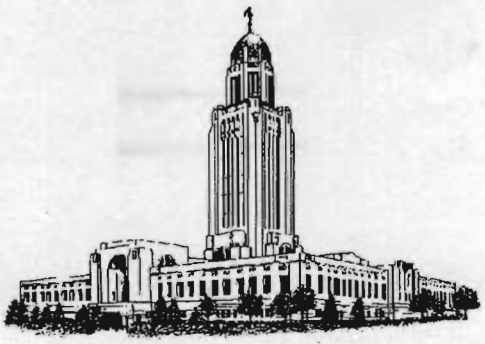
Nebraska State Legislature

SENATOR ERNIE CHAMBERS

District 11
3116 North 24th Street
Omaha, Nebraska 68110

Legislative Address:
Room 1107, State Capitol
PO Box 94604
Lincoln, Nebraska 68509-4604
(402) 471-2612



COMMITTEES

Agriculture
Business and Labor
Judiciary
Executive Board
Reference
Legislative Council

E.C.
1-31-05

JANUARY 31, 2005

John V. Hendry, Chairman
Commission on Judicial Qualifications
State Capitol Building
Lincoln, NE 68509

Colleagues -
You may not read this - but it may prove useful if a constituent seeks your help with a complaint against a judge.
E.C.

COMPLAINT AGAINST SARPY COUNTY DISTRICT JUDGE GEORGE A. THOMPSON FOR WILLFUL MISCONDUCT IN OFFICE AND CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE THAT BRINGS THE JUDICIAL OFFICE INTO DISREPUTE.

TABLE OF CONTENTS

This Complaint alleges "willful misconduct in office" - the most serious charge that can be lodged against a judge - and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Either or both may result in the maximum sanction of removal from office, **In re Complaint Against Jones**, 255 Neb. 1, 9, 10 (1988).

(1) STANDARD OF PROOF

Recognizing both the gravity of the allegations and the possible sanction, I shall discharge the burden of proving the case by clear and convincing evidence which entails thoroughness and detail, grounded in decisional authority and compelling argument. As is often the case (even with court opinions) some repetition is unavoidable when a multi-pronged issue is involved.

The three elements of willful misconduct in office are: (1) unjudicial conduct, (2) committed in bad faith for a purpose other than the faithful discharge of judicial duties, and (3) committed in connection with judicial action. More than mere negligence or error of law must be shown, even though either or both may, under appropriate circumstances, constitute prejudicial conduct.

The relevant facts and conclusions of law are not in dispute, having been found by the Nebraska Court of Appeals in **State v. Bruna**, 12 Neb.App. 798 (2004). Respondent said, prior to sentencing a defendant to 15 to 20 years in prison for first degree sexual assaut on a child:

> **Okay. I probably would be better off not saying anything and simply imposing sentence. The last time I sentenced a person that could be labeled as a "pedophile" I quoted from an author - a learned man - that happened to be a contributor to the Bible. The case was reversed and resentenced by another judge to probation. If people would continue to read that author, they would find that it's not a message of condemnation, but of hope.** (Page 832)

(2) WHAT IF...?

Defendants are compelled to be in the courtroom and are neither free to leave nor to express oppositon nor to openly signal offense while a judge is pronouncing sentence. They are not there for the purpose of being forced to endure a judge's "sermon" based on the judge's personal religious notions and pique at a prior decision of the Nebraska Supreme Court dealing with a previous case of the judge. They are virtual "captives" who must submit in silence, under the threat of judicial displeaure and punishment. Such, is a gross misuse of the judge's power and position of authority.

Nothing is so awe-inspiring to one being sentenced, as judicial authority backed by the power to inflict abritrary, retaliatory punishment to compel unwilling persons to listen to the judge's personal religious notions. This flies in the face and makes a mockery of the principle of "a nation of laws not of men."

In the absence of appropriate corrective action (discipline), the tail (Respondent) triumphantly wags the dog (judicial system) and brings disrepute to the entire system of justice and its practitioners.

As egregious as was the incident involving the stone monument (with a version of the Ten Commandments) in that courthouse rotunda Down South, at least one could avert one's eyes from and refrain from reading the religious words.

In a courtroom where words are articulated, the task of avoidance is not so easy. How does one, standing before a judge to be sentenced, avoid hearing that which is audible and intended by the speaker to be clearly heard?

What if a defendant made noise to drown out the words? He could be punished for disrupting the proceedings and manifesting contempt of the court. (Contempt is a one-way street in the courtroom.)

What if the defendant stuck his fingers in his ears to shut out the words? He could be punished for being disrespectful to the court and creating a distraction. Why should a person be forced even to contemplate taking such unseemly actions, in order to be proof against untoward interjection of religious notions into a formal judicial proceeding which he is compelled to attend?

Operating on the principle that "sauce for the goose is sauce for the gander," what if the defendant chose to counter the judge's homily with a biblical quotation or two about unjust judges? What then? Would the "Bible-believing" judge be as enamored of those biblical passages as he purports to be of the ones issuing from his own mouth?

Injection of inappropriate religious notions into a judicial proceeding engenders much ado. But it is not about nothing. It is about the very nature and function of judicial proceedings and judicial conduct in the courtroom. It is much ado about corrupting the judicial process and the administration of justice, and prostituting judicial authority and power to an inappropriate purpose.

And it is about the right of a citizen - even one convicted of a crime - to a fair and impartial dispensing of justice, untainted by factors not authorized by law. (See **EXHIBIT A**, Column by **Omaha World-Herald** columnist Rainbow Rowell.)

(3) IN GENERAL

Section 24-722 (Reissue 1995) provides in pertinent part:

> **A...judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time, not to exceed six months, or removed from office for (1) willful misconduct in office, ... or (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute[.]**

This is a codification of Art. I, sec. 30 of the Nebraska Constitution.

This Complaint will establish and discuss all of the elements of willful misconduct and prejudicial conduct. The proof actually will exceed the clear-and-convincing standard - and meet the much higher beyond-a-reasonable doubt, for the conclusive proof derives from Respondent's own words uttered while committing his misconduct.

Unethical conduct is conduct that is unjudicial, by virtue of violating the Constitution of Nebraska, statutory and decisional law, and the Code of Judicial Conduct. (See "Law," Terminology Section of the Code.)

Unjudicial conduct is willful when committed in bad faith for an improper purpose - "a purpose other than the faithful discharge of a judge's duties." **Inquiry Concerning a Judge**, 454 S.E.2d 780, 782 (Ga. 1995). Both offenses will

be discussed and analyzed below.

The improper purpose of Respondent, gathered from his own words, was to interject his personal religious predilections into a judicial proceeding.

Bad faith, or willfulness, is established by the fact that the proscribed misconduct had previously resulted in explicit disapproval by the Nebraska Supreme Court [**State v. Pattino**, 254 Neb. 733 (1998)], hence, clearly was for a purpose "other than the faithful discharge of his judicial duties."

Respondent had been explicitly admonished and instructed by the Supreme Court in Pattino, precisely how to faithfully discharge his judicial duties in circumstances like those obtaining in the Bruna case: Refrain from interjecting personal religious views into judicial proceedings.

(4) "DEJA VU ALL OVER AGAIN"

Respondent's inappropriate remarks: (1) embraced his personal religious views, (2) criticized a Nebraska Supreme Court decision involving identical circumstances, and (3) did blatantly defy the Supreme Court by brazenly ignoring the "law of the case" which the Court pronounced in Pattino involving similar remarks by Respondent under identical circumstances.

In Pattino and Bruna, the Court was compelled to vacate the sentence imposed by Respondent and remand the cause for resentencing by a different judge.

As declared former New York Yankees catcher, Yogi Berra, **"It's deja vu all over again."**

Setting aside for the moment, the specific religious content of Respondent's remarks, more problematic and of greater negative significance is the fact that he willfully repeated the exact-same misconduct for which he had been chastised by the Nebraska Supreme Court.

Thus, Respondent's own words, spoken during the commission of his misconduct, constitute, in effect, a confession in open court of the willful misconduct in office, as well as prejudicial conduct: "I probably would be better off not saying anything...."

I found only one other Nebraska case of judicial misconduct where a judge perpetrated such a brazen challenge to the Nebraska Supreme Court's authority (contumacious disregard and disrespect for a ruling affecting the same offending respondent (Judge Staley) for committing the same offense for which he had been "slapped down" by the Court). **In re Complaint Against Staley**, 241 Neb. 152 (1992). Judge Staley was removed.

(5) "WHAT ARE YOU GOING TO DO ABOUT IT?"
(JUDICIAL ARROGANCE AND CONTUMACY)

This Complaint details insufferable judicial arrogance and contumacy exemplified by the repetition of misconduct. After boldly asserting that he knew he was asking for trouble, he went ahead and asked for trouble.

His misconduct resulted in the waste of judicial resources by generating additional, unnecessary judicial proceedings impinging on the time of another judge who must be pressed into service to rectify the consequences of

Respondent's willful misconduct.

Figuratively speaking, Respondent brazenly turned his back to the Supreme Court, bent over, hiked up his robe and "mooned" the Judges. His is an extraordinary mockery, bordering on taunting. **QUERY: If a judge may, with impunity, misbehave in such a fashion, how can the public be enjoined to respect the judiciary and have confidence in the integrity of the administration of justice?**

In re Friedman, 392 N.E.2d 1333 (Ill. 1979) includes a dissent which captures the foul attitude of Respondent. Assessing the arrogant, attitude of a judge who, on a "technicality" forged by the majority, escaped discipline and "got away with one," Judge Clark wrote in exasperated dissent:

> **It simply was not sufficient for the respondent to confront the court after the fact with the completed deception, stating in effect: "I did it. I'm proud of it. What are you going to do about it?"**

(6) WHERE MUCH IS KNOWN

An inappropriate act committed today may be deemed worse than the identical act done previously, due to notice - notice from decisional law that such an act was judicially condemned. Especially would this be true where the identical act was repeated by the judge who was involved in the previous commission of the act.

It is axiomatic that judges are charged with knowledge of the ethical standards governing judicial conduct as well as with knowledge that discipline has been and will be imposed for misconduct. Further, they are charged with knowledge that repetitious misconduct draws heavier discipline than a single act - provided that the single act is not sufficiently egregious to warrant removal. (See, **Jones, supra.**, 355 Neb. 1)

In sum, judges know the ethical standards that bind them and that those standards will be enforced by judicial discipline.

(7) THREE DECISIONS

For the convenience of the Commission, as well as to spare myself the trouble of parsing the cases and scattering portions throughout this Complaint, I am setting forth extensive excerpts from three cases which, combined, "cover the waterfront," on the issue of inappropriate injection of religion:

1. **State v. Bruna**, 12 Neb. App. 798 (2004),
2. **State v. Pattino**, 254 Neb. 733 (1998);
3. **In re Complaint Against Empson**, 252 Neb. 433 (1997).

(A) STATE V. BRUNA

Beginning at page 832:

> After his conviction but before sentencing, Bruna filed a motion requesting that the trial judge recuse himself. There is no copy of that motion in the transcript, but the trial judge referred to the motion before sentencing Bruna and overruled it. Bruna asserts that the trial judge abused his discretion in failing to recuse himself from sentencing Bruna. Although Bruna's counsel discussed at oral argument an earlier motion to recuse, Bruna's

assignment of error, read in context, clearly addresses only the later motion to recuse.

[29,30] In regard to the motion to recuse made after conviction and prior to sentencing, Bruna's brief on appeal focuses on statements made by the trial judge before pronouncing the sentence. The judge began with the following:

> Okay. I probably would be better off not saying anything and simply imposing a sentence. The last time I sentenced a person that could be labeled as a "pedophile" I quoted from an author — a learned man — that happened to be a contributor to the Bible. The case was reversed and resentenced by another judge to probation. If people would continue to read that author, they would find that it's not a message of condemnation, but of hope.

The following is from pages 833-834:

We are asked to determine whether these comments demonstrate that the trial judge based Bruna's sentence on personal bias, thereby committing an abuse of discretion. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. State v. Pattno, 254 Neb. 733, 579 N.W.2d 503 (1998). An abuse of discretion occurs when the sentencing court's reasons or rulings are clearly untenable and unjustly deprive the defendant of a substantial right and a just result. See *id.*

[31] In *State v. Pattno, supra*, the Nebraska Supreme Court vacated the male defendant's sentence for sexual assault on a male child after the trial judge read a lengthy excerpt from the Bible that addressed homosexuality in a negative light. The trial judge in the present case was the same trial judge making the statements in *Pattno*. The *Pattno* court determined that the reasonable person test adopted in *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 495 N.W.2d 36 (1993), constituted the proper standard by which to determine whether a judge was biased against a defendant and therefore whether that judge should have recused himself from imposing a sentence. In such a case, the defendant "must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown." *State v. Pattno*, 254 Neb. at 740, 579 N.W.2d at 508. The *Pattno* court found that the trial judge had "interjected his own religious views immediately prior to sentencing" and concluded that "a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge." 254 Neb. at 743, 579 N.W.2d at 509. The court stated:

> Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice. . . . However, courts are well advised to rely upon the statutory guidelines for imposing sentences. Reliance upon irrelevant material, such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced.

> The problem is that during [the defendant's] sentencing, the trial judge read a biblical scripture and then stated that he had considered the circumstances and the "nature . . . of the defendant" in reaching the sentence of not less than 20 months' nor more than 5 years' imprisonment. A reasonable person who heard the judge's comments could have questioned the judge's impartiality.

(Citations omitted.) *Id.* at 742, 579 N.W.2d at 509. * * *

The trial judge expressly referred to "[t]he last time [he] sentenced a person that could be labeled as a 'pedophile.'" The judge expressly identified the source of a quotation he had recited at that prior sentencing as the Bible. The judge expressly acknowledged that the sentencing in that prior case was vacated on appeal. These comments unmistakably identify the subject matter of *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998), which included an extensive quotation from the Bible. The judge's comment then characterizes the Biblical message from the prior case as one of hope rather than condemnation, at least implicitly suggesting that the Nebraska Supreme Court in *Pattno* had misinterpreted the quotation and the judge's motive and purpose in reading from the Bible at the prior sentencing.

We put aside the issue of whether it is inappropriate for a trial judge to publicly criticize the Supreme Court's decision reviewing the judge's actions in a prior case. In light of *Pattno*, which authority the judge raised by his own comments clearly referring to that prior case's sentencing phase, the judge has again inserted his own religious views in a sentencing proceeding. The *Pattno* analysis contemplates application of an objective test by a reasonable person knowing all of the facts. A reasonable person knowing all of the facts would be aware of the Supreme Court's decision in *Pattno* and the circumstances surrounding its disposition, and to such a person objectively taking into account the judge's referring to that prior case, his implicitly criticizing the appellate review of the prior decision, and his arguing for characterization of the Biblical quotation as "a message [not] of condemnation, but of hope," the insertion of personal religious views becomes explicit and unmistakable.

We are not stating that reference to the Bible may never be made in a sentencing proceeding. But, as the Supreme Court strongly advised in *Pattno*, courts are well advised to rely upon the statutory guidelines for imposing sentences. The danger of confusion and the suggestion of injection of personal religious views generally counsel against such Biblical references.

Here, considered in the context of the reference to *Pattno*, the reference to personal religious views is, again, unmistakable. In this case, as in *Pattno*, a reasonable person could conclude that the trial judge based the sentence upon personal bias or prejudice, thereby depriving the defendant of due process and abusing the judge's discretion.

The Court concluded at page 836: "Because of the trial court's sentencing comments, we vacate the sentence and remand the cause with directions that Bruna be resentenced by a different judge."

This echoes the Supreme Court's conclusion in Pattino, excerpted below: "Therefore, we vacate the sentence imposed upon Pattino and remand the cause with directions that he be resentenced by a different judge." At 254 Neb. 743.

(B) STATE V. PATTINO

Beginning at page 736:

> Subsequently, the trial judge read the following biblical excerpt:
>
> "Ever since the creation of the world his invisible nature, namely, his external power and deity, has been clearly perceived in the things that have been made. So they are without excuse; for although they knew God they did not honor him as God or give thanks to him as God, but they became futile in their thinking and their senseless minds were darkened. Claiming to be wise, they became fools, and exchanged the glory of the immortal God for images resembling mortal man or birds or animals or reptiles.
>
> "Therefore God gave them up in the lusts of their hearts to impurity, to the dishonoring of their bodies among themselves, because they exchanged the truth about God for a lie and worshiped and served the creature rather than the Creator, who is blessed for ever [sic]. Amen.
>
> "For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error."
>
> Following the reading of the biblical passage, the trial judge stated that he had considered the circumstances of the case and the "nature . . . of the defendant" and found that imprisonment was necessary to protect the public and not to depreciate the seriousness of the crime. Pattno was sentenced to not less than 20 months' nor more than 5 years' imprisonment. **Page 736.**

The following is from pages 740-743:

> In *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991), the defendant was convicted of mail fraud, wire fraud, and conspiracy for encouraging persons to donate money to his television evangelism program. At sentencing, the judge stated: "'[Bakker] had no thought whatever about his victims and those of us who do have a religion are ridiculed as being saps from [sic] money-grubbing preachers or priests.'" (Emphasis omitted.) *Id.* at 740. The court of appeals, while noting that a sentencing judge has broad discretion in rendering a sentence, noted that such discretion must be exercised within the boundaries of due process.

The court held that the sentencing judge exceeded these boundaries by imposing a sentence based on impermissible considerations. The court noted that a judge may not take into consideration a party's race or national origin in sentencing without violating due process. The court held that "similar principles apply when a judge impermissibly takes his own religious characteristics into account in sentencing." *Id.* The court stated:

> Courts, however, cannot sanction sentencing procedures that create the perception of the bench as a pulpit from which judges announce their personal sense of religiosity and simultaneously punish defendants for offending it. Whether or not the trial judge has a religion is irrelevant for purposes of sentencing. . . .
>
> . . . .
>
> Yet, the fact remains that this case involves the explicit intrusion of personal religious principles as the basis of a sentencing decision; at least, that is not an unfair reading of the trial court's comments in this case. We recognize that a trial judge on occasion will misspeak during sentencing and that every ill-advised word will not be the basis for reversible error. In this case, however, our review of the sentencing transcript reveals comments that are, in the end, too intemperate to be ignored. Because an impermissible consideration was injected into the sentencing process, we must remand the case.

Id. at 740-41. We find the reasoning of *Bakker* helpful to our consideration of the trial judge's conduct in sentencing Pattno. Due process requires that sentencing judges consider only relevant information as the basis for a sentence. See *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Since our focus is whether a reasonable person under these circumstances would question the trial judge's impartiality, we examine the facts and circumstances in that light. All crimes in Nebraska are statutory. Similarly, sentences imposed upon defendants convicted of a crime are also statutory. No statute in this state criminalizes sexual contact between consenting adults of the same gender. Thus, Pattno's crime is that he had sexual contact with a minor; not that he had sexual contact with another male. Therefore, the biblical scripture which the judge read was not relevant to the crime to which Pattno pled guilty, and it should not have been considered by the judge in determining an appropriate sentence.

Also problematic with the trial judge's use of biblical scripture is the fact that from its very inception, this country has recognized the importance of separation of church and state. Allowing a court to recite scripture, and thereby proclaim its interpretation of that scripture, implies that the court is advancing its own religious views from the bench.

Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice. See, *Six v. Delo*, 885 F. Supp. 1265 (E.D. Mo. 1995), *affirmed* 94 F.3d 469 (8th Cir. 1996); *United States v. Baer*, 575 F.2d 1295 (10th Cir. 1978); *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996). However, courts are well advised to rely upon the

statutory guidelines for imposing sentences. Reliance upon irrelevant material, such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced.

The problem is that during Pattno's sentencing, the trial judge read a biblical scripture and then stated that he had considered the circumstances and the "nature . . . of the defendant" in reaching the sentence of not less than 20 months' nor more than 5 years' imprisonment. A reasonable person who heard the judge's comments could have questioned the judge's impartiality.

* * * A sentencing judge has broad discretion as to the source and type of information, including personal observations, which may be used as assistance in determining the kind and extent of the punishment to be imposed. See *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). However, relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process. See *U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

* * *

A Class IV felony is punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. There is no minimum sentence of incarceration or fine required. As such, Pattno's sentence is clearly within the statutory limits and generally, in view of such facts, would not be an abuse of discretion.

However, because the trial judge interjected his own religious views immediately prior to sentencing, a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge. If a judge's comments during sentencing could cause a reasonable person to question the impartiality of the judge, then the defendant has been deprived of due process and the judge has abused his or her discretion.

Therefore, we vacate the sentence imposed upon Pattno and remand the cause with directions that he be resentenced by a different judge.

(C) IN RE COMPLAINT AGAINST EMPSON

A clear violation of the Code of Judicial Conduct constitutes, at a minimum, a violation of § 24-722(6). Page 436

As a general matter, we find it inappropriate for a judge, as an authority figure, to disseminate religious materials in the courthouse with the intent of impressing his or her beliefs on the recipients. Despite the fact that the Hunt trial was over and the jurors had been excused, the question and answer session in which the religious pamphlets were dispersed proceeded with the jurors remaining in the jury box. More troubling are respondent's remarks that he got to "witness" and "minister" to the jurors. The fact that respondent had completed his judicial "duties" at the time of the discussion is immaterial in determining whether his conduct was appropriate. See *In re Complaint*

Against Kneifl, 217 Neb. 472, 351 N.W.2d 693 (1984). While respondent is free to practice his religion as he chooses, his attempts to express his personal views on persons within the confines of the courthouse are violative of Canons 1 and 2 of the Code of Judicial Conduct and § 24-722(6). page 452

The following comes from pages 455-457:

The goal of disciplining a judge in response to inappropriate conduct is twofold: to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. These principles were first enunciated in *In re Complaint Against Kneifl*, 217 Neb. at 485-86, 351 N.W.2d at 700, wherein we stated:

> The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.

With these principles in mind, we make particular note of the fact that respondent's conduct and statements have violated both the Judicial Code of Conduct and § 24-722(6). * * * . . . As we have previously stated, examination of a judge's conduct "depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Complaint Against Kneifl*, 217 Neb. at 475, 351 N.W.2d at 696, citing *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). We also agree with the sentiments made by the Florida Supreme Court in its removal of a judge from office for a pattern of misconduct:

> "Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which, [taken] together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary."

In re Crowell, 379 So. 2d 107, 110 (Fla. 1979). Even if we were to assume that any of the incidents in question, if isolated, would not be worthy of discipline, the accumulation of repeated misconduct by respondent warrants discipline.

> The proper imposition of discipline in this matter must be sufficient to deter respondent from engaging in such conduct and to deter others from engaging in similar conduct in the future.

(8) WILLFUL MISCONDUCT IN OFFICE

A review of the discussion of willful misconduct in office and prejudicial conduct, by the Nebraska Supreme Court in **In re Complaint Against Kelly**, 225 Neb. 583, 587-588 (1987), shows that all of the elements are found in Respondent's misconduct:

> This is our first opportunity to construe the meaning of "willful misconduct in office." The Arizona and California Supreme Courts describe willful misconduct as
>
> > "unjudicial conduct which a judge acting in his judicial capacity commits in bad faith, while the [charge of conduct prejudicial to the administration of justice] should be applied to conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. . . ."
>
> *Matter of Haddad*, 128 Ariz. 490, 497-98, 627 P.2d 221, 228-29 (1981) (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973)). The North Carolina and Mississippi Supreme Courts define the charge as follows: " '*Willful misconduct in office* is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. . . .' " *In re Inquiry Concerning Garner*, 466 So. 2d 884, 885 (Miss. 1985) (quoting *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977)).
>
> Crucial to a finding that the respondent violated subsection (1) is a showing of bad faith. As stated in *Gubler v. Commission on Judicial Performance*, 37 Cal. 3d 27, 45-46, 688 P.2d 551, 562, 207 Cal. Rptr. 171, 182 (1984):
>
> > Bad faith is the touchstone for testing whether misconduct committed by a judge while acting in a judicial capacity constitutes wilful misconduct. [Citation omitted.] " '[B]ad faith' is quintessentially a concept of specific intent, requiring consciousness of purpose as an antecedent to a judge's acting maliciously or corruptly." [Citation omitted.] When the judge has " 'intentionally committed acts which he knew or should have known were beyond his lawful power,' [citation], . . . 'bad faith' entails actual malice as the motivation for a judge's acting ultra vires. The requisite intent must exceed mere violation; negligence alone, if not so gross as to call its genuineness into question, falls short of 'bad faith.' " [Citation

> omitted.] Even when the acts in question were within the judge's lawful power, they may involve bad faith, and thus constitute wilful misconduct, if "committed for a corrupt purpose, i.e., for any purpose other than the faithful discharge of judicial duties."

(9) BAD FAITH

While the formulation of willful misconduct in office and prejudicial conduct, in **Kelly**, may be deemed a template, other courts have commented in various ways and linked the two. In **Inquiry Concerning a Judge**, 454 S.E.2d 780, 782 (Ga. 1995), the court said:

> We interpret "willful misconduct in office" to mean actions taken in bad faith by the judge acting in her judicial capacity. "Conduct prejudicial to the administration of justice" refers to inappropriate actions taken in good faith by the judge acting in her judicial capacity, but which may appear to be unjudicial and harmful to the public's esteem of the judiciary. Prejudicial conduct may also refer to actions taken in bad faith by a judge acting outside her judicial capacity.

As to discipline:

> Whether discipline should be imposed and the severity of discipline must be determined through a reasonable and reasoned application of the text [of the Code of Judicial Conduct] and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

In **Dodds v. Com'n on Judicial Performance**, 906 P.2d 1260, 1266-67 (Cal. 1995), the court declared:

> By "bad faith" we mean that the judge "intentionally committed acts which he knew or should have known were beyond his lawful power" [citation omitted] or "acts within the lawful power of a judge which nevertheless [were] committed ... for any purpose other than the faithful discharge of judicial duties."
> ... Unjudicial conduct that does not rise to the level of wilful (sic) misconduct, either because of a lack of bad faith or because the judge was not acting in a judicial capacity, may nevertheless constitute prejudicial conduct. [Citations omitted] ...
> Prejudicial conduct refers to conduct that "would appear to an objective observer to be not only unjudicial...but...prejudicial to public esteem for the judicial office."

(10) KNOWS BETTER

Said the court in **In re Fine**, 13 P.2d 400, 414 (Nev. 2000):

> We conclude that willful misconduct occurs when the actor knows he or she is violating a judicial canon or rule of professional conduct and acts contrary to that canon or rule in spite of such knowledge.
> ... Thus, the Commission noted that "Judge Fine in this case before the Commission, violated the same provision of the Nevada Code of

> Judicial Conduct for which she was previously disciplined.
>
> ... In light of Judge Fine's previous discipline for the same misconduct, we conclude that [her] actions show she knowingly acted in derogation to the judicial canons and, therefore, her actions amounted to willful misconduct. Simply put, Judge Fine should have known better. (Emphasis added.)

Respondent, here, not only knew better, but frankly acknowledged that his words would get him into trouble. He is a "repeater," just like Judge Fine. In his view, apparently, the "trouble" would have no significant impact on his status as a judge and really would not amount to a hill of beans. Therefore, the reproof administered by the Nebraska Supreme Court in Pattino served no deterrent effect whatsoever.

In **In re Worthen**, 926 P.2d 853 (Utah 1996), the court undertook a detailed and exhaustive analysis of willful misconduct in office and prejudicial conduct. It is worth considering, in my view. At pages 867 and 868, the court said:

> [T]he first ground - "willful misconduct in office" - requires (i) one or more acts of misconduct (ii) committed with a culpable mental state (iii) by a judge in connection with the judicial office - in effect, abuse or misuse of the judicial office. ... Finally, the fifth ground - "prejudicial conduct" - requires (i) one or more acts, (ii) the effect of which is to bring public disapprobation upon a judicial office.
>
> ... We begin with the first ground, "willful misconduct in office." The first and third elements of this ground are relatively straightforward. The first element requires one or more acts of "misconduct," i.e., conduct inappropriate for a judge - in short, unjudicial conduct ... [which] refers to behavior that departs from the ethical norms governing judges. ...
>
> Finally, the second element of the "willful misconduct" ground pertains to the judge's mental state in connection with the misconduct. ... [Relying on tort law for an analogy], we held that to prove "willful misconduct," one needs to show that at the time the act in question was done, the defendant "must [have been] aware that his [or her] conduct [would] probably result in injury." [Citation omitted.] (Emphasis supplied.)

At 869:

> As thus formulated, the test for "bad faith" [which underlies willfulness] is whether the judge intentionally committed acts, whether within or without the judge's lawful power, which were done for a purpose other than the faithful discharge of judicial duties. ... Thus, the complete articulation of the definition we adopt in Utah for "willful misconduct" in the context of judicial discipline is (i) unjudicial conduct (ii) committed in bad faith (iii) by a judge acting in his judicial capacity[.] (Emphasis supplied.)

At 871:

> The language of the second clause, "which brings a judicial office into disrepute" ... means that only misconduct which lowers public regard for a particular judicial office is covered because the definition of "disrepute" is [l]oss or want of reputation; ill character; low estimation; dishonor." Webster's New Int'l Dictionary 753 (2d ed. 1956). Thus, a reading of the complete provision suggests that the unjudicial conduct must have the effect of lowering public esteem for a particular judicial office, and thus tend to lower public esteem for the entire judiciary so as to reduce its effectiveness. (Emphasis supplied.)

At 872:

> [W]e hold that the "prejudicial conduct" ground requires (i) identifying the relevant "unjudicial conduct," and (ii) assessing whether that conduct would appear to an objective observer to prejudice public esteem for the judicial office.

At 874, the court addresses "repeaters." If a judge

> commits the same error so as to demonstrate the bad faith necessary to support a charge of willful misconduct or the type of disregard and indifference necessary to support a charge of prejudicial conduct, then invocation of the disciplinary machinery is appropriate. (Citations omitted.) (Emphasis supplied.)

(11) NO MITIGATION

Language at page 263 of **Kloepfer v. Com'n on Judicial Performance**, 782 P.2d 239 (Cal. 1989), describes Respondent to a "T":

> His conduct...suggests that rather than using his knowledge and experience to [properly perform judicial duties], petitioner was impatient and frustrated by the need to comply with, and sought to avoid, procedures we deem necessary to the fair and evenhanded administration of justice. ...
>
> The record belies [his] claim that he has learned from past experiences and has modified his courtroom behavior. It demonstrates instead an inability to appreciate the importance of, and conform to, the standards of judicial conduct that are essential if justice is to be meted out in every (emphasis in original) case. ...
>
> ... Petitioner's lack of judicial temperament is manifest.
>
> The record does not suggest that petitioner has, or will be able to overcome this trait and that similar incidents will not occur. (Emphasis supplied.)

Moving backward to pages 262 and 263, we see the court dismantle the effort to find mitigation in a judge doing merely what a judge is expected to do:

> The purpose of Commission proceedings is not punishment, but protection of the public, ensuring evenhanded and efficient administration of justice, and the maintenance of public confidence in the integrity of the judicial system. (Citations omitted.) Our purpose is to determine the nature of the discipline, if any, that is necessary to achieve these goals.

Respondent in the case at hand, falls short in every regard.

> We threrefore consider evidence offered by the judge in explanation and/or mitigation of his conduct. There can be no mitigation for maliciously motivated judicial misconduct, however. (Citation omitted.) ...
>
> Several witnesses, including colleagues on the bench and attorneys who appear before him, testified that petitioner is a person of unquestioned honesty and integrity. None of the charges against petitioner suggest otherwise. This evidence, and that which confirms that petitioner had a good reputation for legal knowledge and administrative skills is not mitigating, however. Honesty and good legal knowledge are minimum qualifications which are expected of every judge. (Code of Judicial Conduct, canons 1 and 3.)

Neither these qualities nor a judge's administrative skills can mitigate either "wilful (sic) misconduct" or "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." (Emphasis supplied.)

(12) INAPPROPRIATE, UNNECESSARY COMMENTS

The Nebraska Court of Appeals, in **Bruna** at 12 Neb.App. 835 - rather magnanimously, if you ask me - said: "We put aside the issue of whether it is inappropriate for a trial judge to publicly criticize the Supreme Court's decision reviewing the judge's actions in a prior case."

Having assumed the task of "making the case" which this Complaint alleges, I shall not "put aside the issue." Respondent had no legitimate reason to make reference to or comment negatively upon **Pattino, supra**, 254 Neb. 733 during the sentencing of the defendant, Bruna.

Although the Nebraska Supreme Court noted that "courts often are required, in resolving matters submitted to them, to criticize the decisions or reasoning of other courts" - **In re Complaint Against White**, 264 Neb. 740, 753 - the Court cautioned that a judge ought not do so if the judge "had no official duties with respect to the disposition of the [criticized] case - much less official duties that required any public statements to be made." **Id.**

Explained the Court, **id.**:

> The Nebraska Code of Judicial Conduct is based in part on the American Bar Association's Model Code of Judicial Conduct (1999), which has been adopted in several jurisdictions; other courts considering provisions similar to Canon 3B(9) have similarly concluded that a judge's public statements shall be considered to be in an official capacity when the statements are part of an official duty, related to an official duty, or sought from or given by the judge because of his or her official position. See, e.g., *Matter of Hey*, 188 W. Va. 545, 425 S.E.2d 221 (1992) (citing cases).
>
> Canon 3B(9) does provide an exception permitting judges to make "public statements in the course of their official duties." We note that there is a significant distinction between comments made in an official capacity and statements made in the course of official duties. For instance, courts are often required, in resolving matters submitted to them, to criticize the decisions or reasoning of other courts. Here, however, the *Brink* case was not pending before the respondent and she had no official duties with respect to the disposition of the case—much less official duties that required any public statements to be made. While the respondent became involved in the *Brink* case in her official capacity as a county court judge, it cannot reasonably be said that her motion to appoint a special prosecutor, made after the respondent's official responsibility for the *Brink* case had been terminated, was made in the discharge of any official duty with respect to the case.

Not only did Respondent know he was not invoking Pattino in order to "faithfully discharge his judicial duties," he confessed that he would be better off saying nothing. He had no legitimate reason to comment as he did, but when he chose to do so, his words "convict" him - not by mere clear and convincing evidence, but beyond a reasonable doubt - or as a lay person might say, "beyond a shadow of a doubt" - of willful misconduct in office and prejudicial conduct.

(13) "LAW OF THE CASE"

Every judge is required to respect appellate decisions. If not technically, then at least by analogy, the legal principle, "law of the case," can be applied here. In a previous case dealing with the same facts and circumstances, the Nebraska Supreme Court admonished Respondent regarding improperly interjecting his personal religious views into a judicial proceeding.

Says Black's Law Dictionary, 5th ed.: "Doctrine of 'law of the case' provides that when appellate court has rendered a decision and states in its opinion a rule of law necessary to decision, that rule is to be followed in all subsequent proceedings in the same action." I repeat, by analogy, the principle, or one very much like it, applies to the matter at hand.

For example, the Nebraska Supreme Court said in **State v. Williams**, 247 Neb. 931, 935 (1995):

> We take this opportunity to remind lower court judges that if the facts are the same as those involved in a holding of this court in a similar case, it is not only their duty but also their obligation to follow the law as has been announced by the Nebraska Supreme Court. (Emphasis supplied.)

In **Pattino**, 254 Neb. at 742, the Court, addressing this Respondent, "stated in its opinion a rule of law," that "relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process."

The concepts of "the law of the case" and of precedent are designed to provide stability and consistency to the administration of justice, and they depend for their effectiveness, on respect for courts, judges and their decisions.

It is axiomatic that judges are held to a higher standard than are lawyers. Regarding the duty of lawyers, **EC 9-6, Code of Professional Responsibility** provides: Every lawyer owes a solemn duty ... to encourage respect for the law and the courts and the judges thereof...."

The Nebraska Supreme Court said in **State v. Lowe**, 248 Neb. 215, 220 (1995) - citing the Nebraska Code of Judicial Conduct and issuing a stern warning to lower courts:

> Judges must be faithful to the law. Canon 3B(2) of the Nebraska Code of Judicial Conduct. The preamble to the Code of Judicial Conduct states that the "law" denotes all court rules adopted by this court, as well as statutes, constitutional provisions, and decisional law. A judge shall respect the law and must act at all times in a manner that promotes public confidence in the integrity of the judiciary. Canon 2A of the Code of Judicial Conduct.

> This is not the first time that the district court for Douglas County has ignored binding precedent. *State v. Plant, ante* p. 52, 532 N.W.2d 619 (1995); *State v. Wilson*, 247 Neb. 948, 530 N.W.2d 925 (1995); *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (1995). Failure to follow precedent can be a violation of the judge's sworn duty. The integrity of the judicial system dictates that courts follow binding precedent. Conscious failure to do so constitutes contempt for the system. This court is bound to act, and will when we deem it appropriate, when a judge continues to ignore decisions of this court. *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992).
>
> As a result of the prejudicial jury instructions, we must and do grant Lowe the relief that the district court willfully and erroneously denied.

Also of significance is the Court's noting the willfulness of "ignor[ing] decisions of this [Supreme] court." Another nail in Respondent's coffin, if you will; and repetition of improperly ignoring Supreme Court rulings is explicitly condemned.

(14) REPETITION OF MISCONDUCT

Repetition of misconduct evinces a lack of judicial temperament which reflects negatively on a judge's fitness to serve. **Lowe** referenced **In re Complaint Against Staley**, 241 Neb. 152 (1992), in regard to judges who ignored Supreme Court decisions.

Staley is on all fours with the case at hand because Judge Staley, like Respondent here, brazenly disregarded a decision by the Nebraska Supreme Court, in which he had previously been admonished. Said the Court at 180:

> ... Despite the fact that **In re Interest of A.M.H.** was an appeal from his own court, it is evident that the respondent has failed and refused to adhere to our mandate in that case requiring verbatim transcripts in juvenile courts and continued to improperly conduct proceedings off the record, as demonstrated in **In re Interest of L.P. and R.P.** 240 Neb. 112, 480 N.W.2d 421 (1992), another appeal from from the respondent's court. (Emphasis supplied.) [Judge Staley was removed.]

In a later case, **In re Complaint Against White, supra.**, although the Judge's misconduct (which included commenting inappropriately on a case where she had no need to comment at all - discussed above) was deemed to be of such a "serious nature" as to warrant "a heavy sanction," the judge was spared removal because "a single case" was involved, and "[t]he record does not show that the misconduct at issue in this case is likely to be repeated," at 752 (emphasis added).

> That having been said, we take note of the respondent's testimony that she thought her actions were permitted by the Code and that she did not intend to violate the Code. Although we have concluded that the respondent was profoundly mistaken, we have no reason to question the respondent's veracity in stating that she intended, and intends, to abide by the Code. The record also shows no other acts of misconduct attributed to the respondent, nor any previous imposition of discipline. Thus, the

record before us leads us to conclude that the respondent's conduct is indicative of serious lapses in judgment, but that those lapses, related to a single case, are not symptomatic of a defect in character that would disqualify the respondent from holding judicial office. The record does not show that the conduct at issue in this case is likely to be repeated.

Accordingly, we determine that removal from office is unwarranted. Because the respondent's misconduct was in her official capacity, however, and because of its serious nature, we conclude that a heavy sanction is necessary.

A former Nebraska Attorney General whose misconduct was so egregious that he received a crushing, four-year suspension from the practice of law, was spared disbarment because of "little likelihood of repetition of the misconduct." Said the Supreme Court in **NSBA v. Douglas**, 227 Neb. 1, 65 (1987):

> As we stated in the Cook case at 387, 232 N.W.2d at 132:
>
> A judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge. Disbarment ought not to be imposed for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law. (Emphasis supplied.)
>
> Furthermore, we believe there is little likelihood of repetition of unethical conduct by the respondent in the future.
>
> We conclude that an appropriate discipline in this case is suspension from the practice of law for a persiod of 4 years....

In the case at hand, Respondent not only has repeated the same misconduct for which he had been admonished and chastised by the Supreme Court, his willfulness suggests that he is likely to repeat it again **if an "opportunity"** presents itself. It would appear that he has made the choice to subordinate his judicial duty and responsibilities to his religious predilections.

No rational explanation exists for his foolhardy challenge to the Supreme Court's authority, ála former Judge Staley, **Complaint Against Staley, supra.**, 241 Neb. 152.

I shall set forth relatively extensive excerpts from two cases because they discuss judicial standards, offenses, and the bases and purpose of judicial discipline:

1. **In re Complaint Against Jones**, 255 Neb. 1 (1998);
2. **In re Complaint Against White**, 264 Neb. 740 (2002).

(15) COMPLAINT AGAINST JONES

The Code of Judicial Conduct demands that judges conform to a higher standard of conduct than is expected of lawyers and other persons in society. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997).

conduct. . . .

We must weigh the nature of the offenses with the purpose of sanctions when determining the proper disciplinary action in these cases. *In re Complaint Against Kelly*, 225 Neb. 583, 407 N.W.2d 182 (1987). Jones' continuing pattern of misconduct demonstrates a lack of proper judicial temperament and a fundamental abuse of power that seriously undermines public confidence in the judiciary. These flaws are inconsistent with service as a judge. Removal from office is necessary to preserve the integrity of the judicial system. **Pages 23,24**

(16) COMPLAINT AGAINST WHITE

Pursuant to § 24-722(6), a judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed 6 months, or removed from office for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The object of the Code is to delineate what conduct should be avoided for its prejudicial potential. Therefore, a clear violation of the Code constitutes, at a minimum, a violation of § 24-722(6). *In re Complaint Against Jones*, 255 Neb. 1, 581 N.W.2d 876 (1998). **Page 743**

The goals of disciplining a judge in response to inappropriate conduct are to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. *In re Complaint Against Empson*, 252 Neb. 433, 562 N.W.2d 817 (1997). We discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. *Id.*

[14,15] The discipline imposed must be designed to announce publicly our recognition that there has been misconduct. *In re Complaint Against Jones, supra.* It must be sufficient to deter the respondent from engaging in such conduct again, and it must discourage others from engaging in similar conduct in the future. *Id.* We weigh the nature of the offenses with the purpose of the sanctions and examine the totality of the evidence to determine the proper discipline. *Id.* * * *

. . . . The determination whether conduct is prejudicial to the administration of justice depends not so much on the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *In re Complaint Against Jones, supra.* To a knowledgeable observer, the respondent's actions in response to the August 14 order are unethical, intolerable, and nearly inconceivable.

[17] We also note that the respondent's conduct is all the more serious because it was directly related to the performance of her official duties. The misconduct of a judge in his or her official capacity is more culpable than extrajudicial misconduct. *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984). The respondent engaged in acts which were not only unethical and unauthorized by law, but which the respondent should have known were beyond her judicial authority and the scope of Nebraska law. The respondent's patent misunderstanding of her judicial responsibility serves not to mitigate, but to aggravate the severity of her misconduct. See *McCullough v. Com'n on Jud. Performance*, 49 Cal. 3d 186, 776 P.2d 259, 260 Cal. Rptr. 557 (1989). **Pages 757–59**

(17) JUDGE, DETER THYSELF

A mantra frequently intoned by judges during sentencing (and in appellate opinions addressing allegations of "excessive sentence): "A lesser sentence would depreciate the seriousness of the offense and fail to serve as a deterrent." Respondent himself invoked the mantra - quoted in **Pattino**, 254 Neb. at 736.

What, and who, deters the wayward judge? That is the question.

The Nebraska Supreme Court summarized the role and purpose of judicial discipline in **In re Complaint Against Empson**, 252 Neb. 433, **supra.** at 455, with emphasis added:

> The goal of disciplining a judge in response to inappropriate conduct is twofold: to preserve the integrity of the judicial system as a whole and to provide reassurance that judicial misconduct will not be tolerated. These principles were first enunciated in *In re Complaint Against Kneifl*, 217 Neb. at 485-86, 351 N.W.2d at 700, wherein we stated:
>
> > The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.

Despite the fact that Respondent has not been the subject of formal discipline, he may be deemed to have been chastised/admonished by the Nebraska Supreme Court in **Pattino, supra.**, and by the Court of Appeals in Bruna, **supra.** Both cases, to repeat, involved identical misconduct and resulted in identical actions by both Courts: sentence vacated, cause remanded for resentencing by a different judge.

Clearly, neither Court's approach constitutes adequate "corrective" action to deter Respondent or other judges from similarly offending again. The only thing corrected was the outcome of Respondent's mishandling of the cases, not his egregious misconduct. If deterrence were accomplished by stern words of disapproval, Respondent would certainly have been deterred by the detailed, unambiguous admonishment of the Supreme Court in Pattino.

Respondent knows that other Nebraska judges have been disciplined for misconduct, yet, such knowledge had no impact on him, whatsoever. In those cases, the Court spoke of deterrence of the particular respondent and other judges.

It is said that the same conduct produces the same result. It is likely, then, that the Court of Appeals' words and action will have no more deterrent effect on Respondent than did the same words and action of the Supreme Court.

If anything, Respondent's defiant attitude and words recounted in Bruna, suggest that he regarded the Supreme Court's opinion in Pattino more as a provocation or incitement than a deterrent (or even "instruction").

If Respondent's unreprentant contumaciousness is again winked at, neither Respondent, other judges or the public will be "instruct[ed] ... in the importance of the function performed by judges."

The disapproving words of the Supreme Court, along with vacating the sentence and remanding the cause for resentencing by a different judge was not "sufficient to deter respondent from again engaging in such conduct." It is not unreasonable, therefore, to suspect that it will not "discourage others from engaging in " misconduct on the bench.

And the public will receive no reassurance "that judicial misconduct is neither permitted nor condoned." Such being the result, its corollary will be the failure "to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men."

As a brazen "repeater," Respondent cannot claim mistake, accident or inadvertence. In fact, such a deliberate, cavalier repetition of the misconduct is sufficient to establish a pattern calling for severest discipline.

Respondent's attitude evinces the strong aroma of taunting the Supreme Court: "I know it was wrong. I was explicitly so informed by the Supreme Court. The Court rebuked and admonished me. But what the Hell? What do those Judges know? They merely uttered words without meaning or consequence. I'll do as I please, when I please and how I please - and the Supreme Court and nobody else can make me do otherwise. They can vacate, remand and order resentencing as many times as they please. It's nothing to me. I'll continue going my own way, marching to a different drum-beat: God's drum-beat. I'm carrying out God's will, and my duty to God obviously transcends any supposed duty to "man's law" or the Code of Judicial Conduct, in the event of a conflict. So, buzz off!!!"

As noted in **EXHIBIT A**, a public school teacher was fired for injecting his personal religious predilections into his classroom instruction where it had no business.

A judge is held to a higher standard than a school teacher. Students in a classroom are less a "captive audience" than is a defendant in a courtroom, being sentenced.

(18) STATUTORY AND CODE VIOLATIONS

Section 24-722 (Reissue 1995) is quoted at page 2 of this Complaint.

PREAMBLE

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and is a highly visible symbol of government under the rule of law.

This Code is intended to establish standards for ethical conduct of judges of this state.

CANON 1
A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

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

Commentary: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2
A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

CANON 3
A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary: A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias or prejudice on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(19) CONCLUSION

(a) Either misconduct was committed or it was not. If, in spite of the authority presented herein, it is determined that no misconduct was committed, this Complaint will be dismissed. Respondent, other judges and the public will be instructed, thereby, that such conduct comports with the ethical standards governing the courtroom conduct of Nebraska judges.

(b) If, on the other hand, misconduct is found to have been committed, a level of discipline must be imposed which "instructs" Respondent, other judges and the public of the seriousness of Respondent's contumacious violations and of the seriousness with which they are viewed.

There is no need to further lengthen this Complaint.

Respectfully submitted,

Ernie Chambers

Ernie Chambers
State Senator

Attchments: **EXHIBITS A & B**

OMAHA WORLD-HERALD 1B 12-24-04

Teacher's firing is good for faithful

Rainbow Rowell

You're either for God or against him.

"Make a stand for God," Robert Ziegler urged the Papillion-La Vista school board.

The board took another stand. For education. For separation of church and state. For algebra...

Ziegler was fired Tuesday night for talking about Jesus in the classroom.

And maybe this seemed to Ziegler and his supporters as a stand *against* God.

It wasn't.

It wasn't a case of "for or against," either/or — though it was very math-teacherly of Mr. Ziegler to try to put it in the simplest terms that way.

There are infinite ways to stand *for* God, and if you are Christian, infinite ways to stand for Christ.

And that's why we need separation of church and state.

Separation of church and state isn't a godless idea. It wasn't created to protect our public squares from the Ten Commandments.

This is a doctrine for the faithful. It protects those who believe most of all.

It keeps what we hold dear a safe distance from government's sticky fingers and liberates us to worship how we feel we must.

Even if you are Christian and feel that you are a part of the majority, do you really want Christian public school teachers preaching to your children?

Think of what a Tower of Babel mess that would be.

Your child could be subjected to a different Christian point of view every time the bell rang.

Would Lutheran parents approve of an outspoken Catholic physics teacher?

Would a Baptist music teacher alienate her Episcopalian students?

What would happen when a Jehovah's Witness was hired to teach geometry?

As it is, public schools struggle with the best way to teach the basics, the three R's. Even teaching reading is controversial. (Some people are religious about phonics.)

We can't agree what books belong in the library, what facts belong in the textbooks.

Imagine the chaos if we threw God into the mix.

Robert Ziegler was hired to teach math. That's job enough. Math class already is too short without detours to the Mount of Olives.

And who says that teaching math — just math — isn't God's work?

If the choices are either for God or against, public school teaching definitely falls in the "for God" column. (It certainly isn't for money.)

Most teachers care about their students, feel responsible for them. They worry about the choices kids make outside of the classroom.

Mr. Ziegler surely isn't the first teacher to have prayed for his students. If you are a teacher and believe in prayer, how could you help but do so?

Teachers — like the rest of us — keep their personal beliefs when they function in the public world. You try to stand for God without standing in someone else's way.

For teachers, this is an especially delicate stance. You have a captive audience made up of other people's children. How will you use that access?

Some of Ziegler's students came to Tuesday's hearing to support him. One upset 16-year-old said Ziegler's firing was "one more way of kicking God out of school."

It isn't true.

There *is* no way to keep God out of school. If you have faith, God goes where you go.

He is in you. In what you say and do. In your prayers.

God doesn't need to be on the syllabus.

EXHIBIT A

LINCOLN JOURNAL STAR 2B 9-8-04 261

Judge's religious comments again force a resentencing

Appeals court vacates Jay Bruna's sentence, saying it's based on judge's religious view.

BY KEVIN O'HANLON
The Associated Press

Religious comments by a Sarpy County judge have again resulted in a sentence of a child molester being overturned.

The Nebraska Court of Appeals on Tuesday vacated the 15- to 50-year prison sentence of Jay Bruna, a former Springfield school bus driver who sexually assaulted a child on his bus. The court based its decision on the fact that District Judge George Thompson made religious references before sentencing.

In 1998, the Nebraska Supreme Court overturned the sentence of a Sarpy County man charged with sexually molesting a 13-year-old boy because Thompson read a lengthy excerpt from the Bible that addressed homosexuality at the man's sentencing.

"The judge has again inserted his own religious views in a sentencing proceeding," the Appeals Court said in an unsigned opinion.

Before sentencing Bruna, Thompson said: "I probably would be better off not saying anything and simply imposing a sentence. The last time I sentenced a person that could be labeled as a 'pedophile' I quoted from an author, a learned man that happened to be a contributor to the Bible.

"The case was reversed and resentenced by another judge to probation," Thompson said. "If people would continue to read that author, they would find that it's not a message of condemnation, but of hope."

The Appeals Court ordered Bruna to be resentenced by another judge, citing the 1998 ruling from the state Supreme Court that vacated the sentence Thompson gave the other man, Aaron Pattno.

"The Pattno court found that the trial judge had 'interjected his own religious views immediately prior to sentencing' and concluded that 'a reasonable person could conclude that the sentence was based upon the personal bias or prejudice of the judge,'" the judges wrote.

"Statements of religious expression by a judge or remarks which suggest that the judge dislikes the crimes committed by a defendant do not necessarily evidence improper bias or prejudice," the court said. "However, courts are well advised to rely upon the statutory guidelines for imposing sentences. Reliance upon irrelevant material, such as the court's own religious beliefs, could convince a reasonable person that a court was biased or prejudiced."

The court said that Thompson "expressly identified the source of a quotation he had recited at that prior sentencing as the Bible."

"The judge expressly acknowledged that the sentencing in that prior case was vacated on appeal," the court said. "The judge's comment then characterizes the Biblical message from the prior case as one of hope rather than condemnation, at least implicitly suggesting that the Nebraska Supreme Court in Pattno had misinterpreted the quotation and the judge's motive and purpose in reading from the Bible at the prior sentencing."

In 1999, the U.S. Supreme Court refused to reinstate Pattno's sentence.

Thompson, who has been on the bench for some 20 years, told The Associated Press in a 1999 interview that he does not make it a practice to quote from the Bible in court.

Thompson said he could not comment on the ruling because, as the presiding judge in Sarpy County, he will have to assign the judge who will resentence Bruna.

OMAHA WORLD-HERALD 1A 9-7-04

Judge: Sentence overturned over religious remark

Sexual assault case

BY JEFFREY ROBB
WORLD-HERALD STAFF WRITER

Sarpy County District Judge George Thompson prefaced his sentence with the comment, "I probably would be better off not saying anything."

But he did.

In sentencing a Springfield school bus driver last year for first-degree sexual assault, Thompson cited an earlier sexual assault sentencing in which he quoted the Bible. In doing so, he made another religious reference.

The Nebraska Supreme Court overturned the first sentence.

And Tuesday, the Nebraska Court of Appeals overturned the second sentence, saying Thompson abused his discretion by the "explicit and unmistakable" interjection of his personal religious views.

The bus driver now must be resentenced by a different judge.

"We are not stating that reference to the Bible may never be made in a sentencing proceeding," the court wrote. But "courts are well advised to rely upon the statutory guidelines for imposing sentences."

In April 2003, Thompson sentenced Jay Bruna to 15 to 50 years in prison. A jury had convicted Bruna of assaulting a 12-year-old boy on his bus.

Before imposing the sentence, Thompson made reference to a case involving Aaron Pattno, who was convicted in 1997 of sexual assault of a child and later sentenced to 20 months to five years in prison.

In Pattno's sentencing, Thompson quoted a Bible passage from Romans condemning "men committing shameless acts with men." The U.S. Supreme Court backed the Nebraska Supreme Court's overturning of that sentence.

In sentencing Bruna, according to Tuesday's ruling, Thompson said that the last time he imposed sentence in such a case, he "quoted from an author — a learned man — that happened to be a contributor to the Bible."

"If people would continue to read that author," Thompson said, "they would find that it's not a message of condemnation, but of hope."

The Court of Appeals said Bruna was deprived of his right to due process. "The judge has again inserted his own religious views in a sentencing hearing."

Thompson and a lawyer for Bruna were unavailable for comment Tuesday.

Sarpy County Attorney Lee Polikov declined to address the Court of Appeals' criticism of Thompson but noted that the higher court issued a strong opinion supporting Bruna's conviction.

"At least the case wasn't brought into question," Polikov said.

EXHIBIT B

OMAHA WORLD-HERALD 1B 12-24-04

Teacher's firing is good for faithful

Rainbow Rowell

You're either for God or against him.

"Make a stand for God," Robert Ziegler urged the Papillion-La Vista school board.

The board took another stand. For education. For separation of church and state. For algebra . . .

Ziegler was fired Tuesday night for talking about Jesus in the classroom.

And maybe this seemed to Ziegler and his supporters as a stand *against* God.

It wasn't.

It wasn't a case of "for or against," either/or — though it was very math-teacherly of Mr. Ziegler to try to put it in the simplest terms that way.

There are infinite ways to stand *for* God, and if you are Christian, infinite ways to stand for Christ.

And that's why we need separation of church and state.

Separation of church and state isn't a godless idea. It wasn't created to protect our public squares from the Ten Commandments.

This is a doctrine for the faithful. It protects those who believe most of all.

It keeps what we hold dear a safe distance from government's sticky fingers and liberates us to worship how we feel we must.

Even if you are Christian and feel that you are a part of the majority, do you really want Christian public school teachers preaching to your children?

Think of what a Tower of Babel mess that would be.

Your child could be subjected to a different Christian point of view every time the bell rang.

Would Lutheran parents approve of an outspoken Catholic physics teacher?

Would a Baptist music teacher alienate her Episcopalian students?

What would happen when a Jehovah's Witness was hired to teach geometry?

As it is, public schools struggle with the best way to teach the basics, the three R's. Even teaching reading is controversial. (Some people are religious about phonics.)

We can't agree what books belong in the library, what facts belong in the textbooks.

Imagine the chaos if we threw God into the mix.

Robert Ziegler was hired to teach math. That's job enough. Math class already is too short without detours to the Mount of Olives.

And who says that teaching math — just math — isn't God's work?

If the choices are either for God or against, public school teaching definitely falls in the "for God" column. (It certainly isn't for money.)

Most teachers care about their students, feel responsible for them. They worry about the choices kids make outside of the classroom.

Mr. Ziegler surely isn't the first teacher to have prayed for his students. If you are a teacher and believe in prayer, how could you help but do so?

Teachers — like the rest of us — keep their personal beliefs when they function in the public world. You try to stand for God without standing in someone else's way.

For teachers, this is an especially delicate stance. You have a captive audience made up of other people's children. How will you use that access?

Some of Ziegler's students came to Tuesday's hearing to support him. One upset 16-year-old said Ziegler's firing was "one more way of kicking God out of school."

It isn't true.

There *is* no way to keep God out of school. If you have faith, God goes where you go.

He is in you. In what you say and do. In your prayers.

God doesn't need to be on the syllabus.

EXHIBIT A