribal council can act to remove tribal judges, judicial independence may be questioned. *See generally* Joseph Thomas Flies-Away, Carrie Garrow, & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Building*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 115, 130-32 (Miriam Jorgensen, ed. 2007).

Other Michigan tribal constitutions ratified since 1988 have followed the lead of the Grand Traverse Band in providing for judicial independence, including the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians. In both tribal constitutions, the tribal judiciary has a role to play in the removal of tribal judges. The constitution of the Little Traverse Bay Bands is particularly instructive. Article XIII, Section (B)(1) restricts the judicial removal authority to the Tribal Judiciary itself, just as it rests with the Tribal Judiciary in

the Grand Traverse Band constitution. The Little Traverse Bay Bands constitution also provides for minimum procedural requirements for removal; specifically:

If a Judge or Justice believes that grounds for removal of another Judge or Justice, they shall state the charges in writing, and distribute copies of the written charges to all members of the Tribal Judiciary, including the accused. As soon as practicable, but no more than sixty (60) days after receipt of the written charges, the Judiciary shall hold a hearing with all members present at which the accused shall have the opportunity to call and cross examine witnesses and be represented by an attorney.

Little Traverse Bay Bands of Odawa Indians Constitution, art. XIII, § B(2)(a). The Grand Traverse Band's constitution does not provide a specific process for the judiciary to follow, but we find the Little Traverse Bay Bands' procedural requirements helpful as a matter of establishing a greater context for judicial self-regulation. Importantly, the Little Traverse requirements allow for the participation in the decision-making process of the judge that filed the statement of charges.

Several years ago, the Court adopted subchapter 1.200 of the Tribal Court Rules to govern the removal of tribal judges, under which the Judicial Commission must hold a hearing. *See* Grand Traverse Band Court Rule 1.205(D) ("The hearing shall be conducted by the Judicial Commission under rules applicable to a trial of a civil action in Tribal Court. The hearing shall be recorded and shall be open to the public.").

The irreducible minimum import of Section 8 is that three members of the Tribal Judiciary, which currently numbers five, may remove any judge for any of the reasons provided in the subsections.

We exercise this authority in light of tribal common law traditions we believe should be respected and applied in the context of difficult internal tribal governance matters. Recently, in *Raphael v. Grand Traverse Band of Ottawa and Chippewa*

Indians Election Board, No. 13-2189-CV-CV (Grand Traverse Band Tribal Judiciary, May 21, 2014) (en banc), we stated our approval of the:

Seven Grandfather Teachings – Niizhwaaswi Mishomis
Kinoomaagewinawaan.... The Seven Grandfathers are:

Nbwaakaawin – Wisdom
Zaagidwin – Love
Mnaadendimowin – Respect
Aakwade’ewin – Bravery
Gwekwaadiziwin – Honesty
Dbaadendizwin – Humility
Debwewin – Truth

The Seven Grandfathers are general principles of Anishinaabe traditional common law that derive from the even more general principle of Mino-Bimaadziwin, a way of life akin to what legal scholars and practitioners might think of as natural law. We borrow from Eva Petoskey, a former Grand Traverse Band elected official, who described Mino-Bimaadziwin in these terms:

There is a concept that expresses the egalitarian views of our culture. In our language we have a concept, *mino-bimaadziwin*, which essentially means to live a good life and to live in balance. But what you’re really saying is much different, much larger than that; it’s an articulation of a worldview. Simply said, if you were to be standing in your own center, then out from that, of course, are the circles of your immediate family. And then out from that your extended family, and out from that your clan. And then out from that other people within your tribe. And out from that people, other human beings within the world, other races of people, all of us here in the room. And out from that, the other living beings ... the animals, the plants, the water, the stars, the moon and the sun, and out from that, the spirits, or the *manitous*, the various spiritual forces within the world. So when you say that, *mino-bimaadziwin*, you’re saying that a person lives a life that has really dependently arisen within the web of life. If you’re saying that a person is a good person, that means that they are holding that connection, that connectedness within their family, and within their extended family, within their community.

Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* at 39, 47-48 (2012).

Raphael, supra, at 6-7. See also Order Denying Motion to Dismiss at 7-8, *In the Matter of Judge John Kern*, No. 2014-2331-CV-CV (Grand Traverse Band Judicial Commission, June 13, 2014).

We assert the solemn authority of judicial self-regulation today.

Procedural History

On April 22, 2014, Associate Judge Michael J. Long delivered a Complaint and Request for Investigation of [Chief] Judge John Kern to Chief Appellate Justice Mary Roberts, who is by rule the permanent member of the Judicial Commission in accordance with Rule 1.201(D) of the Grand Traverse Band Court Rules. In accordance with Rules 1.201(D)-(E), Chief Justice Roberts appointed Appellate Justices Matthew Fletcher and Quintin Walker as members of the Judicial Commission, who then appointed Chief Justice Roberts the Chair of the Commission.

In accordance with Rule 1.203, Chief Justice Roberts began an investigation. Using the complaint filed by Judge Long as a guide, she interviewed several individuals with personal knowledge of the facts to help the Judicial Commission determine whether it should proceed with removal under Article V, Section 8.

On May 13, 2014, in accordance with Rule 1.204, Chief Justice Roberts presented the results of her investigation to the other members of the Judicial Commission. The Judicial Commission agreed to proceed with a disciplinary action in accordance with Rule 1.205.

On May 19, 2014, the Grand Traverse Band Judicial Commission filed a Statement of Allegations in this matter, *In the Matter of Judge John Kern*, based on the statements of those interviewed by Chief Justice Roberts. In accordance with Grand Traverse Band Court Rule 1.205(B), Respondent filed a request for a hearing and an answer on May 30, 2014. Respondent also filed several motions at that time, including motions to disqualify Chief Justice Roberts, to comply with the tribal government's personnel policy, and other procedural motions. On June 3, 2014, the Judicial Commission responded with a Procedural Order, which set June 16 through June 19, 2014 as the hearing dates. The Procedural Order also detailed the procedures to be used during the hearing, and denied the motions to recuse and to follow tribal governmental personnel procedures on grounds of judicial independence.

On June 4, 2014, Tribal Prosecutor filed a Motion for Protective Order designed to ensure the Judicial Commission proceedings comply with tribal law relating to the confidentiality of Indian child welfare matters. On June 5, 2014, the Judicial Commission granted the motion for a protective order, and also provided a witness list.

On June 12, 2014, Respondent filed a Motion to Dismiss, reiterating arguments made in the motion to disqualify Chief Justice Roberts, and requesting a private hearing before the Judicial Commission. The Judicial Commission denied the Motion on June 13, 2014.

On June 16 and June 17, 2014, the Judicial Commission conducted the hearing. The Judicial Commission conducted the hearing in a manner loosely analogous to administrative hearings conducted by the State of Michigan. *E.g.*, Department of Energy, Labor, and Economic Growth, State Office of Administrative Hearings and Rules, Due Process Procedures for Special Education Hearings Rule 84(g)-(j) ("Administer oaths or affirmations[:] Preside at the hearing and actively participate to ensure a fair, orderly, and full development of the evidence relevant

to the claims and defenses asserted[;] Rule on objections to the conduct of the hearing and to the introduction of evidence and give effect to the rules of privilege.”).

The Tribal Judiciary acting as the Judicial Commission presided over the hearing in an inquisitorial manner, meaning the Judiciary called witnesses and asked questions of the witnesses. The Judicial Commission called as witnesses Judge Long, Tribal Prosecutor Matthew J. Feil, Michigan Indian Legal Services Deputy Director Cameron Fraser, and several others. Judge Kern, through counsel, cross-examined the witnesses. Judge Kern testified on his own behalf on two separate occasions during the hearing.

Memorandum of Decision

I. Summary

The Judicial Commission recommends the removal of Respondent Judge Kern as a judge in accordance with Article V, Section 8 of the tribal constitution. We do so not as a result of our concerns with Judge Kern’s administration of the tribal court, but because we find considerable evidence that Judge Kern is not qualified to sit on the bench as a judge, that Judge Kern engaged in unethical conduct, that Judge Kern has persistently failed to perform his duties as chief judge, and Judge Kern has engaged in gross misconduct.

We are particularly persuaded by the expert and unbiased testimony of Associate Judge Long and Tribal Prosecutor Feil, as well as Michigan Indian Legal Services Deputy Director Cameron Fraser. The fact that two of the most experienced legal professionals employed with the tribe, and a third with extensive GTB tribal court experience, expressed their strong opinions or offered compelling evidence that Judge Kern is not qualified to serve as judge is all but dispositive.

We conclude as a matter of law that a judge that cannot perform the legal duties of judicial officer in a capable manner cannot serve as judge. We hold that removal of an unqualified judge is required under both Section 8(a) (violations of the American Bar Association Code of Judicial Conduct) and Section 8(c) (persistent failure to perform duties).

We also find that Judge Kern's actions and inactions during an emergency Indian child welfare (ICW) hearing on April 8, 2014, as well as his duplicity in the aftermath of that incident, independently compel his removal as judge. We do not find credible Judge Kern's explanations for his actions and inactions, and we hold Judge Kern as chief administrator of the tribal court responsible for the fact that no judge was available on that day to preside over an emergency ICW matter. We hold that Judge Kern's actions and inactions in this matter compel removal as judge under Section 8(a) (unethical conduct), Section 8(c) (persistent failure to perform duties), and Section 8(d) (gross misconduct).

II. The Position of Chief Judge

The Chief Judge position at the Grand Traverse Band is one of the most demanding and complex positions in the tribal government. The Chief Judge is a judicial officer, called upon to hear and dispose of cases in a relatively busy docket that consists of very demanding cases such as Indian child welfare cases and criminal cases. Judicial officers, with the assistance of court staff, are obliged to generate numerous orders that provide specific findings of fact and conclusions of law. In ICW matters, especially, precision and accuracy are at a premium.

The Chief Judge is also the chief administrator of the tribal court. The Chief Judge supervises a staff of five, and serves as the tribal court's liaison between the tribal council and the other departments of the tribal government. The employee supervision duties require the Chief Judge to apply the tribal government's

personnel policy, which is controlled by a Memorandum of Understanding between the tribal court and the tribal council. See *Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court Administrator*, No. 02-09-1351-CV, 2003 WL 25838644 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, May 22, 2003).

The administration of the tribal court and service as a full-time judge may often seem like the equivalent of holding two jobs at once. Despite the clear separation of powers between the judicial and legislative and executive branches of tribal government, the job is inherently political, forcing the Chief Judge to interact appropriately with tribal councilors and tribal government employees.¹

¹ We have some doubts as to whether Judge Kern did engage appropriately on a political level with the tribal council, as evidenced by an email exchange between himself and the court administrator in May 2014. The exchange began when the court administrator recommended that Judge Kern delete his emails with former tribal councilors Bob Kewaygoshkum and Jane Rohl:

From: Campos, Cristine
Sent: Wednesday, May 14, 2014 3:21 PM
To: Kern, John
Subject: Email

Hey – with Jane and BK being gone ☹ you should delete your sent items and then empty your deleted items. I think Bob and Jane will do theirs before they leave, but you should do yours too. ☺

Cristine Campos
Tribal Court Administrator

Judge Kern responded by questioning whether deletion was sufficient:

From: Kern, John
Sent: Wednesday, May 14, 2014 4:16 PM
To: Campos, Cristine
Subject: RE: Email

Done, but I'm never sure they're gone. When I accidentally deleted a whole folder, and then deleted it altogether, Jeff was still able to retrieve it. If you have a way to assure permanent disposal, please tell me.

The court administrator said she would look into the matter “on the sly”:

Moreover, as the chief judge, sole full-time judge, and chief tribal court administrative official, Judge Kern must be available by phone 24 hours a day, seven days a week, to respond to emergency ICW and criminal matters if necessary. The chief judge might be unavailable at a given time to preside over a matter, but he is ultimately responsible for ensuring that a judge is available to preside over emergency hearings.

III. Procedural Fairness

At the removal hearing, Judge Kern frequently alleged that the entire process was unfair. These claims largely were repeats of prior concerns expressed in the pre-hearing motions, all of which the Judicial Commission rejected previously. *See* Order Denying Motion to Dismiss, *In the Matter of Judge John Kern*, No. 2014-2331-CV-CV (June 13, 2014); Procedural Order, *In the Matter of Judge John Kern*, No. 2014-2331-CV-CV (June 3, 2014) (denying motions for a private hearing under the tribal governmental personnel policy and to recuse Chief Justice Roberts). *See also* Protective Order and Witness List, *In the Matter of Judge John Kern*, No. 2014-2331-CV-CV (June 5, 2014) (granting Tribal Prosecutor's motion for a protective order).

From: Campos, Cristine
Sent: Wednesday, May 14, 2014 4:45 PM
To: Kern, John
Subject: RE: Email

I'll ask and let you know – I think there is only a short period of time to restore items. I'll ask Jeff on the sly. ☺

And Judge Kern thanked her:

From: [Kern, John](#)
To: [Campos, Cristine](#)
Subject: RE: Email
Date: Thursday, May 15, 2014 7:58:00 AM

Thank you!

During the hearing, Judge Kern through counsel also alleged that the Judicial Commission's failure to interview or meet with Judge Kern before the public removal hearing also constituted a form of unfairness. The Judicial Commission disagrees, for all the reasons given in prior procedural orders. Rule 1.203(C) *allows* but does not *mandate* the Judicial Commission to notify respondents of a pending investigation: "During the course of the investigation, the Judicial Commission Chairperson may notify the respondent of the subject being investigated." Similarly, Rule 1.205(A)-(C) does not mandate that the Judicial Commission sit down with a respondent. Judicial Commission Chair Mary Roberts chose not to inform Judge Kern during the pendency of the investigation, believing that the persons she interviewed would not be candid with her if she did not preserve their anonymity until after the process became public when Judge Kern was served with the Statement of Allegations.

The Judicial Commission also finds that there is a strong factual basis favoring the preservation of confidentiality for as long as possible. Judge Kern supervised Judge Long, and Judge Long expressed concern that he would still be supervised by Judge Kern if the Judicial Commission chose not to proceed. Similarly, Tribal Prosecutor Feil expressed his concern that since he appeared regularly before Judge Kern, the tribal government's interests might be compromised in some cases.

Moreover, the Judicial Commission finds that Judge Kern often has not responded in a professional matter to criticism or even requests for information from other judges and the tribal council. The Judicial Commission has endeavored to handle the matter of Judge Kern in accordance with the principles of Mino-Bimadziwin and the Seven Grandfathers. We focus most especially on Manaadjitowaawin (respect) and Dibaadendizowin (humility). We are aware that we are not charged with the day-to-day tribal court operations as appellate judges, and that we cannot, should not, and will not second-guess discretionary administrative decisions Judge Kern made as the chief tribal court administrator

made in good faith. Unfortunately, in all too many circumstances, we have noticed that Judge Kern does not afford either the appellate bench, tribal court staff, tribal councilors, tribal department heads, and others the same respect and humility. Indeed, as Chief Justice Roberts notes, Judge Kern repeats that he is "the ultimate authority."

We have no doubt that in a vast majority of interactions with colleagues, he behaved ethically and professionally. However, in far too many instances, Judge Kern's responses to requests for information or to criticism were deeply troubling and unprofessional in the extreme.

For example, early in Judge Kern's tenure, he engaged in a vituperative series of emails with now-Chief Justice Roberts (then Associate Appellate Justice) and then-Chief Justice Genia over the cancellation of a hearing involving the entire tribal judiciary sitting en banc. The simple explanation was that then-Chief Justice James Genia was deathly ill (he later tragically walked on). On December 12, 2012, then-Justice Roberts asked for an explanation for the cancellation of the hearing, and for "the recent unusual atmosphere at the Court":

From: Mary Roberts [mailto:maroberts3297@yahoo.com]
Sent: Monday, December 12, 2011 2:36 PM
To: Kern, John
Cc: jmgenia@yahoo.com
Subject: Re: Judicial meeting

Thank you for your response to my call this morning. I have reviewed the items on the agenda and do not see anything on hearings which would require an en banc decision as the appellate case which was scheduled for this afternoon was adjourned until further notice. Also, when Jim contacted me yesterday about his hospitalization, he agreed we should go ahead with the meeting.

I do not understand the reasons for the recent unusual atmosphere at the Court. The Judiciary have always interacted respectfully and openly. It appears lately that this is not the case. If I am incorrect in my observations, please let me know. Thank you and have a good afternoon.

Instead of explaining that he cancelled the meeting due to Justice Genia's health issues, and perhaps engaging in a constructive dialog, Judge Kern's response was anything but cordial and constructive:

Dear Justice Roberts:

You are indeed incorrect regarding the "unusual" atmosphere at the Court, and of the Judiciary not interacting respectfully and openly. If anything, I am trying diligently to promote more frequent and more open communications. The Tribal Court itself, at least from my perspective, is operating quite well under difficult circumstances. Please help me understand your misgivings with specific observations so that I can address them promptly.

As far as having the entire judiciary present during official hearings and meetings, I have found by unfortunate experience that judgments, opinions and directives that issue from only partial consideration are open to misunderstanding in both legal and public arenas. In other words I am working hard to maintain the integrity of our Courts. Consensus is key, and that cannot be achieved when especially the Chief Justice is absent. Incidentally, in our communication this morning, you neglected to mention that Jim agreed we should go ahead with the meeting. It would help if Justice Genia could copy me these directives.

I look forward to your specific observations.

Māgwetch. John

Justice Roberts' response is an example of how she sought to respectfully instruct Judge Kern about the history and custom of interaction between the chief administrator and the appellate court. Know that now-Chief Justice Roberts is a highly respected elder entitled to significant respect. She wrote:

From: Mary Roberts [mailto:maroberts3297@yahoo.com]
Sent: Tuesday, December 13, 2011 12:46 AM
To: Kern, John
Cc: James Genia
Subject: Previous email from you

You stated in your response to my email today that I was "indeed incorrect regarding the unusual atmosphere at the Court." I know you are new to this community and new to the Tribal Court so you are not familiar with how past judiciary interacted with each other and with court staff. I have been an appellate judge for a number of years and have always had a positive, respectful and professional working relationship with all the Judiciary and court staff. The atmosphere at the Court now does not seem to be as welcoming and positive. This is what I meant by "unusual."

There has always been open communication between the Judiciary. You stated in your email, "I am trying diligently to promote more frequent and more open communications. The Tribal Court itself, at least from my perspective, is operating quite well under difficult circumstances." The four of us met once for a very short meeting, obviously of no fault of yours, however we are available by telephone. To my knowledge, you have not contacted any of us by phone to discuss any "difficult circumstances." There is also the option of scheduling a telephone conference to discuss issues which are too pressing to wait for a meeting. Your cancellation of today's meeting seems to imply you do not value nor trust my and Quinton's judgement. To me, this is not an indication of "trying diligently to promote more frequent and more open communications."

I am very concerned that the communication between you and me has been of a negative nature. As I stated before, I have always had a positive, respectful and professional relationship with all Court Judiciary and staff. I hope that we, too, will develop such a relationship.

If you have any other concerns or want additional information, I am sure any one or all the Judiciary is ready and willing to confer with you.

Judge Kern did not afford Justice Roberts the same respect. He cut short this exchange with this email copied to then-Chief Justice Genia and the tribal manager stating he would no longer respond to Justice Roberts:

From: Kern, John
Sent: Tuesday, December 13, 2011 7:04 AM
To: jmgenia@yahoo.com
Cc: Zotigh, Sonya
Subject: RE: Previous email from you

Dear Jim:

I am no longer going to respond to this series of emails. Mary appears to be intentionally trying to create issues where none exist and it is snowballing each time I try to reason with her. There is nothing wrong with my Court. In fact it has not been better . . . at least much better now since I arrived. Perhaps, and I admit this is pure speculation, it may have something to do with the fact that I found it necessary to release a member of her family from my staff last Friday. In any event, it is clear that she's trying to pick a fight, and I'm not going to play. She is an appellate judge, for Chrissakes!

Respectfully yours,

John

This exchange indicates the beginning of the walling-off of the tribal court administration from the appellate court, and the establishment of a hostile relationship between Judge Kern and now-Chief Justice Roberts.

A later series of emails between Judge Kern and then-Chief Justice Genia involving an appeal brought by former tribal judge Holly Thompson discussed below evidences Judge Kern's disrespect for now-Chief Justice Roberts:

From: [Kern, John](#)
To: [Jim Genia](#)
Bcc: [Campos, Cristine](#)
Subject: CONFIDENTIAL inquiry/statement
Date: Monday, February 04, 2013 11:27:45 AM

Good morning Jim:

4. By the manner in which the Holly Order was written, I was placed in an extraordinarily poor light. This together with Mary's inappropriate activism and the undercurrent of ongoing antagonism between Mary and I no matter how courteous I try to be toward her, I am convinced that she cannot rule on any of my decisions with professional objectivity. At the very least, if she had an ethical bone in her body, she would recuse herself from any appeals that involve my decisions. Of course, we both know that would never happen voluntarily.

As will be noted below in Part II(A)(4), Judge Kern was simply wrong in his analysis of the Thompson matter, and, more importantly, he provided no factual basis whatsoever for his claim that Justice Roberts should recuse herself from appeals of his decisions.

Perhaps Judge Kern's open antagonism toward the appellate court is best encapsulated by this email alleging without any apparent basis that then-Chief Justice Genia (or others) had intentionally kept him from knowing about a tribal judiciary meeting:

From: [Kern, John](#)
To: [Jim Genia](#)
Subject: Postscript
Date: Friday, February 01, 2013 9:55:28 AM

Jim, please keep me informed of any judicial meetings. I was knowingly and purposely not informed of the last meeting.

Thanks, John

Judge Kern's also directed antagonistic and sarcastic responses to comments, suggestions, and criticism from other departments. In this exchange with tribal police captain Dan Barboza over what appears to be a simple miscommunication, Judge Kern's response is unqualifiedly unprofessional. The exchange began with Capt. Barboza's email:

From: Barboza, Dan
Sent: Tuesday, January 24, 2012 7:54 AM
To: Quitugua, Cristine; Campos, Yvette
Cc: Feil, Matthew; Kern, John
Subject: RE: Victim Rights Fund

Cristine,

Yvette job description states she is to establish and maintain effective working relationship with law enforcement, attorneys, judges, court staff, other agency and the public. Like all of us she has more than enough on her plate to handle and can not take on more duties which are not part nor within the scope of her job description.

The above states: "to establish and maintain effective working relationship with law enforcement, attorneys, judges, court staff," not to take on the duties of court or their staff.

Judge Kern's response:

From: Kern, John
Sent: Tuesday, January 24, 2012 8:26 AM
To: Barboza, Dan; Quitugua, Cristine; Campos, Yvette
Cc: Feil, Matthew; Zotigh, Sonya
Subject: RE: Victim Rights Fund

Dear Dan:

I dread to respond, for I fear it will start up another endless, pointless rift. But, so goes it: **where, in the very respectfully composed message below did Crissi ask Yvette to take on the duties of the court or its staff?**

Put simply, so that victims with documented damage claims of \$500 or less don't have to wait a year or more for compensation from percap, the court is going to compensate them immediately from the victim's rights fund (which the Court feeds with its fines) and then have the defendant repay the victim's rights fund.

Crissi appears only to have tried to explain the Court process for that procedure. I hope, I plead, that this explains the communications below and ends this misunderstanding: i.e., the Court is NOT asking anyone to do its work for them.

Sincerely and respectfully, John

In a second exchange with Capt. Barboza, Judge Kern again responded sarcastically to a comment from Capt. Barboza about a rule about beverages in the courtroom:

From: Kern, John
Sent: Thursday, May 31, 2012 4:52 PM
To: Barboza, Dan
Cc: Quitugua, Cristine; TribalCourt; Zotigh, Sonya; Teeple, Mike
Subject: Re: Court Appearances

Final message: Cristine referred to no one in particular because she merely forwarded MY message (and I was not referring to anyone on particular). Moreover, I never proscribed beverages in the courtroom, only their intrusive use. Please read what I wrote, rather than seeking hidden meaning where none exists. Thank you, and now I am done with this preposterous exchange. John

I look forward to civil exchanges among all when I return (why does this nature of conflict seem always to occur when I'm gone?).

Sent from John Kern's iPhone

Judge Kern's responses to criticism from the tribal manager's office indicates further hostility. Tribal manager Zotigh wrote:

On Jul 10, 2012, at 6:39 PM, "Zotigh, Sonya" <Sonya.Zotigh@gtbindians.com> wrote:

Judge Kern, the attached shows emails of a personal nature that should not be addressed as they were by Tribal Court staff to other GTB staff. This is not a GTB work matter but a personal matter between two individuals and isn't appropriate @ work. It puts all involved in the email in an uncomfortable light and they were caught off guard not knowing how they should respond when really it's between the Campos'. Thank you for your attention to this, Sonya.

Judge Kern's response:

Zotigh, Sonya

From: Kern, John
Sent: Tuesday, July 10, 2012 8:02 PM
To: Zotigh, Sonya
Subject: Re: Personal Business

Jesus!!!

Sent from John Kern's iPhone

Moreover, as emails preserved in Judge Kern's computer confirm, he frequently vented his frustration with tribal judges and tribal councilors to the court administrator – an employee over which he had direct supervisory authority – In a highly inappropriate and unprofessional manner. As will be noted below, the April 8, 2014 hearing at which Judge Kern was absent generated significant controversy. After Councilor Tom Shomin forwarded Judge Kern's email responding to requests for information about his absence, Judge Kern emailed the tribal court administrator the following unprofessional and vituperative email:

From: Kern, John
To: Campos, Cristine
Subject: FW: Hearings
Date: Tuesday, April 22, 2014 8:18:00 AM

Tom sent it to everyone listed below, the little *****! Why do we bother when such people have only sour thoughts?

Judge Kern choice to involve the court administrator in his unprofessional ranting toward the tribal council evidenced an unfortunate pattern. After receiving an email from the tribal council asking for a meeting, Judge Kern wrote the

following email – possibly the most unprofessional communication conceivable – to the court administrator:

From: Kern, John
To: Campos, Cristine
Subject: RE: Attached letter requesting a meeting
Date: Tuesday, March 18, 2014 1:42:00 PM

You know, since that debacle with Sherri, Council has sucked away nearly all my dedication and will to serve a community that has no sense of right and wrong. I remember I used to get here an hour or more early and look forward to a day's work. Now, I can readily trace my indifference to that royally immoral butt-fuck by Council and JP, and I'm finding it real hard to care (except for the poor souls who end up in Court . . . and even then the "prosecutor" finds compassion aggravating). God, I wish something positive could happen to change my perspective, but it probably won't. Hell, I don't even feel comfortable asking Bob anymore for advice. Now they want to do it again.

Oh well.... See you tomorrow.

Even during the removal hearing, Judge Kern made repeated antagonistic statements about Chief Justice Roberts and directly to her. Judge Kern's antipathy toward Chief Justice Roberts further supports the Judicial Commission's decision to proceed with the investigation privately until the Commission filed the Statement of Allegations.

That the Judicial Commission did not involve Judge Kern early on in its investigation or agree to meet privately with him before the public hearing may to an outsider appear unfair, but there is substantial evidence that Judge Kern would have been uncooperative and combative once he learned of Judge Long's complaint. The Judicial Commission acknowledges that the process implemented in this matter was not perfect, but complied with Article V, Section 8, subchapter 1.200 of the tribal court rules, and the obligation of the tribunal to provide fundamental fairness to the accused.

IV. Tribal Law of Judicial Conduct

Article V, Section 8, as stated above, governs the process and the substance of the removal of tribal judges. These provisions have never been interpreted or applied by the tribal judiciary, and this matter is a case of first impression.

Section 8(a) incorporates by reference the American Bar Association Code of Judicial Conduct. As the tribal constitution came into effect in 1988, we look to the ABA judicial code in effect at the time, the 1986 version. Relevant for our purposes here, Canon 3(A)(1) of the ABA code states: "A judge should be faithful to the law and maintain professional competence in it." A leading commentary on the 1986 code suggests that mere isolated legal errors does not constitute a failure of "professional competence," but that continued errors occurring over years constitutes justification for removal:

Given that courts have ruled that some forms of legal error do amount to judicial misconduct, but that care should be taken to protect judicial independence, it becomes very important to draw a line between "mere" legal error correctable only by appeal and more serious legal error that rises to misconduct. Unfortunately it is not easy to draw such a line. Yet, there are some criteria that are most helpful. The first is, as already noted, a pattern of repeated legal error over a period of years. This sort of continuous conduct demonstrates that the judge has not maintained a professional competence in the law and is not fit to hold office. In fact, *several courts have ruled that a repeated pattern of legal error calls for the most harsh sanction—removal.*

Jeffrey M. Shaman, 2 GEO. J. LEGAL ETHICS 1, 9 (1988) (footnotes omitted) (emphasis added).

Canon 1 requires judges to "observe[] high standards of conduct, so that the integrity and independence of the judiciary may be preserved." We hold that these high standards of conduct prohibit misrepresentations of fact in the administration of the court, or in reporting facts about tribal court operations. As one commentator noted:

Lack of Candor. Bad judges are untruthful. They fabricate their backgrounds in order to obtain their appointments, fail to be forthright in applications for service on the bench, are evasive in responding to required periodic disclosures of financial transactions and interests, neglect to inform the authorities about criminal convictions, and *misrepresent the status of their dockets in order to avoid acknowledging backlogs*. When accused of misconduct, they lie to the police, the press, and disciplinary authorities. They fail to cooperate with investigators, behave in a contumacious manner in formal misconduct hearings, and intimidate, suborn, or retaliate against witnesses.

Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 453-54 (2004) (footnotes omitted) (emphasis added).

The tribal judiciary also has enacted Subchapter 1.100 of the court rules to expound upon judicial conduct more specifically. Along with subchapter 1.200, these provisions allow for judicial discipline up to and perhaps including removal. Relevant provisions are reproduced here:

Protecting the integrity of an independent judiciary: “A Tribal Court judge should uphold the integrity and independence of the Tribal Judiciary in that an independent and honorable Tribal judiciary is indispensable to justice in the Tribal community.” Grand Traverse Band Court Rule 1.102.

Judges held to high standards of conduct: “A judge should participate in establishing, maintaining, and enforcing, and should him/herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.” *Id.*

Judges must promote confidence in the integrity and impartiality of the judiciary: “A Tribal judge should respect and comply with the law of the Tribe and at all times should act in the manner that promotes confidence in the integrity and impartiality of the Tribal Judiciary.” Grand Traverse Band Court Rule 1.103(A).

Judges must value judicial activities over all other activities: “A Tribal Court judge should perform the duties of the office impartially and diligently. The judicial activities of a Tribal judge should take precedence over all other activities.” Grand Traverse Band Court Rule 1.104.

Judges should be courteous to those they deal with officially: “A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, advocates and others with whom he/she deals with in his/her official capacity.” Grand Traverse Band Court Rule 1.104 (A)(2).

Judges must guarantee fundamental fairness to litigants: “A Tribal Court judge should accord to every person who is legally interested in any proceeding, or his/her lawyer or other representative, full right to be heard according to Tribal law and except as authorized by law, neither consider nor permit one-sided or other communication with a litigant, his/her attorney, or lay advocate concerning a pending or impending proceeding unless all parties to the proceeding are present.” Grand Traverse Band Court Rule 1.104 (A)(3).

Judges must perform administrative responsibilities diligently: “A judge should diligently perform his/her administrative responsibilities with a high degree of integrity and diligence.” Grand Traverse Band Court Rule 1.104 (B)(1).

There is no Grand Traverse Band case law interpreting these provisions.

V. Legal Analysis

The Judicial Commission’s decision rests upon several independent foundations. First, Judge Kern is unqualified to serve as a judicial officer is well established by the evidence presented at the removal hearing. We most especially rely upon the testimony of Judge Long, Tribal Prosecutor Feil, and Ms. Fraser of Michigan Indian Legal Services. Second, Judge Kern’s actions and inactions relating to an emergency ICW hearing on April 8, 2014 constitute unethical conduct and gross misconduct, justifying his removal. Third, Judge Kern’s assignment of most cases to Judge Long resulting in an unbalanced workload for the two judges, possibly related to Judge Kern’s lack of qualification to serve as a judicial officer, creates inefficiencies in court operations that undermine the integrity of the court, justifying his removal. Fourth, Judge Kern’s failure to effectively notify proper tribal managers about his serious health conditions in 2014 violate the tribal personnel policy and further undermined the integrity of the court and constitute gross misconduct. Finally, several other isolated circumstances relating to Judge Kern’s

administration constitute gross misconduct; for example, misrepresenting court operations information to the tribal council and others, failure to ensure tribal court staff are adequately trained, interference with appellate court processes, and others.

Perhaps most damning to Judge Kern is the ongoing decrease in the tribal community's respect for the tribal court. Judge Long testified that the tribal community has been more critical of the tribal court under Judge Kern than ever before:

When I first began, there were people that voiced concerns about the way things were being handled by Judge Kern and my response to them I think was everyone is entitled to time to get their feet under them. Discretionary decisions are by their very nature discretionary. And it's to be expected there may be times people would disagree. ... What I found has happened is that after that initial period, things had plateaued and more and more people began to approach me and I started seeing again a lot of what I put in my complaint. There were small things going on that by themselves didn't really rise to a huge level of concern. And as I started to put it together I put it all of it onto pages and began to note. In my opinion ... what's happened is that the court staff has suffered because they feel as though the judge is not 100 percent committed. Should they be 100 percent committed? I think the members, from their showing [up to the courthouse] and there's no judge there, [are] concerned. All the departments are important but I think the court is just as if not more important because there are some emergent nature things that other departments don't have. What I've heard, what I've felt is that there is even greater criticism and concerns by others that historically there has been.²

Michigan Indian Legal Services Deputy Director Cameron Fraser, who has years of experience practicing before the Grand Traverse Band tribal court, stated that the court's operations have "definitely gone downhill."³ She elaborated:

Since Donna Chippewa has left it has definitely gone downhill. And I'm sure that Eric or Fred ... can tell you when I'm filing sometimes I have to explain to the court clerks what it is, why I'm doing it, what the

² Testimony of Judge Long, 10:04 AM – 10:06 AM, June 16, 2014.

³ Testimony of Cameron Fraser, 9:38 AM, June 17, 2014.

process it. But also court orders don't come out anywhere near as swiftly. It just hasn't been functioning anywhere near as well administratively.⁴

What constitutes credibility is not an easy concept to articulate, and whether Judge Kern is substantially to blame for a loss of credibility is admittedly not clear. The Judicial Commission finds that Judge Kern's administration of the tribal court has been incredibly damaging to ongoing tribal court operations and credibility in the community.

We provide our analysis in the structure offered in the Statement of Allegations.

*I. Persistent Failure to Perform Duties (GTB
Constitution art. V, § 8(c))*

*A. Failure to Perform Duties as a Presiding
Judge*

1. For at least the last calendar year, Respondent has performed as the presiding judge in regular court hearings for only a small percentage of matters on the docket. Associate Judge Michael Long, a part-time judge, handles the remainder of the hearings. Respondent refuses to hear child welfare matters altogether except where Associate Judge Long is conflicted out of the matter.

The record supports the allegation that Judge Kern holds far fewer hearings than does Judge Long, and that there are significant problems in tribal court administration that result from this situation. The impact on the tribal court's operations is substantial enough for the Judicial Commission to find that Judge

⁴ Testimony of Cameron Fraser, 9:39 AM, June 17, 2014.

Kern's assignment of most cases to Judge Long has violated Grand Traverse Band Court Rule 1.102, which requires tribal judges to preserve the integrity of the judiciary; Rule 1.104, which requires tribal judges to perform the duties of the office diligently; and Rule 1.104(B)(1), which required tribal judges to perform administrative duties with a "high degree of integrity and diligence." We find further than Judge Kern's assignment of most cases to Judge Long qualifies as "[p]ersistent failure to perform duties" under Article V, Section 8(c).

We further find that the fact Judge Long handles the lion's share of the tribal court caseload is a symptom of the greater problem of Judge Kern's lack of competence to preside over important matters. We do not find credible Judge Kern's defense that his health issues from January 2014 through May 2014 excuse his assignment of a staggering workload to Judge Long. The workload problem existed long before the health concerns, and Judge Kern's failure to formally notify the remainder of the tribal judiciary or tribal human resources of his health issues until after Judge Long filed his complaint negates his defense.

Judge Long presides over the vast majority of hearings at the tribal court. Since October 2013, Judge Long handled 191 hearings, while Respondent heard 71.⁵ Judge Long is scheduled to work at the tribal court about two-and-a-half days a week. During his scheduled days, hearings are stacked, with numerous hearings scheduled back-to-back, akin to a "rocket docket."⁶ On days Judge Long is not scheduled, there are relatively few hearings.

There is a severe imbalance of judicial workload tilted toward relieving Judge Kern of much of his obligations to preside over cases. While Judge Kern has offered to handle more hearings, he generally has not. Judge Kern strangely places the

⁵ Testimony of Judge Long, 9:40 AM, June 16, 2014.

⁶ Testimony of Matthew Feil, 11:23 AM, June 17, 2014.

burden (and even blame) on Judge Long,⁷ who was unaware of the workload imbalance until recently,⁸ to seek workload relief from his supervisor.

Judge Kern points to an email exchange involving one day in September 2013 that he claims absolves him of responsibility for assigning or allowing Judge Long to hear so many cases in one day. The first email is where Judge Kern asks Judge Long if wants assistance:

On Sep 6, 2013, at 8:08 AM, "Kern, John" <John.Kern@gtbindians.com> wrote:

Mike, you sure you don't want me to take some of those cases?

Judge Long responded as any subordinate would to his supervisor, suggesting he could do the work if necessary and leaving it to his boss to reshuffle the workload:

From: Long, Michael
Sent: Friday, September 06, 2013 10:17 AM
To: Kern, John
Subject: Re: guardianships/conservators

Completely up to you. They are all guardianship/conservatorship cases. Assuming they have paperwork filed, none should run longer than 15 minutes, no paperwork filed, plan is to get a verbal update and a deadline in the order to complete paperwork. If child has aged out or moved, we are going to provide paperwork to motion court to terminate/modify. It's more a house keeping day than anything else, and more the clerks carrying the weight of the day, I assume there will be calls leading up to that day that will resolve some of the cases.

Sent from my iPhone

Judge Kern's response indicates that he had no interest in taking on those cases, and allowed Judge Long's "rocket docket" to continue rather than reassigning cases:

⁷ Testimony of Judge Kern, 2:01 PM – 2:03 PM, June 16, 2014 (alleging that Judge Long said he could handle the cases, and leaving it to Judge Long to make his own schedule).

⁸ Judge Long testified that workload was not something "that I track, and frankly I had an inability to track because as the software is utilized what happens is once a hearing is done it's purged from the calendar." Judge Long Testimony at 9:38 AM, June 16, 2014.

From: [Kern, John](#)
To: [Long, Michael](#)
Subject: RE: guardianships/conservators
Date: Friday, September 06, 2013 1:17:49 PM

Okay. I just overheard that you had quite a lot of them scheduled on one day and am offering to help if you need. Let me know. John

Judge Long understandably did not seek relief for his heavy workload that day or any other day, given the power dynamics (Judge Kern is his supervisor) and information asymmetry (Judge Long did not know that on days we was not in the tribal court that there was relatively little court activity).

This workload imbalance has numerous consequences. Because hearings are stacked, Judge Long and court staff have no opportunity to draft and edit orders in a timely manner. Orders are delayed, and backlog ensues. Judge Long testified:

Orders could not get out within 24 hours. And the reason is that the clerks, because I was only there two-and-a-half, three days a week, the hearings were getting stacked and as I went through some days there would be five or six, seven hearings, there was no way the order could get done, be reviewed, changes made as necessary, go back to the clerk, and then the order would get out. In fact, what was happening was – I was here, for example, Monday, Tuesday, and Thursday, I would have the orders from Monday probably get to me on Thursday because we have hearings on Monday, hearings on Tuesday, and when I came in Thursday, some of the orders would be prepared. If I had to make modifications and send them back, I wouldn't be in until the following week. There were some orders that just were not getting out in a timely manner.⁹

⁹ Testimony of Judge Long, 9:39 AM, June 16, 2014.

Judge Long stated that these stacked hearings created a “logjam.”¹⁰ Michigan Indian Legal Services attorney Cameron Fraser testified, “I know we have to wait quite a while for orders to come out, especially in child welfare cases. They used to come out pretty quickly.”¹¹

Judge Kern stated that he had severe health problems during the first five months of 2014 as a means of explaining his absenteeism.¹² He testified that he worked odd hours – evenings and weekends – to make up for missed work.¹³ Working evenings and weekends might make up for certain administrative duties, but does not address the more pressing issue of Judge Long’s stacked hearing schedule.

Judge Kern admits that during the first five months of this year, he was present in the tribal court building for a full day only about two or three days a week.¹⁴ The evidence is less clear about whether Judge Kern was available by phone when he is not in the building. Judge Kern alleges he was always available by phone when not in the building, and often came to work when he was not feeling well.¹⁵

But Judge Kern’s testimony on the extent of his health issues is inconsistent and confusing. At one point, Judge Kern testified that his health issues were “debilitating,” apparently referencing his 2013 knee problems:

The discomfort I was going through made it difficult to remain in a sitting position for any length of time and was somewhat debilitating.¹⁶

He also mentioned coming to work without taking his medication because he could not function while he was medicated. He testified:

¹⁰ Testimony of Judge Long, 9:40 AM, June 16, 2014.

¹¹ Testimony of Cameron Fraser, 9:40 AM, June 17, 2014.

¹² Testimony of Judge Kern, 12:36 AM – 12:42 AM, June 16, 2014.

¹³ Testimony of Judge Kern, 12:42 AM – 12:45 AM, June 16, 2014.

¹⁴ Testimony of Judge Kern, 1:42 PM – 1:43 PM, June 16, 2014.

¹⁵ Testimony of Judge Kern, 1:43 PM – 1:44 PM, June 16, 2014.

¹⁶ Testimony of Judge Kern, 1:00 PM, June 16, 2014.

Immediately following my surgeries, I stopped my medication because I wanted to get back at work. I couldn't sit in court and make judgments or do any kind of rulings while I was medicated.¹⁷

Judge Kern's health issues were genuinely serious, but he appears to recant somewhat when asked whether he could actually perform his work. At another point in his testimony he denied the health issues were affected his work:

Justice Fletcher: You said it was "somewhat debilitating." Your debilitation started and you said it has ended?

Judge Kern: I would say it was debilitating but it did not prevent me from performing my obligations. I may not have been physically here for a few hours on one day or a few hours on another day. As I said I was always made sure that the docket was clear, that there was no problems, there was nothing to be signed, and everyone knew how to get ahold of me in case any emergencies came up.¹⁸

Judge Kern testified that his health as of mid-June has "improved exponentially."¹⁹

Judge Kern provided numerous emails to tribal court staff notifying them of time when he would be out of the office. For example, on January 25, 2013 (long before the time he claimed his illnesses were debilitating), Judge Kern wrote:

From: [Kern, John](#)
To: [Campos, Cristine](#)
Subject: Drs. appt
Date: Friday, January 25, 2013 12:34:31 PM

Crissi, I'll be leaving today at 2:00 to get my x-rays, and then I have another appointment on Monday at 2:15 for the steroid shots. FYI. You may want to get your timesheets to me. ☺

Similarly, on April 24, 2013, Judge Kern wrote:

¹⁷ Testimony of Judge Kern, 1:50 PM, June 16, 2014.

¹⁸ Testimony of Judge Kern, 1:46 PM, June 16, 2014.

¹⁹ Testimony of Judge Kern, 1:45 PM, June 16, 2014.

From: Kern, John
To: Campos, Cristine
Subject: off
Date: Wednesday, April 24, 2013 11:15:13 AM

Okay, I'm off. Need sleep. Have a pleasant and quiet day! ☺☺☺

Emails Judge Kern sent to the court administrator in 2014 confirm his health concerns. On April 23, 2014, Judge Kern informed the court administrator that he felt poorly, and was going to the doctor for medication:

From: Kern, John
To: Campos, Cristine
Date: Wednesday, April 23, 2014 1:58:00 PM

Crissi, I feel like crap. Going to go to docs for some medication. See tomorrow afternoon. Call me if anything needs attention before then. JK

On May 6, 2014, Judge Kern again left early due to not feeling well, informing the court administrator by email:

From: Kern, John
To: Campos, Cristine
Subject: Other stuff
Date: Tuesday, May 06, 2014 9:41:00 AM

Crissi, since Mike is here all day, I may go home. I feel like crap. I believe this surgery was so traumatic it lowered my immune system, cause now I'm catching everything. I need rest is all. So I'm going to go pretty soon so I'll be okay the rest of the week. Anything you need signed or done?

Judge Kern's testimony and his email record demonstrates that he followed a pattern of notifying the court administrator and no one else on a day-to-day, hour-to-hour basis when he would be out for health reasons. Judge Long at times would even recommend to Judge Kern that he should go home on bad days.²⁰

²⁰ Testimony of Judge Kern, 1:44 PM, June 16, 2014.

Importantly, Judge Kern confirmed that he did not formally notify human resources of the extent of his health issues, nor that he disclosed the amount of time he was absent from the tribal court building.²¹ Judge Kern's failure and refusal to inform the proper tribal officials formally of the extent of his illnesses in 2014 is exasperating in light of his acknowledgment that he missed significant time as a result of the health issues. In two instances this year, Judge Kern mentioned via email his health issues to the tribal manager's office. On March 24, 2014, Judge Kern emailed the tribal manager, making no mention of the extent of his debilitation, and even making light of it:

From: [Kern, John](#)
To: sonya.zotigh@gtbindians.com
Subject: GPT time
Date: Monday, March 24, 2014 10:19:00 AM

Good morning Sonya!

Hope all is well. Here, I was reminded by my CA to send in a GPT request, which of course I forgot to do in all the day-to-day administrations. I requested 24 hours for the day I had some hand surgery and the 2 days following (March 4-6). I should have taken longer, but my physician is one of these "manly" types who spoke admiringly of patients who were back at work in two days after his "slice and dice" session with them. It was a Dare, of course. So here I was on Friday trying with all my might not to swear, complain or be cranky.

So, I did this while my wife was gone for a little over a month, and so she wouldn't have to endure my standard funk after yet another surgery (all horse related). Another mistake. I was miserable by myself and I'm not embarrassed to admit it. In any event, she's coming back late Tuesday evening and I would like to take Wednesday off to be with her. I checked Full Court and my calendar and I will not be missing anything. I will scan the Report to you and then send the original by interoffice mail. Any questions let me know.

On April 16, 2014, he emailed the tribal manager a more sobering message hinting as his debilitation, but still asserting he could perform his duties:

²¹ Testimony of Judge Kern, 1:48 PM, June 16, 2014.

From: [Kern, John](#)
To: sonya.zotigh@gtbindians.com
Subject: CONFIDENTIAL, re: DMs mtg.
Date: Wednesday, April 16, 2014 11:05:00 AM

Hi Sonya:

This year has been rather rough for me health-wise. I've had surgery to fuse a badly damaged wrist, and each week for the last 4 weeks I have had to appear at my physician's office and have some carcinomas removed. The last one (we hope) was excised yesterday with less than 12 stitches it looks like (not as bad as the others). Both Crissi and Mike are aware of this situation.

But the substantive issue is this: I can attend the division manager's meeting this afternoon, but if there is nothing stunningly important to be shared I wonder if I might sit this one out? I feel like crap and find quiet to be useful. But I'm not a zombie either and can come if you wish. Please let me know. Thanks, and warm regards. John

Judge Kern's 2014 emails to the tribal manager about his health issues are perplexing. Despite the fact that he frequently not present in the tribal court building, he only asked for relief from the tribal manager one time, when he was scheduled to appear at a division manager's meeting. He could easily have acknowledged his serious health concerns then, but did not. The tribal personnel policy, with which the tribal court must comply in accordance with the Memorandum of Understanding with the tribal council, squarely places the obligation on any employee to report to work on time and give proper notice to management:

It is the responsibility of each employee to report to work as scheduled and on time. Punctuality and regular attendance are necessary to maintain job performance expectations. Management recognizes that there are times when illness, injury or personal emergency may result in an absence or tardy. Sufficient advance notice allows the supervisor to make alternate scheduling arrangements. Even with proper notice this usually means either a personal inconvenience or more work for co-workers. Recognizing that there are times when lateness or absences are unavoidable, government management expects all employees to exercise good professional judgment in reporting to work and providing as much advance notice as possible. Every employee has a responsibility to monitor and be aware of his/her attendance.

When an employee cannot report to work as scheduled, it is critical that employee notify his/her immediate supervisor prior to his/her scheduled start time unless there are extenuating circumstances. This notification must be made even if the employee will be arriving past the scheduled start time.

Grand Traverse Band Government Personnel Policy § 600.00. If the chief judge is unavailable for significant periods of time, then the tribal council should be able to assist in hiring a temporary judge or other relief. *See* GTB Constitution art. V, § 4(a) (governing appointments to the tribal court).

Judge Kern's claims that he always informed tribal court staff of his unavailability, and that he was always available by phone when out of the office are belied by incidents such as the one on April 8, 2014 (discussed in the next section) and by Judge Kern's own testimony that his illnesses were debilitating and required medication that prevented him from functioning properly. As chief trial judge and chief administrator of the trial court, it was Judge Kern's absolute duty to report all debilitating or potentially debilitating health concerns to the proper managers; for example, tribal human resources or the tribal manager's office.

Moreover, it is clear that others had noticed Judge Kern's frequent absences. Judge Long testified that others had asked him about Judge Kern's absences, and instances where tribal court staff could not locate Judge Kern by phone:

I had been approached by a couple people including Justice Walker about occasions where there were calls made to the court and there was not a judge available or no judge there and staff was unaware of how to get ahold of ... Judge Kern. ... [B]ased on the technology we have in place there should never be an occasion where a clerk doesn't know how to get ahold of someone. The only time I'm unavailable is when I'm in a hearing and have to turn my phone off. That includes ... at night or on the weekends. It appeared to me as you move through 2013 and 2014 that changed with Judge Kern and there was less time available and court staff knew less and less about where he was.²²

²² Testimony of Judge Long, 9:34 AM, June 16, 2014.

Mr. Feil also testified that on at least one occasion other than the April 8 hearing discussed below, Judge Kern was not present on a day he was scheduled to appear in court to handle an important criminal matter.²³ The testimony of both Judge Long and Mr. Feil belies Judge Kern's insistence that he was always available. The Judicial Commission finds that contrary to Judge Kern's assertions, his absences from the tribal court building negatively affected court operations.

We find this situation similar to *In re Alford*, a Louisiana Supreme Court decision removing a judge from office for excessive absenteeism due to health concerns. *See* 977 So.2d 811, 827 (La. 2008) ("The Commission concluded that Judge Alford's absences from court were directly related to her using very large quantities of prescription drugs, and that her absence negatively impacted the functioning of the court."), but worse because of Judge Kern's position as chief administrator of the court and sole full-time judge.

Judge Kern may have informed tribal court staff on a given day that he was not feeling well or had a medical appointment as a means of explaining why he would miss time at work. Judge Kern talked to Judge Long to some extent about his medical problems. But no one knew the extent of Judge Kern's illnesses, which were severe and, in his own words, debilitating – so much so that he missed days of work, or hours of work in days he was in – about half of the days of each week Judge Kern was not available. When he was out of the office, he might have been medicated to the point where he could not function, or was at a medical appointment, which further belies his testimony that he could perform his work while not in the office. Judge Kern never disclosed his unavailability due to his health issues formally to the tribal judiciary or to tribal human resources.

The evidence is strong that tribal court operations have suffered from this situation, and the evidence is equally strong that Judge Kern has done little or nothing to resolve the problem. The Judicial Commission is critical of Judge Kern's

²³ Testimony of Matthew Feil, 11:23 AM, June 17, 2014.

assignment of most cases to Judge Long, creating the “rocket docket” stacking problem that contributes to inefficiencies within the court.

We also find that Judge Kern’s failure to formally inform the relevant tribal managers of the extent of his health issues or how much time he was actually missing from work is actionable. Judge Kern’s efforts to minimize his health issues to support his view that he was available to work even when he was not present in the tribal court building conflict with his efforts to maximize his health issues to justify his absences from the building in the first place. However we are to interpret Judge Kern’s health issues, his failure to inform the appropriate tribal officials of his significant absences constitutes gross misconduct.

Each of these findings serves as justification for his removal as judge under Article V, Sections 8(c) and 8(d).

We further find that the evidence tends to support the conclusion that Judge Kern’s over-reliance upon Judge Long is a symptom of a more serious concern about Judge Kern’s incompetence to serve as judge that have nothing to do with Judge Kern’s health.

2. *On or about April 9, 2014, Respondent failed to appear and was unavailable by phone without a valid reason at an emergency child welfare hearing on a day Associate Judge Long was unavailable.*²⁴

The Judicial Commission finds that Judge Kern’s actions and inactions on April 8, 2014 justify his removal from the bench. We find that Judge Kern failure as chief tribal court administrator to ensure that a judge would be present at the April 8, 2014 emergency ICW hearing is gross misconduct that justifies his removal as

²⁴ The Judicial Commission takes judicial notice of the fact that the hearing in question actually took place on April 8, 2014.

judge. Judge Kern's failure to ensure that a judge would be present on April 8 also violates Rule 1.104(B)(1), the duty to perform administrative functions with a high degree of integrity and diligence; and Rule 1.102, the duty to uphold the integrity of the tribal judiciary.

We begin by describing in general terms the import of a 24-hour ICW hearing. When Anishinabek Family Services and the tribal prosecutor become aware of a child who may be in danger and in need of immediate care, the tribe initiates a matter in tribal court. *See generally* 10 Grand Traverse Band Tribal Code § 114 et seq. The tribal court is obligated to hold a hearing on the matter within 24 hours.²⁵ Emergency ICW hearings may be the most critical hearings held by the tribal court, and may involve the immediate safety of an Indian child.

On Monday, April 7, 2014, GTB Prosecutor and Anishinabek Family Services (AFS) Presenting Officer informed Judge Long that he expected AFS to file an emergency Indian child welfare (ICW) petition the next day.²⁶ Judge Long informed tribal court staff and Judge Kern that the hearing could occur the next day, when he was not scheduled to be available.²⁷ The court calendar also indicated that Judge Kern would be available to hear the matter.²⁸

This type of ICW hearing must be conducted within 24 hours,²⁹ which in this matter meant that the hearing would be held on Tuesday, April 8. Moreover, the hearing was absolutely critical, and involved the safety of an Indian child:

[S]imply noting that there may be a necessary hearing regarding change in placement now knowing what the case was going to be, it clearly is important and in the absence of a court order changing the placement, the court speaks through its orders and then there could have been a whole host of risks that could have occurred had the

²⁵ Testimony of Matthew Feil, 10:55 AM, June 17, 2014.

²⁶ Testimony of Judge Long, 9:22 AM, June 16, 2014; Testimony of Matthew Feil, 10:54 AM, June 17, 2014. Judge Long incorrectly identified the date of the hearing as having happened in March.

²⁷ Testimony of Judge Long, 9:22 AM, June 16, 2014.

²⁸ Testimony of Matthew Feil, 10:55 AM, June 17, 2014.

²⁹ Testimony of Matthew Feil, 10:55 AM, June 17, 2014.

hearing not taken place. So it was of an emergency status, it was terribly important, and in my opinion had safety issues built into it.³⁰

Normally, Judge Long handles incoming ICW matters, but he is a part-time judge who was unavailable on April 8. Judge Long did say he would try to be available by phone if necessary. Judge Kern agreed on April 7 to handle the matter.³¹ Later that night, he suffered a fall, injuring his wrist or arm. Judge Kern had had surgery on the wrist a month prior, and so he was concerned that the fall might have damaged the surgical repair.³² Although Judge Kern appears to have made a trip to Munson Medical Center for treatment the next day, he suffered no significant injury to his wrist:

From: Kern, John
To: Shomin, Tom
Cc: Pedwaydon, Al.; Gasco, JoAnne; Arroyo, David; Kewaygoshkum, Bob; Rohl, Jane; Antoine, George; Long, Michael; Petoskey, John, E; "matthew.fletcher@law.msu.edu"; Judge MaryAnn Roberts; Judge Quintin walker
Subject: RE: Hearings
Date: Friday, April 18, 2014 11:51:00 AM

However, I could not anticipate that when I arrived home that night after work I would slip and fall on ice in my driveway and land with some force on the arm and wrist that was surgically fused just 6 days before. The next morning, in noteworthy discomfort and fearful that I may have damaged my surgical apparatus, I contacted my physician who shared my concerns and called me into his office immediately for x-rays. It was determined that the internal metal structures used for the fusion received a little jog, but remained reasonably stable and needed only a brief period of complete immobilization after a recasting. My physician did not seem concerned that the fall resulted in a chipped bone in my elbow, but that's another story.

The Judicial Commission finds that Judge Kern was not incapacitated on April 8. During the removal hearing, he stated that he had three separate medical appointments scheduled for April 8.³³ He testified that he was "not unconscious." He

³⁰ Testimony of Judge Long, 9:36 AM to 9:37 AM, June 16, 2014.

³¹ Testimony of Judge Long, 9:23 AM, June 16, 2014.; Testimony of Judge Kern, 12:48 PM, June 16, 2014.

³² Testimony of Judge Kern, 12:47 PM – 12:48 PM, June 16, 2014.

³³ Testimony of Judge Kern, 12:49 PM, June 16, 2014.

also testified that he could have presided over the hearing “telephonically.”³⁴ Though Judge Kern was likely in pain, he was also aware that an emergency ICW hearing was occurring that day. An Indian child was at risk, and Judge Kern should have taken every conceivable action to ensure that a judge would be available for that hearing. Instead, he effectively did nothing to ensure there was an available judge, claiming that he never received a call from the tribal court.³⁵

On the day of the hearing, Tuesday, April 8, 2014, tribal court clerk and bailiff Eric Placer emailed Respondent at 7:57 A.M., copying Judge Long and Mr. Feil, to formally notify Judge Kern that the emergency hearing was a go, and would take place at 11 A.M.:

From: Placer, Eric
Sent: Tuesday, April 08, 2014 7:57 AM
To: Kern, John
Subject: Emergency Placement Hearing

Good morning Judge Kern,

I was just informed by Pam that you were not going to be here this morning. Matt and Judge Long wanted me to set a emergency placement hearing for this morning at 11:00. If they didn't remove yesterday and they remove the child today we can change and set for tomorrow. I will get ahold of Matt and find out what they did. Thanks

Eric Placer
Court Clerk / Bailiff
Grand Traverse Band Tribal Court

Judge Kern had already contacted a tribal court staff member, Pamela Soffredine, that morning of April 8 to state he was unavailable;³⁶ the 7:57 AM email from Mr. Placer confirms this contact. Judge Kern further alleges that “the court” – and it would have to be Ms. Soffredine because that was the only person to whom Judge

³⁴ Testimony of Judge Kern, 12:40 PM, June 16, 2014. However, this statement is in tension with his April 18 email to Councilor Shomin reproduced above where he emphasizes his “noteworthy discomfort and [fear] that [he] may have damaged [his] surgical apparatus....”

³⁵ Testimony of Judge Kern, 12:49 PM, June 16, 2014.

³⁶ Testimony of Judge Kern, 12:50 PM, June 16, 2014.

Kern spoke – told him Judge Long was available after all.³⁷ Even so, Mr. Placer’s email put Judge Kern on notice that a hearing might be required that day – “*if* they didn’t remove yesterday...” (emphasis added). There is no indication in this email that Mr. Placer was informing Judge Kern that Judge Long was available.

Judge Kern also states that he contacted Mr. Placer on multiple occasions, suggesting that he was in more contact with the court than he actually was:

The court has been provided with emails that show first of all that I did in fact notify Mr. Placer so that the court was notified that I was unable to be there because the day before I had a medical emergency.³⁸

Judge Kern did not send multiple emails; his only email is the 1:43 PM email. The evidence shows that he was completely out of contact with court from the time he spoke to Ms. Soffredine before 7:57 AM until he emailed Mr. Placer at 1:43 PM. Judge Kern apparently read into the 7:57 AM email from Mr. Placer, and his early morning conversation with Ms. Soffredine, that he no longer had any obligation to the court for that day.

Judge Kern did not appear at the courthouse on April 8. Judge Long was in the Detroit area conducting depositions in his private practice. Several attorneys, including the prosecutor, tribal employees, and parties appeared in time for the 11 AM hearing.³⁹ After efforts to contact Judge Kern by phone,⁴⁰ tribal court staff eventually contacted Judge Long, who had turned on his phone after his deposition work.⁴¹ Judge Long conducted the emergency hearing by phone while on the side of

³⁷ Testimony of Judge Kern, 12:50 PM, June 16, 2014.

³⁸ Testimony of Judge Kern, 2:23 PM, June 17, 2014.

³⁹ Testimony of Judge Long, 9:23 AM, June 16, 2014; Testimony of Cameron Fraser, 9:25 AM – 9:26 AM, June 17, 2014; Testimony of Matthew Feil, 10:56 AM, June 17, 2014.

⁴⁰ Testimony of Matthew Feil, 10:57 AM, June 17, 2014. Judge Kern disputes this finding, testifying that he never received a call from the court. Testimony of Judge Kern, 12:49 PM, June 16, 2014.

⁴¹ Testimony of Judge Long, 9:23 AM, June 16, 2014.

the highway in metro Detroit about 45 minutes after the scheduled start time.⁴² Judge Long held a follow up hearing a few days later.⁴³

Judge Kern did not reply to the 7:57 AM email from Mr. Placer until well after the hearing was over. At 1:43 P.M., Respondent wrote in response to Mr. Placer's early morning email:

From: [Kern, John](#)
To: [Placer, Eric](#)
Cc: [Long, Michael](#); matthew.feil@gtbindians.com
Subject: RE: Emergency Placement Hearing
Date: Tuesday, April 08, 2014 1:43:00 PM

Thanks Eric. I believe I overheard Mike and Matt discussing this yesterday, and am confident Judge Long has it in hand. If there are any problems or hitches, let me know.

John

Judge Kern's explanation for his absence is simply unacceptable. To rehash events: (1) Judge Kern contacts the court – Ms. Soffredine – to let the court know he is injured and unavailable; (2) Mr. Placer emails Judge Kern at 7:57 AM, the content of which places Judge Kern on notice that a hearing might need to be held that day; (3) the court sets an 11 AM emergency ICW hearing; (4) Mr. Placer and possibly other court staff unsuccessfully try to reach Judge Kern and Judge Long at or around 11 AM; and finally (5) at 11:45 AM, the court staff reach Judge Long and he holds the emergency ICW hearing telephonically.

The court administrator, Christine Campos, was also out that day,⁴⁴ leaving a relatively new tribal court employee, Mr. Placer, who serves as both court clerk

⁴² Testimony of Judge Long, 9:24 AM, June 16, 2014; Testimony of Cameron Fraser, 9:26 AM – 9:27 AM, June 17, 2014; Testimony of Matthew Feil, 10:59 AM, June 17, 2014..

⁴³ Testimony of Judge Long, 9:24 AM, June 16, 2014.

⁴⁴ Testimony of Judge Long, 9:23 AM, June 16, 2014 (noting that the court administrator was out on April 8, and had been bedridden for several days). The following email also establishes that the court administrator was ill on April 7, and that Judge Kern was aware of that fact:

and bailiff, to respond to this series of events on his own. The Judicial Commission simply cannot countenance this scenario, no matter how strenuously Judge Kern attempts to explain away blame for this incident. It is the tribal court's chief administrator who has the ultimate responsibility to ensure that the tribal court operates effectively, and at a critical moment, the tribal court was leaderless and rudderless.

The Judicial Commission finds that Judge Kern failed to adequately explain his absence, and forced tribal court staff into the difficult – and unfortunately, a not unusual – circumstance of scrambling to find a judge to hold a hearing. Judge Kern's failure to appear, failure to *effectively* notify the court of his unavailability, and failure as chief court administrator to ensure that *any* judge would be available that day created a crisis at the court that the parties, counsel, and court staff were able to work through successfully with a temporary solution,⁴⁵ along with Judge Long's providential response to calls from the court on a day he was not expected to be available. Judge Long also had indicated he was willing to drive back to Peshawbestown to hold a hearing in the evening if necessary.⁴⁶

Still, there is more. Though we assume that Judge Kern did injure his wrist, we cannot ignore that Judge Kern continued to conduct personal business on his work email outside the office. Six minutes *before* he responded to Mr. Placer's early

From: Kern, John
Sent: Monday, April 07, 2014 7:59 AM
To: Lewis, Jodi
Subject: quarterly review

Good morning Jodi:

Crissi is out today. She is not feeling at all well. And it appears I may have a doctor's appointment I forgot about. May we please reschedule the review set for this morning?

Thanks, John

⁴⁵ Testimony of Matthew Feil, 10:59 AM, June 17, 2014.

⁴⁶ Testimony of Matthew Feil, 11:00 AM, June 17, 2014.

morning email asking for his availability at 1:43 PM, Judge Kern emailed the University of Malta recruitment office to update his application for a law teaching position at the university:

From: [Kern, John](#)
To: [Recruitment HRMD](#)
Subject: RE: Resident Academic Post: Comparative Law
Date: Tuesday, April 08, 2014 1:37:00 PM

Dear UM Recruitment Officer:

I just scanned relevant certificates required for my application. Please let me know if you do not receive them.

Thank you for your efforts on behalf and your kind consideration.

Regards, John Kern

Judge Kern's insurance records indicate that he spent at least part of that Tuesday at the hospital, but the email indicates that he spent another part of the day scanning "relevant certificates" required to complete a job application. This is hardly a man immobilized by pain in his wrist. This is a man physically capable of appearing in court to conduct a hearing that might possible save an Indian child from harm. This apparently is also a man who would handle personal business seeking another job before he would respond to inquiries from his inexperienced court staff about a hearing absolutely critical to the well-being of an Indian child.

Judge Kern's formal response to the tribal council inquiry betrays his casual disregard for Indian families and for the import of his failure to ensure that a judge would be present to hear the matter:

From: [Kern, John](#)
To: [Shomin, Tom](#)
Cc: [Pedwaydon, Al.](#); [Gasco, JoAnne](#); [Arrovo, David](#); [Kewaygoshkum, Bob](#); [Rohl, Jane](#); [Antoine, George](#); [Long, Michael](#); [Petoskey, John, F.](#); ["matthew.fletcher@law.msu.edu"](mailto:matthew.fletcher@law.msu.edu); [Judge MaryAnn Roberts](#); [Judge Quintin walker](#)
Subject: RE: Hearings
Date: Friday, April 18, 2014 11:51:00 AM

As a consequence, I was unable to attend work the remainder of the day and so informed my staff. It just so happened that the Court Administrator was also out due to serious illness, which left only two relatively inexperienced staff to manage the rescheduling of that hearing. Unfortunately, by the time I informed my staff that I would be unable to come in it was nearly time for the emergency placement hearing to take place. There was no time or opportunity for Mr. Placer to contact the parties and reschedule the hearing. Mr. Placer did, however, managed to contact Judge Long who was able to conduct the hearing telephonically. Emergency placement hearings have been conducted telephonically before, and it is a legitimate Court procedure given the urgency of these type of circumstances (though it is by no means the ideal method). I have done so on six separate

occasions, one time with the GTB Court when I was at a Drug Court conference in Nashville, and there have never been any residual problems. I cannot be sure, given the information you provided me, whether the complainant here—whomever it was-- was unhappy with the outcome itself (the children were, to the best of my knowledge, placed [REDACTED]); unhappy with having to wait until the Court could set up the telephonic disposition; and/or unhappy with a specific individual or circumstance. Sometimes, some individuals are simply “unhappy” in general.

For Judge Kern, the fact that parents, attorneys, and government employees all appeared for a critical hearing in the life and well-being of an Indian child and no judge was present to conduct the hearing was no big deal. “Some individuals are simply ‘unhappy’ in general.”

At the removal hearing, Judge stated, “I can’t understand why a judge can’t have a medical emergency and everyone else can.”⁴⁷ The simple answer is that a judge is more than “everyone else.” See Rule 1.102 (“A judge should participate in establishing, maintaining, and enforcing, and should him/herself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved.”). But the record strongly indicates that Judge Kern’s “medical emergency” – an “emergency” that allowed him to do the groundwork needed for his job search with the University of Malta; an “emergency” that did no significant harm to his wrist – was nothing like the real emergency facing an Indian child on April 8.

⁴⁷ Testimony of Judge Kern, 2:23 PM, June 17, 2014.

Fortunately for everyone involved, the parties agree that the only injury in this specific matter was the inconvenience of Judge Long, the parties, and counsel. But Judge Kern's absence, which exposed a child to potential injury, and we cannot dismiss that possibility lightly, cannot be excused like that of any other employee. As the Chief Judge and the chief tribal court administrator, it was his job to ensure that the court functioned properly at critical moments. The court's operations broke down dramatically at a critical moment, and Judge Kern was at home looking for another job.

Judge Kern's injured arm and wrist are no excuse for the Chief Judge of the Grand Traverse Band tribal court for failing to ensure that there would be a judge available to hear the emergency ICW hearing he knew in advance would be held knowing that Judge Long likely would be unavailable. Moreover, Judge Kern's actions and representations after the April 8 hearing bring into question his credibility as a judge going forward. This last point we take up below in Part III(B).

The April 8 incident justifies the removal of Judge Kern as judge for gross misconduct.

3. Respondent fails to update the Tribal Court's calendaring system, Full Court, with his availability.

By Judge Kern's admission, he does not update the tribal court calendaring system.⁴⁸ His persistent failure to both learn how to use the software and his choice to use emails to staff to communicate his unavailability in court are perhaps worthy of discipline, but we are not persuaded this incident rises to the level of justifying removal.

⁴⁸ Testimony of Judge Kern, 12:59 PM – 1:00 PM, June 16, 2014.

The Full Court software allows the court staff to access the court calendar.⁴⁹ Judge Long's schedule would be on the calendar for the days he would be working at the court. Judge Long testified, "That was the case until the latter half of 2013 into 2014, and then there would be periods of time when there was nothing on the calendar and no one knew where he was at."⁵⁰

Judge Long testified that in recent months: "[T]here were greater balances of time when he would just leave. ... [I]t in clearly became an even greater pattern and frequency as we moved into 2014 and it wasn't on the calendar. There was nothing there."⁵¹

Rather than utilize the Full Court software, Judge Kern preferred to email tribal court staff with his availability; for example:

From: Kern, John
To: Campos, Cristine
Date: Monday, February 17, 2014 2:51:00 PM

Okay, I'm back. I'll be leaving shortly for PT. Anything I need to do first?

Other emails indicate that Judge Kern was frequently in and out of the office on any given day – and his own testimony suggests that he did not update Full Court.

We find Judge Kern's failure to update his availability in general could subject him to discipline but we need not rely on this evidence to justify his removal.

4. *Respondent routinely does not work a full day in the Tribal Court building. Moreover, Respondent routinely is unavailable by phone when he is not present at Court.*

The substance of this allegation is addressed in Part I(A)(1) above.

⁴⁹ Testimony of Judge Long, 9:30 AM, June 16, 2014.

⁵⁰ Testimony of Judge Long, 9:31 AM, June 16, 2014.

⁵¹ Testimony of Judge Long, 9:32 AM, June 16, 2014.

B. Failure to Adequately Supervise Tribal Court Staff

1. Respondent has failed to ensure that Tribal Court clerks are adequately trained and supervised. Tribal Court hearings routinely are rescheduled without proper notice, improperly scheduled with only one party being noticed, or not being scheduled at all.

The Judicial Commission finds that in some respects Judge Kern's supervision of tribal court staff leaves much to be desired. The Commission further finds that tribal court operations are inefficient and occasionally performed incompetently. Though the Chief Judge serves as the chief administrator, we need not rely upon his weaknesses in his administration to justify ordering the removal of the judge.

2. Respondent has failed to ensure that Tribal Court bailiffs are adequately trained.

Again, though there is compelling evidence (discussed in part III(A) below) that Judge Kern's administration may have been partly to blame for unsatisfactorily ensuring public safety and tribal court staff safety, we need not rely upon this evidence to justify ordering the removal of the judge.

C. Incompetence

1. Respondent is not competent to handle child welfare matters. Associate Judge Long currently handles the large majority of child welfare hearings, except those in which he served as guardian ad litem. When Respondent did routinely

handle child welfare hearings, his performance was incompetent. He did not issue orders with the proper language necessary for the State of Michigan to cover placement costs under Title IV(E). He would then order the placement costs be covered by the tribal children's per capita gaming payments trust fund.

Judge Kern is not competent to preside over Indian child welfare matters, justifying his removal under Article V, Section 8(a). ICW matters constitute a large part of the tribal court's docket, require a great deal of procedural and technical expertise, involve some of the most crucial decisions facing tribal judges, and involve multiple jurisdictions. Apparently because Judge Kern himself knows he struggles with these matters, he generally assigns Judge Long, who has more ICW experience, to handle all or nearly all ICW matters. After more than two years of sitting on the bench at Grand Traverse Band, Judge Kern's ability to handle ICW matters has not improved enough to justify his retention on the court.

The primary evidence of Judge Kern's lack of competence is the oral testimony provided by Judge Long. We note as an initial matter that Judge Long and Prosecutor Feil have expressed enormous respect for Judge Kern as a person and as a lawyer. However, they both have gone out of their way to protect Judge Kern from embarrassment in these matters. For example, Judge Long has reviewed audiotapes from hearings over which Judge Kern presided to ensure that the findings of fact articulated in the orders are accurate and sufficient to meet the State of Michigan's requirements in relation to Title IV-E funding. Judge Long testified:

The state of Michigan has very specific language that has to be in the order, especially when it comes to Indian child welfare cases. What had happened was early on Judge Kern's tenure here, there were some orders that didn't have the necessary language in [them]. Now in his

defense, for someone that hasn't practiced in that area, it would be very easy to make a mistake. And as I mentioned earlier, [when] the order's not correct, and the right questions aren't asked in the hearing, you can't go back and just recreate what you need to establish [to qualify for] the funding. What I ended up doing for multiple files is that when Judge Kern had a hearing I would look at the order, and I would have to go back and listen to hearings and make sure the order comported with what happened in the hearing, and the necessary language was there. That was done to ensure that we didn't have any other mistakes because we had had a couple. And the end result of that is that there was loss of funding on some of the Indian child welfare cases.⁵²

This is a very serious allegation, and goes directly to Judge Kern's continuing incompetence to preside over ICW matters. Judge Long's extensive private practice experience as a lawyer guardian ad litem strongly supports the credibility of his testimony. AFS official Helen Cook noticed also that Judge Kern relied heavily on "prompting" by the tribal prosecutor:

It appeared to me when I was in court that the judge needed prompting from the prosecutor just procedurally, how to go about the court case.⁵³

Moreover, as noted elsewhere in this opinion (e.g., Part II(A)(2) – *GTB Housing v. Oskaboose*, No. 2011-001943-CV-EV), Judge Kern's inability to draft orders accurately stating relevant and required findings of fact is a recurring theme.

Moreover, it is apparent to the Judicial Commission that the tribal court's credibility in the tribal community and with the state in ICW matters has suffered a severe decline under Judge Kern. We have already noted the controversy over the April 8, 2014 emergency ICW matter, and Judge Kern's failure to adequately inform the court of his unavailability. In another matter, witnesses alleged much worse behavior by Judge Kern involving an emergency ICW matter in which he allegedly refused to hold an emergency hearing despite being in the courthouse and available

⁵² Testimony of Judge Long, 9:42 AM – 9:43 AM, June 16, 2014.

⁵³ Testimony of Helen Cook, 1:55 PM – 1:56 PM, June 17, 2014.

to preside.⁵⁴ There is not sufficient evidence to justify the Judiciary's removal of Judge Kern merely for this incident, but the overall impression of Judge Kern as a judge in ICW matters by the tribal prosecutor, the associate tribal judge, state DHS officials, and Anishinabek Family Services workers is overwhelmingly negative.⁵⁵ One witness even alleged that some tribal members would rather have their ICW cases handled in state court.⁵⁶ There was minimal evidence to support this view, but the allegation supports the Judicial Commission's finding that Judge Kern's credibility in ICW matters in the community is very poor.

In the early months of Judge Kern's tenure, he made mistakes in at least a few cases. He certainly was not the first tribal judge to make these mistakes. It is a technical endeavor, to be sure. Failure to meet the technical requirements means that the tribal government or even the child in need (through his or her tribal gaming revenue per capita payments) must shoulder the costs, which may amount over time to thousands of dollars per case. For example, Judge Kern recently lamented about a case that cost the tribe \$20,000:

From: Kern, John
To: Feil, Matthew; Long, Michael
Cc: Placer, Eric; Greensky, Dana, M; Soffredine, Pamela; Campos, Cristine
Subject: RE: Order Language
Date: Tuesday, March 18, 2014 11:07:00 AM

Just talked to Mike about this. I am grateful for his advice and assistance. Have to say, though, as I mentioned to Mike: It was roughly about two or a little more years ago when I first arrived here that I used the work "referred" rather than "committed" in an order and it cost us --what was it Crissi-- \$20,000 or something absurd like that (and had NOTHING to do with the "assistance" of AFS during that period)? It would be nice to have settled language after all this time. ☺

⁵⁴ Testimony of Helen Cook, 1:50 PM – 1:53 PM, June 17, 2014. *See also* Testimony of Matthew Feil, 11:01 AM – 11:04 AM, June 17, 2014 (testifying that he had been called to meet with the tribal council to discuss a complaint against Judge Kern, who allegedly refused to preside over an emergency ICW hearing despite being available, resulting in the loss of Tile IV-E funding).

⁵⁵ E.g., Testimony of Pat Sparks, 1:15 PM, June 17, 2014 (state official lamenting lack of "professionalism" from the tribal court under Judge Kern); Testimony of Helen Cook, 1:55 PM, June 17, 2014 (AFS official lamenting tribal court's poor credibility in the tribal community, and concern about "court protocol").

⁵⁶ Testimony of Pat Sparks, 1:16 PM, June 17, 2014.

Judge Long testified that other cases may cost considerably more:

I would say that that's far lower than I would anticipate. My guess is actual numbers – this may have been 20 grand for one child.... [S]ome of these cases could go a year. And that, for example, a child who does not have special needs and may not be in counseling on a regular basis, just the placement costs are in the ballpark of 700 or so a month.⁵⁷

There is little evidence that Judge Kern made many mistakes after the first few months of his tenure, perhaps due to the fact that he rarely presides over ICW matters, or is assisted by Judge Long. We need not rely upon evidence that Judge Kern has made mistakes in Title IV-E funding matters, only that he had little competence to preside over those cases at the time of his appointment, and that this situation has not improved.

In conclusion, the fact that Judge Kern has systematically excluded himself from presiding over ICW matters suggests that he is not competent to handle these matters. Add in the expert opinion of the associate judge that Judge Kern does not have sufficient competency, we conclude Judge Kern remains after two-plus years incompetent to handle ICW matters. Given the importance of ICW matters to the Grand Traverse Band court docket, Judge Kern's continued incompetence justifies removal.

2. *Respondent is not competent to handle criminal matters. Respondent has shown little understanding of the rules of criminal procedure, sentencing, and evidence.*

We find that Judge Kern also is not qualified to handle criminal matters, justifying his removal under Article V, Section 8(a). After two years on the bench, Judge Kern's ability to handle criminal matters has never been established. The

⁵⁷ Testimony of Judge Long, 9:52 AM, June 16, 2014.

testimony of the tribal prosecutor is critical in our determination that Judge Kern should be removed.

Tribal Prosecutor Feil provided the meat of the testimony on Judge Kern's competence to handle criminal matters. He testified that:

From the start, there might be confusion. For example, the one that occurred quite a bit early on was that we might have a plea, it happened on a number of occasions. Something might be set for a plea, we might be taking a plea. ... After advising someone of their rights, ... he would look to me [and ask], "Shall we set for sentencing?" And we haven't even taken a factual basis yet and it was hard because, especially if that person was represented, but even if they were I never wanted Judge Kern to look bad in court. I wouldn't do that to any judge, because I have respect for the bench, and he is our chief judge.⁵⁸

In general, before the tribal government began funding appointed defense counsel, Mr. Feil would be forced to guide Judge Kern through basic criminal procedure, such as establishing on the record a factual basis for a plea bargain. In those days, Judge Kern was so dependent on Mr. Feil that Mr. Feil was concerned that it appeared to the people in the hearing that there were two prosecutors. He testified that Judge Kern's performance has not improved in two-plus years:

Procedurally, we did have pretty regular problems. And I would offer assistance by either feigning my own ignorance ... or just indicating "do we need to ..." and at times Judge Kern would ask me ... "what do we do next?" And that was evident early on, and it was problematic because it persisted I think almost all the way to the last hearing I had with Judge Kern ... [w]ithin the past month or so. It was a criminal proceeding. In all fairness maybe he was getting there and I didn't give him a chance but based on past performances I wanted to make sure that we got the factual. But my concern was that I didn't want it to appear as though we had two prosecutors in the courtroom. Or the judge and I are doing our thing and it's just an individual over there. At some point I tried to hold back a little bit as much as I could not because I wanted Judge Kern to get it wrong but I wanted to try to

⁵⁸ Testimony of Matthew Feil, 11:17 AM – 11:18 AM, June 17, 2014.

give him an opportunity to get there on his own. Appearances are everything.⁵⁹

Even now that the tribe funds appointed defense counsel, Mr. Feil and presumably opposing counsel must guide Judge Kern through the procedures. Mr. Feil testified that Judge Kern's competence to handle criminal cases has never improved from the time his tenure began. Chief Judge Roberts quoted from her notes from her interview with Mr. Feil to confirm whether he agreed with the statement:

Chief Justice Roberts: [Mr. Feil has] had to assist Kern quite a bit in criminal procedures. Kern would forget to swear someone in or take a plea. It was challenging for [Mr. Feil] when Kern asked for assistance as [he] did not want to make any judge look bad on the bench.

Mr. Feil: That's a fair ... if I said that, that's accurate.⁶⁰

Judge Kern's performance on the bench did not improve from the early days in his tenure, according to Mr. Feil.⁶¹ Judge Kern was not wrong all the time, but Mr. Feil did stated that "[c]onsistently, I did provide assistance."⁶²

Former tribal court employee Fred Jacko provided additional testimony establishing that, at the outset of Judge Kern's tenure, he was not competent to handle criminal matters. He testified that Judge Kern did not require criminal defendants to swear an oath to tell the truth before going on the record to establish a factual basis for a guilty plea until Judge Long joined the bench and established that it was necessary:

When I started as clerk, we held arraignments and nobody – if anybody knew they didn't say anything – ... we never swore in any individual who was giving a factual basis for a plea in court. In other words, if they would plead guilty they'd be required to give a factual basis to prove the plea was right, that is was sufficient for the court to accept. We never swore anybody in. And I did not know the difference until Judge Long came along and we started doing arraignments and

⁵⁹ Testimony of Matthew Feil, 11:18 AM – 11:20 AM, June 17, 2014.

⁶⁰ Testimony of Matthew Feil, 11:20 AM, June 17, 2014.

⁶¹ Testimony of Matthew Feil, 11:21 AM, June 17, 2014.

⁶² Testimony of Matthew Feil, 11:21 AM, June 17, 2014.

he stopped me during the hearing and said why haven't you sworn the person in yet.⁶³

The Judicial Commission emphasizes that there was no evidence introduced whatsoever that criminal defendants were prejudiced by Judge Kern's incompetence. Coincidentally, Judge Kern alleged that criminal defendants did not appeal many convictions. Yet it is apparent that Mr. Feil and various defense attorneys typically guided Judge Kern through the proper procedure, or corrected errors with out-of-court arrangements.

We agree with other courts confronted with judges that incorrectly accept guilty pleas in criminal cases should be disciplined. *E.g., In re Hammermaster*, 985 P.2d 924, 937 (Wash. 1999) ("Neither Judge Hammermaster's good faith belief nor his misguided reliance on attorneys can excuse the deprivation of constitutional rights which resulted from the judge's conduct. Judge Hammermaster testified that as a municipal court judge, he has presided over thousands of cases. In light of this fact, his continued acceptance of defective guilty pleas makes his conduct even more egregious. Judge Hammermaster's reliance on other attorneys for validation of his guilty plea forms cannot excuse his duty to be faithful to the law and to maintain professional competence.").

In sum, Judge Kern was not competent to handle criminal cases at the outset of his tenure, and has shown nothing in the intervening two years to reverse that problem. The Judicial Commission is compelled to conclude that Judge Kern should be removed for incompetence.

II. Gross Misconduct that Clearly Prejudicial to the Administration of Justice (GTB Constitution art. V, § 8(d))

A. Abuse of Judicial Authority

⁶³ Testimony of Fred Jacko, 9:58 AM, June 17, 2014.

1. *Respondent has refused to hold emergency child welfare hearings in violation of law requiring hearings to be held within 24 hours.*

The Judicial Commission finds there is not enough evidence to conclude that Judge Kern refused to hold emergency ICW hearings sufficient to justify removal. While there was evidence Judge Kern may have acted inappropriately in a case or two, we need not rely on the evidence.

2. *Respondent has issued orders in housing department matters where the housing department has not filed a complaint or sought judicial relief of any kind.*

The Judicial Commission concludes that there is sufficient evidence that Judge Kern may have acted inappropriately in a matter captioned *GTB Housing v. Oskaboose*, No. 2011-001943-CV-EV. This incident alone is not sufficient to justify removal, but could be sufficient to justify some form of discipline. More importantly, the incident supports the general theme that Judge Kern is not competent to serve as a presiding judge.

Michigan Indian Legal Services attorney Cameron Fraser testified that she represented the defendant in this matter. The housing department did not initiate the filing of the Notice to Show Cause, which means the matter probably was a scheduling error.⁶⁴ In other words, there was no factual basis for the hearing as the defendant had not done anything wrong. However, right before or right after the hearing began, Judge Kern stated to the defendant, "I don't know how you're going to get out of this one."⁶⁵ Ms. Fraser's testimony on this point is credible, and Judge Kern claimed to not remember the incident. Ultimately, Judge Kern dismissed the

⁶⁴ Testimony of Cameron Fraser, 9:35 AM, June 17, 2014.

⁶⁵ Testimony of Cameron Fraser, 9:35 AM, June 17, 2014.

matter,⁶⁶ but his statement suggests a lack of understanding about court processes and perhaps even that he had (very incorrectly) prejudged a matter.

The Judicial Commission finds that Judge Kern acted inappropriately in this matter, and would have recommended discipline short of removal if a complaint had been filed with the Commission. We do find, however, that this incident is additional evidence of Judge Kern's incompetence to sit on the bench.

*3. Respondent has sentenced individuals
to jail time for contempt of court without charges
being brought.*

In the matter of *Grand Traverse Band v. Fox*, No. 2012-000429-CR (Grand Traverse Band Tribal Court, Jan. 25, 2013), Judge Kern sentenced a probation violator to 14 days of jail time over and above the time expected for probation violations.⁶⁷ Judge Kern sentenced the additional 14 days for contempt of court, but without the formal filing of a charge of contempt.⁶⁸ When a person is charged with contempt for probation violation, that violation occurs outside the presence of the court. The 14 day sentence violates 3 Grand Traverse Band § 702(c), which provides:

When criminal contempt is not committed in the immediate view and presence of the Tribal Judge and upon a verified statement filed with the Tribal Court reciting with particularity the alleged acts and/or omissions constituting criminal contempt, a Warrant of Arrest may be issued by such Tribal Judge and the person may be arrested and brought before the Tribal Judge immediately. The Tribal Judge must give the arrested person an opportunity to answer the verified complaint. The Tribal Judge may then discharge her/him or may convict her/him of criminal contempt.

⁶⁶ Testimony of Cameron Fraser, 9:36 AM, June 17, 2014.

⁶⁷ Testimony of Cameron Fraser, 9:32 AM – 9:33 AM, June 17, 2014; Testimony of Matthew Feil, 11:14 AM, June 17, 2014.

⁶⁸ Testimony of Cameron Fraser, 9:33 AM, June 17, 2014; Testimony of Matthew Feil, 11:14 AM, June 17, 2014.

Because the defendant potentially faced another charge, defense counsel and the tribal prosecutor negotiated to drop that charge in exchange for not appealing the 14 day sentence.⁶⁹ In short, no harm, no foul.

But Judge Kern's testimony on the question raised more concerns. He stated that he recalled the defendant, though not the specific case.⁷⁰ In his recollection, the defendant was a "one of GTB's chronic offenders."⁷¹ His testimony suggests he prejudged the defendant, and perhaps explains the additional 14 day sentence.

The Judicial Commission finds that this incident may be an incident worthy of some form of discipline, but we need not rely on this evidence to justify his removal. We find that it is additional evidence of Judge Kern's incompetence to sit on the bench.

*4. Respondent held back the appeal of a
decision denying an attorney the right to practice in
Tribal Court.*

The Judicial Commission finds that Judge Kern's official actions in this matter, which involved his denial of former tribal judge Holly Thompson's application to practice law in tribal court, serve as additional evidence of his incompetence as a judicial officer. Further, there is significant and credible evidence that Judge Kern impermissibly intervened in the appeal either to prevent the timely review of the appeal by the appellate court and to improperly influence the appellate court. Those actions justify his removal under Article V, Section 8(a) (unethical conduct) and Section 8(d) (gross misconduct).

Ms. Thompson served as a tribal court judge until she resigned prior to Judge Kern's appointment. Following her resignation and return to private practice, she sought admission to practice in the tribal court. Judge Kern denied the application

⁶⁹ Testimony of Cameron Fraser, 9:33 AM, June 17, 2014.

⁷⁰ Testimony of Judge Kern, 2:20 PM, June 17, 2014.

⁷¹ Testimony of Judge Kern, 2:20 PM, June 17, 2014.

on June 29, 2012.⁷² She appealed, and Judge Kern apparently refused to allow the transmittal of her direct appeal to the appellate court until November 12, 2012.⁷³

Judge Kern delivered a memorandum to the appellate court explaining his views dated October 15, 2012.⁷⁴ In short, he argued that he had denied her application on the grounds that she had been escorted from the tribal court building by tribal police upon her resignation; therefore, in Judge Kern's view, her standing with the tribe was poor enough to justify his denial of her application.

Fred Jacko, former tribal court employee, testified that he served as appellate clerk at that time, and received the appeal.⁷⁵ He testified that Judge Kern's court administrator "took" the file from him:

[T]hat filing was held from the appellate court. ... It was taken from me by Christine [Campos]. ... She just took it.... The basis was that Judge Kern has that decisionmaking ability, and that particular type of decision made by him was not subject to appeal by the court.⁷⁶

Mr. Jacko further testified that after that appeal, "Judge Kern came to me and said that he wanted to view all appellate filings to make sure they were timely before they would be submitted to the appellate court. And that did happen after the Holly Thompson filing."⁷⁷

Judge Kern denied interfering with appellate filings, but the following excerpts of an email and a memo he sent to the appellate court insisting that his decision to deny Ms. Thompson's application was correct belies his insistence that he did not interfere. He communicated his intention to refuse to allow Ms. Thompson's appeal, as he informed the appellate court on September 24, 2012:

⁷² Grand Traverse Band of Ottawa and Chippewa Indians v. Hall, No. 2012-272-JV-JO (Grand Traverse Band Appellate Court, Jan. 9, 2013). *See also* Testimony of Fred Jacko, 10:11 AM, June 17, 2014.

⁷³ Grand Traverse Band of Ottawa and Chippewa Indians v. Hall, No. 2012-272-JV-JO (Grand Traverse Band Appellate Court, Jan. 9, 2013).

⁷⁴ Memorandum from John Kern to James Genia, Mary Roberts, and Quintin Walker (Oct. 15, 2012).

⁷⁵ Testimony of Fred Jacko, 10:12 AM, June 17, 2014.

⁷⁶ Testimony of Fred Jacko, 10:12 AM, June 17, 2014.

⁷⁷ Testimony of Fred Jacko, 10:13 AM, June 17, 2014.

Subject: FYI: CH and legal representation
From: Kern, John (John.Kern@gtbindians.com)
To: maroberts3297@yahoo.com; jmgenia@yahoo.com;
Date: Monday, September 24, 2012 11:26 AM

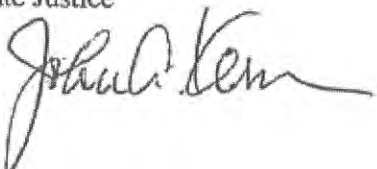
Dear GTB Justices:

Therefore, Ms. Thompson's appeal will be sent back to Mr. Levine without action based on:

1. The Chief Judge has sole discretion over who to admit to the GTG Bar;
2. The Court cannot process an appeal without legal grounds under GTBCR 9.203 and 9.204.
3. There is no Court Rule to appeal a Chief Judge's discretionary decision, and that such decisions have always resided with the presiding judge.

If you wish to place this in the judiciary's October 8th agenda, please let me know. Unless I hear from you by the end of the week, however, I think I should send my response to Ms. Thompson and her attorney out of simple courtesy. Also, Mary, do you have a way to forward this message to Quintin? If so, I would greatly appreciate it.

A month later, on October 15, 2012, after the appellate court heard Ms. Thompson's appeal through the appeal in another matter, Judge Kern attempted to influence the appellate court's decision:

To: James Genia, Chief Justice
Mary Roberts, Associate Justice
Quintin Walker, Associate Justice
From: John Kern, Chief Judge 
Date: October 15, 2012
Re: Holly Thompson Appeal of Court's Denial to Practice in the GTB Court

It is well known that in 2011 the GTB Council bought out almost the entire last year of Ms. Thompson's contract as a GTB judge (a considerable sum, which reflects Council's determination to remove her), and had Ms. Thompson escorted from the Court. I do not know the circumstances of her release, but the facts given here do not in any way suggest "good standing" with the GTB Court: GTB's executive/legislative branch concluded, with the advice and consent of the Judiciary, that Ms. Thompson violated standards as a GTB judge. As you are aware, judicial standards are much higher than those of admitted attorneys. I would also note that, at a Council/Court Roundtable meeting (held every month) near the end of 2011, Council made it crystal clear to me that Ms. Thompson was not be to allowed to return to the GTB Court for any purpose. While the Court is not bound by Council directives regarding its practice and procedure, due regard for the imperatives between branches should be observed whenever possible.

I had the discretion under GTBCR Rule 2.208(B) to schedule a hearing, but saw no reason to allow Ms. Thompson to undertake a defense rehashing and/or attacking Council and its decision.

Ms. Thompson has employed an attorney to appeal my decision. That ball is now in your Court, as it were.

The October 15 memorandum constitutes an overt attempt to improperly influence an appeal from his denial of her application in violation of tribal law. See Grand Traverse Band Tribal Court Rule 1.103(B) ("A judge should not attempt to use prestige of his/her office to advance the private interests of him/herself or others, nor should a judge convey the impression that anyone has special influence on him/herself."). Cf. Grand Traverse Band Tribal Court Rule 1.104(A)(3) ("A Tribal Court judge should accord to every person who is legally interested in any proceeding, or his/her lawyer or other representative, full right to be heard according to Tribal law and except as authorized by law, neither consider nor permit one-sided or other communication with a litigant, his/her attorney, or lay advocate concerning a pending or impending proceeding unless all parties to the proceeding are present."). Moreover, it is now clear that Ms. Thompson *had not* been escorted from the building. Judge Kern appears to have relied upon an order denying her application relied upon a simple rumor rather than evidence received

into the official record in a court of law or in an affidavit, a hearing he refused to hold.

Even if Ms. Thompson had been escorted from the building, many employees in sensitive tribal government positions might also be escorted from the building for any number of innocuous or illegitimate reasons, and none of that justified the denial of her application.

The tribal appellate court ultimately reversed Judge Kern's decision. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Hall*, No. 2012-272-JV-JO (Grand Traverse Band of Ottawa and Chippewa Indians Appellate Court, Jan. 19, 2013).

Even after the appellate court issued its decision, Judge Kern continued to comment about the decision, criticizing then-Justice Roberts in an email to then-Chief Justice Genia:

From: [Kern, John](#)
To: [Jim Genia](#)
Bcc: [Campos, Cristine](#)
Subject: CONFIDENTIAL inquiry/statement
Date: Monday, February 04, 2013 11:27:45 AM

Good morning Jim:

I wanted to ask you a confidential question and/or state some observations about the Order the GTB Judiciary signed overturning my decision to not reinstate Holly Thompson to the GTB Bar. There are a number of factors that are a residual consequence of that Order that you may not be aware of. Whether you can, or want, to do anything about it is of course entirely up to you:

Jim, all I ever wanted to do here was preside over GTB community issues with fairness, and maintain the integrity of GTB's Court. A labyrinth of personal agendas and residual resentments are making that all but impossible, especially when a member of the GTB Appellate Court is inextricably entwined in political intrigue and what she previously acknowledged in a written reprimand was an inability to "consider the political implications of her actions at the time because she was thinking as a Tribal Elder, rather than as an Appellate Judge." Investigation Report, at 2 (October 7, 2009). Mary's thinking has not changed.

This note is only intended to keep you apprised of the "climate" here, and give you background for making any decisions you might need to make in order to uphold the integrity and fairness of the appellate process. I am quite sincere when I tell you that I don't want to be known as the Chief Judge that allowed the GTB Judiciary to diminish in stature and actually slip into the sludge of political partisanship.

The Judicial Commission finds that Judge Kern's order denying Ms. Thompson's application is additional evidence of his incompetence to serve as tribal judge. Judge Kern asks us not to penalize him for making a judgment call on the denial because the appellate court corrected the error. However, we find that his reliance upon rumor instead of fact to justify the denial, coupled with his refusal to allow Ms. Thompson a hearing, coupled further with his interference in the appellate process, is strong evidence of his incompetence as a judicial officer, and evidence of abuse of power sufficient to justify significant discipline, if not removal.

B. Abuse of Employee Supervisory Authority

1. Respondent requested a Tribal Court employee to transport him to and from a medical office for surgery. The employee agreed to the request because she felt she did not have a choice. The employee was required to take time off from work without pay.

Judge Kern admits that he abused his authority in asking a tribal court employee to transport him to a personal medical appointment on that employee's

personal time. We find that Judge Kern's actions constitute gross misconduct under Article V, Section 8(d).

Judge Long initially testified that he was aware through court staff that Judge Kern had asked the court administrator and then later the probation officer to accompany him on a medical appointment.⁷⁸ Judge Kern abused his authority as judge and as supervisor in asking subordinate employees to perform personal tasks for him. Judge Long testified:

I think it's completely inappropriate for a supervisor to ask someone he's directly supervising to take personal time to assist them. It would be one thing if it was an emergency. But it shouldn't happen. It puts the party, the employee in a difficult situation. It shouldn't happen. I'm even more conservative. I would never ask a female working under me to make the decision to assist. That to me on a broader scale should never have been asked. And I think it puts them in a horrible position. If they say yes, even though they want to do it out of the goodness of their heart, it shouldn't be asked. And to do it, have someone take time they're not paid for, it's just inappropriate. It should never happen. It should never have happened.⁷⁹

The Judicial Commission finds that Judge Kern likely violated his ethical duty as judge and as supervisor in this matter, worthy of removal. Other courts have reached the same conclusion. *E.g., In re Alford*, 977 So.2d 811, 830-31 (La. 2008) ("The Commission found that Judge Alford improperly used staff to perform many personal errands not only for herself, her mother, and her son. Judge Alford maintained in her hearing testimony that she never required anyone to perform personal errands, and she only asked staff to pick up lunch for her when she was detained at court. Judge Alford's responses to this charge reflected that she did not appreciate the relative weaker position of employees who depended upon her to remain employed.").

⁷⁸ Testimony of Judge Long, 9:20 AM, June 16, 2014.

⁷⁹ Testimony of Judge Long, 10:12 AM – 10:13 AM, June 16, 2014.

2. *Respondent refused to rehire a Tribal Court employee he improperly terminated even after she won her appeal for wrongful termination and was to return to work with full back pay.*

The Judicial Commission finds that many of Judge Kern's actions in the personnel matter of a former tribal court employee (hereinafter S.V.) were inappropriate and perhaps justify discipline but we do not rely upon this series of incidents to reach our conclusion that he should be removed.

We pause to note that Judge Kern's tenure at the tribal court has been immensely and negatively affected by this matter. If this matter had been handled properly by Judge Kern, it is very possible that no removal complaint would have been filed. We also note that Judge Kern's response to the tribal appellate court's inquiries and recommendations on this matter was highly inappropriate and contributed to the overall degradation of the relationship between the appellate court and Judge Kern.

The matter arose from Judge Kern's termination of a tribal court employee, S.V., that a hearing officer under the tribal government's Discharge Dispute Forum reversed.⁸⁰ Judge Kern's initial response to the decision was unprofessional, and set the table for what was to come:

⁸⁰ See Decision of the Hearing Officer, In re [S.V] (Jan. 17, 2012).

From: Kern, John
Sent: Tuesday, January 17, 2012 12:43 PM
To: Zotigh, Sonya
Subject: RE: Hearing Officer Decision, CONFIDENTIAL

Sonya . . .

How, for the love of God, can you have a "reasonable suspicion" of sexual misconduct without facts? This judgment is so phenomenally flawed. Please, please Sonya, we cannot have Sherri back here if there is any way to avoid it. If she insists, can you override her insistence? Here, at the Court, we have already reorganized the staff structure. She would not assume her prior duties—others have done so—so she will be relegated to basically clerical work (though at the same salary). She will claim retaliation, but the Court is simply a different place now that she has been gone. She would have to accept the restructuring. I cannot see how she could, but then I could not see how the termination would be overturned either. HELP!!! This Court will go into moral decline with her presence (and now, nothing will ever be able to be done about her attitude or misconduct w/o a claim of retaliation. In other words, she'll be untouchable and insufferable).

Yours in genuine despair,
John

The hearing officer's reversal of the termination of S.V.'s employment required the return of the vindicated employee to her prior position. Tribal manager Zotigh emailed Judge Kern to accept S.V. back into the tribal court after taking months to locate a job for her in another part of the tribal court:

On Sep 6, 2012, at 7:00 PM, "Zotigh, Sonya" <Sonya.Zotigh@gtbindians.com> wrote:

Judge Kern, when the decision by the Hearing Officer came down to return Sherri Vezina to work, it is without a doubt that we knew he meant the Tribal Court. At the time of this decision this was a very sensitive and somewhat volatile situation and between Matt McClellan, Zeke Fletcher, you and myself we looked to place Sherri elsewhere but full knowing that she could be, at some point, returned to this position. When the Court clerk position was posted I had asked Mike Teeple to confer with you about placing Sherri back in this position because her grant is ending and rightfully she should be there. This is a difficult situation at best but upon carefully looking at this with HR and Legal, we believe that at this point we would like to make this transition. I am looking forward to an effective date of having Sherri back in Tribal Court 10/01/12—I am requesting that you work with us for this to happen. Let's please set up a meeting to plan this at your earliest convenience. I know you have a meeting with the TC on Monday and I would be glad to discuss it then as well. Thank you! Sonya

Judge Kern refused, repeating his previous objections, but also asserting judicial independence:

From: Kern, John
Sent: Friday, September 07, 2012 8:51 AM
To: Zotigh, Sonya
Subject: Re: Hold on Court Clerk's position

Sonya, you know I respect you and I would not give you any grief. I cannot, however, accept Sherri back. This is now a strong assertion of Separation of Powers and nothing less. First, she waived her right to return to the court when she accepted employment elsewhere. Second, she has created a permanently hostile work environment; and third, she has completely undermined my authority. Who do you expect to supervise her, after all? Crissi? Please! Me? If I say one word of criticism to her, she can holler retaliation. Moreover, I have no/zero respect for her.

No! Respectfully, NO!

John

Sent from John Kern's iPhone

On September 26, 2012, GTB Tribal Chairman Alvin Pedwaydon sent a letter to the Tribal Judiciary about the matter. The text of the email demonstrated the seriousness of Judge Kern's ongoing refusal to accept S.V.'s return. It is apparent the incident even threatened a minor constitutional crisis involving the continuing viability of the memorandum of understanding adopted in *Grand Traverse Band of Ottawa and Chippewa Indians Tribal Council v. Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court Administrator*, No. 02-09-1351-CV, 2003 WL 25838644 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court, May 22, 2003), governing employment decisions by the tribal court. In relevant part, the letter stated:

The above provisions of Tribal Court rules and the M.O.U. settling a previous lawsuit governs the Tribal Court personnel decisions. Pursuant to this process, an outside attorney Hearing Officer overturned termination decision of the Tribal Court Judge, who was acting in his administrative capacity, and the Hearing Officer determined that the Tribal Court employee was not terminated "for cause." Therefore, according to the Hearing Officer and the adopted administrative GTB Personnel Policy process, the Tribal Court was directed to re-hire the terminated employee. However, in the interim, the terminated employee was administratively placed in another position to comply with the Hearing Officer's order while the executive and judicial branch discussed the order.

Despite this clear ruling under GTB law, the employee still has not been returned to the job from which the employee was improperly terminated. By e-mail dated August 20, 2012, the HR Department was informed of "the Court's determination that it is not legally nor morally obligated to accept [employee's] return, . . ." The Tribal Council, acting through executive branch employees has informed the Tribal Court that the employee will be returned to the employee's former position effective October 1, 2012. However, by e-mail dated September 7, 2012, the Chief Judge asserted "separation of powers" in opposition to this decision. Therefore, we request, consistent with the M.O.U., an informal meeting between our branches of government to discuss the M.O.U., Tribal Court Rule 3.005, which arguably, implements the M.O.U., and the position of the Chief Judge relative to the M.O.U. and existing court rules governing personnel matters.

Shortly thereafter, the appellate court through now-Chief Justice Roberts instructed Judge Kern to allow S.V. to return to work in the tribal court:

TO: John Petoskey, General Counsel; Mike Teeple, Assistant HR Director

FROM: Mary Roberts, Appellate Judge *Mary Roberts*

DATE: October 9, 2012

RE: ~~Shirley V. Kern~~ to Return to Tribal Court Employment

I have been directed by the Tribal Judiciary to inform you that ~~Shirley V. Kern~~ shall be returned to work at the Tribal Court in her former position of Court Clerk with the same rate of pay which she previously received. This determination is based upon the Decision of the Hearing Officer following a Personnel Policy Discharge Hearing in January 2012. This action shall take place as soon as procedural matters for her return are determined by the Human Resources Department.

It is the responsibility of Judge John Kern to ensure that a "hostile work environment" at the Court will not be tolerated. All Court staff must set aside any lingering animosity, if such exists, in the performance of their professional duties. Court employees are held to a higher Code of Conduct beyond the standard provisions of the GTB Personnel Policy and as such must maintain a work environment which adheres to this Code of Conduct and preserves the integrity of the Court.

If there are questions or concerns about the content of this memo, please contact me at 271-3212 or by email at maroberts3297@yahoo.com.

Judge Kern ignored these requests from both the tribal council and the tribal appellate court. It is difficult to second-guess Judge Kern on his personnel decisions after approximately two years, but it is plain that he had little or no respect for the tribal council, the tribal appellate court, and S.V., a long-time, valued tribal court employee who had won her appeal. The Judicial Commission need not at this time rely upon this evidence as justification to remove Judge Kern, but condemns his actions.

III. Unethical Conduct (GTB Constitution art. V, § 8(a))

A. Misrepresentation of Staff Training and Competence. Respondent made representations about the adequacy of the training of Tribal Court staff to the Tribal Council that are untrue or misrepresentations of the truth.

There is credible evidence that Judge Kern made misrepresentations to the tribal council about staff training, and also evidence that Judge Kern's actions to ensure staff training and public safety were inadequate, at least perhaps until very recently. Judge Kern's failure to ensure that tribal court staff were trained, and his misrepresentations about their training to the tribal council, violates Rule 1.103(A), requiring judges to promote confidence and integrity in the judiciary; Rule 1.104(B)(1), requiring judges to perform administrative duties diligently; and Rule 2.016(D)(2), engaging in misrepresentation that adversely reflects upon the judge's honest and trustworthiness.

While it appears that there has been significant turnover in staff going back to the early days of Judge Kern's tenure, and that court operations have suffered as a result of Judge Kern's failure to adequately address these issues. Judge Long testified:

[T]here was this new influx of employees, all of whom I think could be really good employees and have been, but in my opinion as of this date, haven't been given the opportunity to get the training they need and that is required for them to their job well. And more specifically, in certain cases, in my opinion, places them at risk, and places others at risk. The example I had mentioned – as of this date, the bailiff I don't believe has been offered or given the opportunity to get the necessary training for his job. It is my understanding that the training that was received, the taser training, he was the one who actively went out, sought it, went to it. I am not aware of any updated training in restraint. He is asked to transport people. He is asked to control people in a courtroom setting. And prior to going to law school, I was a police officer. That type of training is necessary, mandatory. If you restrain someone improperly, you can harm them, you can end up harming yourself, and it's just not ... it's completely inappropriate. It needs to be done on an annual basis and I mentioned it ... to the court administrator. And the frustrating thing for me was in tribal council meetings, and I believe in judiciary meetings, the statement was made that people were being trained and they weren't. It just wasn't happening.⁸¹

Judge Long further testified that Judge Kern's answers to inquiries from tribal council about safety training were misrepresentations:

I understand that sequestration occurred on multiple occasions. In my opinion, training especially for new employees would have been the last spot that should have been cut. And if it was cut, based on the questions we were getting from tribal council, it had to be cut, here's why, here's what we need to get done, ask them to help come up with a solution. And what tribal council was told time and time and again is that the parties had received training and were trained and it just wasn't happening.⁸²

Judge Long's testimony is very credible on this question. He sat in on meetings with the tribal council in which Judge Kern made those representations, and as a former law enforcement officer knew full well the importance of that training. He knew the

⁸¹ Testimony of Judge Long, 9:57 AM – 9:59 AM, June 16, 2014.

⁸² Testimony of Judge Long, 11:02 AM – 11:03 AM, June 16, 2014.

difference between general training and serious, hand-on training needed to ensure the safety of tribal court staff and the public.⁸³

Judge Kern admitted he did little to ensure that tribal court staff members charged with public safety duties were adequately trained. He left those obligations to the court administrator, who herself was inadequately trained. Judge Kern testified in response to questions from Justice Walker and Justice Fletcher:

I am to provide opportunities for training but the training under the job descriptions, Justice Walker, belongs to the court administrator as far as her staff goes.

No, it is my job to require that they ... be trained. To that end, I attempted everything I could to find every kind of training that might be available and might be relevant to our court staff. But as far as requiring the staff to actually be trained with those programs and suggestions I sent, it is the court administrator's duty under her job description that they undertake that training. I have sent everything I could possibly could that I came across that was relevant to training my staff.⁸⁴

Judge lays blame exclusively on the court administrator for the lack of public safety training, and merely lays out his passive efforts to suggest training as sufficient action to meet his obligations. Judge Kern's response to Judge Long's allegation that court staff members are not trained properly and that public safety is at risk is wholly inadequate.

Judge Kern has a history of failing to ensure that tribal court staff who are charged with guaranteeing public safety are not adequately trained, and that Judge Kern misrepresented the extent of their training to the tribal council. The Judicial Commission finds these allegations to be proven, and to be serious.

⁸³ Testimony of Judge Long, 11:08 AM, June 16, 2014.

⁸⁴ Testimony of Judge Kern, 1:40 PM – 1:41 PM, July 16, 2014.

B. Dishonesty in Providing Excuses for Failure to Appear at April [8], 2014 Hearing. Respondent asserted that he could not attend the April 9 hearing because of a hand or wrist injury arising from surgery that took place on or about April 1. Respondent had previously asserted that his hand or wrist surgery took place on or about March 3.

We have already discussed our disapproval of Judge Kern's actions and inactions relating to the April 8, 2014 hearing in Part I(A)(2). But unfortunately, the story does not end there. Judge Kern's response to the tribal council inquiry about the hearing misrepresented the extent and character of his response to the incident. This misrepresentation constitutes unethical conduct under Article V, Section 8(a) and gross misconduct under Article V, Section 8(d).

Because tribal councilors heard about the debacle at the court, then began to inquire as to Judge Kern's absence that day. Councilor Tom Shomin wrote Judge Kern a week after the April 8 incident:

From: Shomin, Tom
To: Kern, John
Cc: Pedwaydon, Al; Gasco, JoAnne; Arroyo, David; Kewaygoshkum, Bob; Rohl, Jane; Antoine, George; Long, Michael; Petoskey, John, F; matthew.fletcher@law.msu.edu; Judge MaryAnn Roberts; Judge Quintin walker
Subject: Hearings
Date: Tuesday, April 15, 2014 1:04:30 PM

Aanii Judge Kern,

This e-mail is a follow-up to the discussion in yesterday's meeting about the missed hearings. The hearing dates in question are April 9th and 10th.

I was told hearings were scheduled and court staff stated did not know your where you were and Judge Long was scheduled away from the court.

Megwetch,

Thomas P Shomin
Tribal Councilor
Grand Traverse Band of Ottawa and Chippewa Indians

Note the correct date of the hearing is April 8, 2014. Judge Kern asked his court administrator for advice on how to respond.

From: Kern, John
To: Campos, Cristine
Subject: FW: Hearings
Date: Wednesday, April 16, 2014 7:30:00 AM

Crissi: Can you respond to this (TO ME for any editing) so I can respond . Thanks dearly. I'm in no0 mood for witch hunts right now.

Her response is a detailed description that provides additional evidence of the poor relationship between the tribal court and the tribal council, and foreshadows much of the basis of Judge Kern's ultimate response to the inquiry:

From: Campos, Cristine
To: Kern, John
Subject: RE: Hearings
Date: Wednesday, April 16, 2014 3:39:27 PM
Sensitivity: Confidential

Council can ask you questions regarding your schedule and you can answer **as a courtesy** but you **DON'T** answer to them – you don't have to explain yourself to them at all.

All I would do is say it was a miscommunication / misunderstanding (for the 9th) and that we will do our very best to make sure that it does not happen again.

If you can get your doctor's office to email you a statement saying something like how critical it was that you go in and get it taken care of that would probably go a long way...Also, you can let them know I was severely ill and wasn't aware of the issue/hearing but that I have since met with staff, discussed what happened and what **SHOULD** happen - and we have a plan in place in case something like this were to happen again. I think the fact that Eric was so panicked set everyone else off (DHS, etc... Staff and I spoke about what kind of face they should be giving to the public (calm, confident in the midst of all hell breaking out).

I would make it VERY short and VERY vague (with sugar on top) ☺

I would also add at the end of whatever email you send that you will FOLLOW PROCEDURE AND THE SEPARATION OF POWER and discuss this issue with the **only** folks that can call you out on ANYTHING – the Judiciary – at your next meeting. I would just give them a “heads-up” about it – make it no big huge deal and just say you wanted to let them know as Council did ask about it.

Notably, the court administrator, who was not at work on April 8, dismisses Eric Placer's concerns as an inability to control “what kind of face [he] should be giving to the public...,” not the real issue of how to deal with a judge who routinely is absent from the courthouse.

Judge Kern offered a detailed email response to Councilor Shomin on April 18 that will not be reproduced here in full due to confidentiality concerns. The email is consistent with much of Judge Kern's testimony in the removal hearing; notably, that he was aware of the probability of the need for an emergency hearing on April 8, and that he fell on his wrist in the evening of April 7. Judge Kern also reminds the councilor of the meaning of judicial independence, and asks that the tribal council let him handle any complaints about the court.

It is the final paragraph that detains the Judicial Commission a little longer:

From: Kern, John
To: Shomin, Tom
Cc: Pedwaydon, Al; Gasco, JoAnne; Arroyo, David; Kewayqoshkum, Bob; Rohl, Jane; Antoine, George; Long, Michael; Petoskey, John, F; "matthew.fletcher@law.msu.edu"; Judge MaryAnn Roberts; Judge Quintin walker
Subject: RE: Hearings
Date: Friday, April 18, 2014 11:51:00 AM

As for this particular instance, Councilman Shomin, I detected an uncommon and improbable sequence of events; and a small measure of unintended miscues due to "green" staff unfamiliar with the management of unusual and unanticipated events. This event has been discussed with my staff, and corrective procedures implemented where possible (it's hard to plan for unimagined and unanticipated circumstances, but not impossible to set up a general procedure which has been done). I trust that this response is satisfactory. If not, please let me know and we can discuss it further.

Sincerely, Judge Kern

Judge Kern asserts that "[t]his event has been discussed with my staff, and corrective procedures implemented where possible...." Careful review of Judge Kern's emails from April and May 2014 indicates instead that Judge Kern did *nothing* to develop or implement new procedures. There is no written documentation or reference in any email to court staff, especially the court administrator, that Judge Kern took corrective action to prevent a recurrence of this event. There is no record of Judge Kern even acknowledging to court staff that anything had happened, except his request to his court administrator (and also days later to Judge Long) for advice on how to proceed, and that the court administrator admonished Mr. Placer for panicking. The email record does indicate that Judge Kern and his court administrator conducted other policymaking business using email, as evidence by Judge Kern's email on April 11, 2014 to asking the court administrator to review an email on political activity by court staff, excerpted below:

From: [Kern, John](#)
To: [Campos, Cristine](#)
Subject: political activity by Court employees
Date: Friday, April 11, 2014 9:17:00 AM

Dear Staff:

Please review Section 704.00 of the GTB Personnel Policy Manual regarding political activity of government employees. This personnel policy was last brought to your attention in a March 28th email from HR Director Mike Teeple. **In addition**, there are specific rules for Court employees that reflect our higher standards of responsibility toward the public trust than those of regular government employees. That is, GTB Tribal Court Rule 3.001 *et seq*, for which I have highlighted relevant portions below:

The court administrator responded as directed:

From: [Campos, Cristine](#)
To: [Kern, John](#)
Subject: RE:
Date: Friday, April 11, 2014 9:24:06 AM

It looks good to me – I would add that any questions regarding same should be brought to your attention as CHIEF JUDGE through me (or not – I guess that doesn't matter). I think it just needed to be stressed A LOT that even though someone might comment on FB after hours, if it is read and responded to during working hours by ANYONE that would constitute political activity during work. We have to have standards. I have nightmares about being in a hearing and listening to a witness say, "but your own Court Clerk said blah blah blah just last night..." There is no way that could fly...

Judge Kern was busy setting policy by email for the court between the April 8 hearing and the April 15 inquiry from Councilor Shomin, but was doing nothing – and apparently did nothing – to address the underlying concerns raised by the event on April 8 due to "green" and a routine lack of judges in the building. This is strong evidence that at least part of Judge Kern's response to Councilor Shomin – specifically the promise that he had addressed to court staff how to respond when judges were not in the building – was intentionally duplicitous. The only response Judge Kern had to the incident on April 8 appears to be an effort to cover his tracks, blame his staff, and to improperly minimize the potential injury of his inactions to the tribe.

In conclusion, the importance of the April 8, 2014 hearing to the well-being of an Indian child is well established. Judge Kern's casual disregard of the importance of the hearing is also well established by the fact that he did not bother to explain his absence to court staff, or to the parties. Judge Kern's duplicity to the tribal council and to the Judicial Commission is also well established. He was in fact available to serve on April 8, and took every effort to prevent others from learning this fact.

For the Judicial Commission:

Mary Roberts
Chief Justice Mary Roberts

6-27-14
Date

Quinton Walker (MR)
Appellate Justice Quintin Walker *hypermission*

6-27-14
Date

Matthew Fletcher
Appellate Justice Matthew L.M. Fletcher

6/27/14
Date