No. COA 12-964 FOURTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN THE MATTER OF TRACEY E. CLINE	)	From Durham County No. 12-CVS-1614

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APPELLEE'S BRIEF

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ISSUES PRESENTED

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING CLINE'S MOTION FOR A CONTINUANCE?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING CLINE PRE-HEARING DISCOVERY?

III. DID THE TRIAL COURT ERR IN SELECTING AND APPLYING THE CLEAR, COGENT AND CONVINCING STANDARD OF PROOF?

IV. DID THE TRIAL COURT ABUSE ITS DISCRETION IN ADMITTING LAY TESTIMONY CONCERNING THE IMPACT OF CLINE'S MISCONDUCT?

V. DID THE PROCEEDINGS BELOW VIOLATE CLINE'S RIGHT TO DUE PROCESS?

VI. IS N.C. GEN. STAT. § 7A-66(6) UNCONSTITUTIONALLY VAGUE?

VII. DID THE REMOVAL OF CLINE FROM OFFICE VIOLATE THE FIRST AMENDMENT?

STATEMENT OF THE CASE

On 18 January 2012, Durham attorney Kerstin Walker Sutton filed an affidavit in Durham County Superior Court pursuant to N.C. Gen. Stat. § 7A-66 requesting an inquiry into the removal of Tracey E. Cline ("Cline") as District Attorney for the Fourteenth Judicial District of North Carolina. (R p 3). On 27 January 2012, the Honorable Robert H. Hobgood found probable cause for suspending Cline pursuant to N.C. Gen. Stat. § 7A-66(6). (R p 16).

From 20 February to 29 February 2012, Judge Hobgood conducted a hearing on the allegations in the affidavit. (R p 2) ("Removal Hearing"). On 2 March 2012, the court entered an order ("Removal Order") removing Cline from office pursuant to N.C. Gen. Stat. § 7A-66(6). (R p 84). On the same date, Cline filed notice of appeal. (R p 213).

STATEMENT OF FACTS[1]

Tracey E. Cline ("Cline") was licensed in North Carolina as an attorney in 1989. (R p 86, # 3). She served as an Assistant Public Defender in Fayetteville and then as an Assistant

[1] None of the material facts are in dispute. Cline did not challenge any of the trial court's factual findings in her brief, so they are binding on appeal. *See Countrywide Home Loans, Inc. v. Bank One, N.A.*, 190 N.C. App. 586, 587, 661 S.E.2d 259, 261 (2008).

District Attorney in Pasquotank County. (R p 86, # 3). In 1994 she became an Assistant District Attorney in Durham County. (R p 86, # 3; 2/24/12 T p 144). In 2008 Cline was elected District Attorney for Durham County and was sworn into office in January 2009. (R p 86, #2; 2/24/12 T pp 146-47).

Initially Cline had a positive relationship with Judge Orlando F. Hudson, Jr., Senior Resident Superior Court Judge of Durham County. (R p 86, # 5; 2/24/12 T pp 145-46). In December 2010, Cline objected to Judge Hudson's decision to dismiss *State v. Allen* (98 CRS 5208, 98 CRS 7979-7980) and then disagreed with certain findings in the Order of Dismissal, issued in March 2011. (R pp 87-88, # 12-15). In August 2011, Judge Hudson signed an order dismissing *State v. Dorman* (10 CRS 7851), a murder case that Cline's office had prosecuted. (R p 88, # 16). On two occasions Judge Hudson continued from published trial calendars criminal cases that were ready for trial, causing Cline great frustration. (*Id.*) Cline testified, "It became clear to me that Judge Hudson had animosity toward me." (*Id.*)

On 17 November 2011, Cline filed a complaint against Judge Hudson with the Judicial Standards Commission. (2/24/12 T pp 423-25; Exh. 16; R p 88, # 17). Instead of waiting for an investigation and action by the Commission, Cline began to make

repeated statements in court filings about the honesty, integrity and fairness of Judge Hudson. (R p 88, # 17).

I. IN MULTIPLE COURT FILINGS, CLINE ACCUSED JUDGE HUDSON OF WILLFUL MISCONDUCT, DISHONESTY AND CORRUPTION.

A. *DORMAN* NOTICE (17 November 2011)

On 17 November 2011, Cline filed a pleading in *State v. Dorman* titled "Conflict of Interest Between the State and the Honorable Court," or "Notice of Conflict of Interest" (Exh 1, pp 1, 13) ("*Dorman* Notice"). Cline noted that she had filed a complaint against Hudson with the Judicial Standards Commission and alleged that "this Honorable Court's violations and abuse of discretion is willful misconduct ... wherein this Court's improper and wrongful use of the power of his office consists of intentional and malicious acts with GROSS UNCONCERN for this conduct and done in BAD FAITH." (Exh 1, p 1) (emphasis in original). The *Dorman* Notice included the following statements by Cline:[2]

> 19."[T]his Honorable Court's misconduct involves more than an error of judgment or a mere lack of diligence; this Court's actions encompasses [sic] conduct involving moral turpitude, dishonesty and corruption." (Exh 1, p 1; R p 89, # 19).

[2] For ease of reference, Appellee's Brief uses the same number to identify a particular statement by Cline with the number corresponding to that statement in the Findings of Fact in the Removal Order.

20. “[T]he District Attorney’s refusal to dismiss Allen ... ignited a purposeful pattern of abuse of discretion and intentional misconduct of this Honorable Court to misuse his power in retaliation against the District Attorney ... To design a distorted decision necessary to judicially ordain a pretext of prosecutorial misconduct, which manufactures the intended media mayhem; resolute in attempts to ruin reputations, and incidentally creating court casualties of truth, integrity, and justice.” (Exh 1, p 5; R p 89, # 20).

21. “[T]his malicious misconduct still continues and will not cease; in that this Honorable Court sacrifices the justice owed to the citizens of Durham County in order to punish the prosecutor.” (Exh 1, p 6; R p 89, # 21).

22. “[T]his continued constant failure to follow the law for personal privilege to punish the prosecutor is not simple misconduct; this is an appalling action that sacrifices all of the principals [sic] of the criminal court system; truth, law, impartiality, and integrity.” (Exh 1, p 10; R p 89, # 22).

23. “[T]he State’s right to be heard has been striped [sic] away under Orders of this Honorable Court, the victims’ rights are lost by this Court’s calculated schemes, the chief medical examiner’s opinion is clouded by ‘court created conspiracy’ unsupported by any facts or law; families of murder victims’ faith is forfeited by fictitious findings of this Court, and victims of decades old crimes are being emotionally and relentlessly repeatedly raped by this Court’s rulings, based only on retaliation disregarding what is right, and the criminal justice system’s credibility is a causality [sic] of this Court’s callous misconduct.” (Exh 1, pp 10-11; R p 89, # 23).

24. “The District Attorney may personally accept the planned purposeful personal attacks of this Court, but there are some sacrifices that are too great for the District Attorney to accept, kidnapping the rights of victims and their families, holding these rights for hostage until the prosecutor plays the game would

> bankrupt the credibility of our court system and Justice will not play that Game." (Exh 1, p 11; R p 89, # 24).

B. *YEARWOOD* MOTION (17 November 2011)

On 17 November 2011 – the same day she filed the Judicial Standards Commission complaint and the *Dorman* Motion – Cline filed a 284-page motion in *State v. Yearwood* (99 CRS 65452, 65460, 65461-62) titled "Respectfully the State's Request This Honorable Court to Disqualify Himself." (Exh 3) ("*Yearwood* Motion"). Cline requested that Judge Hudson immediately "disqualify himself" from presiding over *Yearwood* and all other criminal matters in Durham County. (Exh 3, p 1, 282-83). The *Yearwood* Motion included the following statements by Cline:

> 26. "[S]uch conduct [by Hudson] will rot the system at its core in that the court is not governed by law, the law is replaced by the whims of the Judge and the associations of the Court; this is a total and radical lack of respect for the rule of law which does not promote public confidence in the court, but fertilizes the 'favorite son syndrome' of bias and prejudice that the democratic society has for so long tried to alleviate." (Exh 3, p 15; R pp 89-90, # 26).
>
> 27. "[T]his Honorable Court's authority and power are no longer controlled by constitutional limits, morality or conscience." (Exh 3, p 70; R p 90, # 27).
>
> 28. "[T]he intentional malicious misconduct of this Court is covered by the robe, and rationally relied on by reporters and the public. Then media mayhem – another prosecutor withheld evidence; this shameful disgraceful conduct is unimaginable, but true with this Honorable Court. This is gross judicial

misconduct." (Exh 3, p 79-80; R p 90, # 28) (emphasis omitted).

29. "This Honorable Court as Senior Resident Superior Court Judge for the Fourteenth Judicial District has not remained faithful to the law and principles of justice for all, his almost daily degradation of the constitutional rights of victims and the State retards any and all professional confidence in the application of the law by this Court." (Exh 3, p 174; R p 90, # 29).

30. "[T]he clandestine claims of misconduct, invented in spite of the truth and contrary to the application of the law, which are cowardly conceived by deeds in the dark afraid of the bright light of truth are clearly inconsistent with truth and justice and this Honorable Court knows that this is not consistent with the Administration of Justice. This Honorable Court must acknowledge this. Justice is not ashamed of the light of truth and the right of confrontation. Hiding behind hidden emails, clandestine communications, and staying stone silent are not the testaments of truth and are legally illegitimate to an impartial and fair Court." (Exh 3, p 271; R p 90, # 30).

C. *PETERSON* MOTION (23 November 2011)

On 23 November 2011, in *State v. Peterson* (01 CRS 24821), Cline filed another 284-page motion titled "Respectfully the State's Request This Honorable Court to Disqualify Himself." (Exh 5) ("*Peterson* Motion"). Cline requested that Judge Hudson immediately "disqualify himself" from presiding over *Peterson* and all other criminal matters in Durham County. (Exh 5, pp 1, 282-83). The *Peterson* Motion included the following statements by Cline:

32. “Such abuse of power, without legal consciousness of right and wrong, having a total and reckless disregard of the law, and reprobate mind of a monarch, aims to destroy and will destroy, the heart of our justice system if left unchecked.” (Exh 5, p 3; R p 90, # 32).

33. “In these cases this Honorable Court’s agenda is to impede the Administration of Justice, attack the calendaring authority of the District Attorney, and appease friends or associates who share his common agenda of falsifying prosecutorial misconduct to make and mold a media mania of unsupported and unwarranted allegations of prosecutorial misconduct, and generally whatever actions in this Court’s power whether ethical or not to clandestinely hinder the operation of the District Attorney’s Office and to draw a media light to the mayhem this Court personally manufactured.” (Exh 5, p 14; R p 90, # 33).

34. “[T]he willful misconduct of this Honorable Court is Judicial Power fueled by vengeance and unrestrained power, without responsibility or the regard of the rights of others, or even the basic sense of right or wrong.” (Exh 5, p 70; R pp 90-91, # 34).

35. “[T]he District Attorney confidently and without hesitation indicates based on Personal Knowledge that this Honorable Court is no longer fair and impartial and can not and will not perform the duties required of him, in an impartial manner. Moreover, this Honorable Court’s blatant intentional misconduct destroys the dignity of his office, but worst of all justice becomes a joke in that this unrestrained power is without principles.” (Exh 5, p 88; R p 91, # 35).

36. “[T]his Honorable Court totally disregards the interests of the State to be heard in these matters and the District Attorney cannot foresee any possibility of this conduct changing anytime in the near or distant future.” (Exh 5, p 171; R p 91, # 36).

37. “[S]uch abuse of discretion and misuse of authority in total disregard of the facts, the

applicable law, by trading reason and common sense for irrational revenge refusing to rely on what is right to seek selfish satisfaction is a cancer in this justice system." (Exh 5, p 200; R p 91, # 37).

38. "[T]his Honorable Court continues to follow the pattern and plan to attack the character of the prosecutor in total disregard of the law or the consequences of that decision. The true facts and the application of the law are irrelevant to the insolence of this Court." (Exh 5, p 216; R p 91, # 38).

39. "[T]his Honorable Court is in total and complete violation of the North Carolina Code of Judicial Conduct and … will continue to violate the North Carolina Code of Judicial Conduct with no regard to the rights of others, no regard of the constitutional protections of the victims of crime, and no regard to the simple difference between right and wrong." (Exh 5, p 272; R p 91, # 39).

40. "Orders full of false findings are relayed to and relied upon by the press to agitate or ignite even more distrust in the prosecutors, law enforcement and the entire criminal justice system and for the root of this unjustified contempt to be conceived in the womb of justice, a judge, sworn to be fair and impartial, destroys the dignity of the office of this Honorable Court and for those who use this Court for special situations outside the lines of right and wrong; don't hide your dirty hands; and to those who have seen, and know, yet turn a blind eye, acknowledge your hands are covered with the blood of justice. And be ashamed." (Exh 5, p 283; R p 91, # 40).[3]

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[3] The *Yearwood* and *Peterson* motions include many more statements by Cline in the same vein. For example, those 284-page motions each include the following statements:

495. "[T]his Honorable Court devised a blueprint of bias anchored in his animosity against the District Attorney which completely consumed the morality of this Honorable Court, fostered an absolute abandonment of legal authority with fabricated facts. [Attorney Heather] Rattelade's unethical misrepresentations of material facts in a court document is

II. JUDGE FOX AND JUDGE HARDIN WARNED CLINE NOT TO MAKE UNSUBSTANTIATED AND FALSE STATEMENTS.

A. THE WARNING FROM JUDGE FOX

On 5 December 2012, a hearing was held in Durham County Superior Court before Superior Court Judge Carl R. Fox to consider Cline's motions to disqualify Judge Hudson in *Dorman*, *Peterson* and *Yearwood*. (Exh 2). Judge Fox, who previously served as Orange County District Attorney, described Cline's affidavits as "woefully inadequate." (Exh 2, p 79). Cline withdrew the motions but then indicated her intention to file more, eliciting a warning from Judge Fox:

[sic] in violation of the North Carolina Rules of Professional Conduct and ... this intentional and malicious misconduct was and continues to be orchestrated and judicially orchestrated and judicially ordained by this Honorable Court." (Exh 3, p 128, # 495; Exh 5, p 128, # 495).

631. "[T]he attempted intimidation of this Honorable Court and abuse of discretion and judicial authority of this Court aided or assisted in the purposely produce [sic] fictitious facts to apply to laws reduced to legal loopholes by this Court simply to spin salacious stories to defame the District Attorney and this abuse of discretion is a flagrant violation of the North Carolina Code of Judicial Conduct." (Exh 3, p 164, # 631; Exh 5, p 164, # 631).

1003. "[T]his judicial superciliousness flaunts falsehoods as facts, disregards the death of a child, a torture traumatize [sic] victim of rape, exploit the statutory exclusive jurisdiction of the medical examiner, and promotes putrescence of public confidence in the integrity of the court system." (Exh 3, pp 269-70, # 1003; Exh 5, p 269, # 1003) (truncated in Exh 5).

> CLINE: I will indicate to the Court that the State intends to file another motion to disqualify in the *Yearwood* case today ... .
>
> THE COURT: Well, let me say this. It would be incumbent upon you to attach to that motion affidavits containing substantial allegations, substantial evidence, to point to a violation or conduct which would require the disqualification of Judge Hudson or a recusal of Judge Hudson ...
>
> I'm just cautioning before you file this thing immediately that whatever affidavits are attached to this be attachments that have substantial evidence in support of the allegations in the motion.

(Exh 2, pp 117-18).

B. THE WARNING FROM JUDGE HARDIN

On 14 December 2011, a hearing was held in Durham County Superior Court before Resident Superior Court Judge James E. Hardin, Jr., to address Cline's conduct in three cases, *State v. Yearwood*, *State v. Kidwell* and *State v. Richardson*. (Exh 4; R p 93, # 49). Judge Hardin, who previously served as Durham County District Attorney, reminded Cline of her duty of candor to a tribunal, and gave her the following warning in open court:

> So with respect to motions that appear before this Court and any other Court of North Carolina, please ensure that they are factual, that they contain no material misrepresentations of fact, and you will consider this a warning and a public admonition as it relates to that.

(Exh 4, pp 29-30; R p 93, # 49).

III. DESPITE THE WARNINGS FROM JUDGE FOX AND JUDGE HARDIN, CLINE CONTINUED TO MAKE FALSE STATEMENTS ABOUT JUDGE HUDSON.

After the warning and public admonition from Judge Fox and Judge Hardin, "Cline continued to make inflammatory and false statements about ... Hudson that were totally unsupported by the facts." (R p 93, # 50). On 9 January 2012, Cline filed a motion in *State v. Pollard* (09 CRS 53103) titled "Amended State's Request for Orlando F. Hudson, Jr. to Recuse Himself." (Exh 6)("*Pollard* Motion"). The *Pollard* Motion included the following statement by Cline:

> 41. "[T]his Honorable Court uses his power to retaliate against the District Attorney in total disregard of the facts and law; the legal rights of victims and/or victims' families, and even the horrific impact these actions have on the integrity of the judicial system." (Exh 6, pp 1-2; R p 91, # 41).

Along with the *Pollard* Motion, Cline submitted an affidavit ("*Pollard* Affidavit") that included the following "inflammatory and false statement ... totally unsupported by facts": "It is clear that there is a purposeful plan for Judge Hudson to seek cases and/or issues to make unsupported findings of fact and conclusions of law to find something to support his predisposition to rule against the State." (Exh 7, p 19, #115; R p 93, # 50).

IV. CLINE'S UNSUPPORTED AND INFLAMMATORY ACCUSATIONS AGAINST JUDGE HUDSON BROUGHT THE DISTRICT ATTORNEY'S OFFICE INTO DISREPUTE.

Staples Hughes, Director of the North Carolina Office of the Appellate Defender, testified at the Removal Hearing. (2/20/12 T pp 5-55) Hughes supervises a staff of 18 lawyers and has a vast background as criminal defense lawyer at the appellate and trial level. (R p 92, # 43). He characterized the *Yearwood* Motion as "extraordinary." (2/20/12 T p 47; R p 92, # 44). Hughes explained:

> I have never seen a pleading that makes those sorts of accusations that at least the motion did in Yearwood, unsupported by verification or affidavit, that accused a judge of conspiracy, of utter disregard for the truth, utter disregard for justice and all the other things that I … read earlier this morning from the pleadings that Ms. Cline filed. I just never even heard of anything like that....[4]
>
> I do not, after reading that pleading, trust Ms. Cline's judgment in prosecuting cases in this judicial district. I think it utterly undercuts her credibility and the trust that the public should feel in their prosecutor.

(2/20/12 T pp 47-48). Hughes testified that Cline's motions have brought the Office of the District Attorney into disrepute. (2/20/12 T pp 49; see *id.* pp 53-54; Exh 8).

[4] In his Findings of Fact, Judge Hobgood adopted as facts Hughes' testimony that Cline "failed to lay out in factual terms any support for her statements that Judge Orlando F. Hudson, Jr. participated in any conspiracy against her or that he had utter disregard for the truth or justice." (R p 92, # 44).

Thomas Maher, current Director of the North Carolina Office of Indigent Defense Services and former Director of the Center for Death Penalty Litigation, also testified at the Removal Hearing. (2/20/12 T pp 65-76). In preparation, Maher read the *Peterson* Motion, the *Pollard* Motion, the *Pollard* Affidavit, the transcript of the hearing on 14 December 2011, and the briefs in the *Allen* case. (*Id.* pp 67-68). In Maher's opinion, "Cline's conduct was prejudicial to the administration of justice." (*Id.* p 72). Maher explained:

> Well, it has raised very inflammatory accusations about how justice is administered in this county without, to my knowledge, any factual support for the more inflammatory accusations about conspiracy and corruption....
>
> [T]he fact that accusations like that would be made without factual support casts serious doubt about how [the District Attorney's] office is operating and how justice is being administered in Durham.

(*Id.* pp 72-73). As a result, Maher does not have confidence in the District Attorney's Office. (*Id.* p 73). In his Findings of Fact, Judge Hobgood adopted as facts the testimony of Maher. (R p 92, # 45).

Based on extensive media coverage, there is widespread public knowledge of Cline's accusations against Judge Hudson. (R p 92, # 46). Judge Hobgood found that 22 specific statements by Cline are "inflammatory in nature and bring the office of the

Durham County District Attorney into disrepute." (R p 93, # 51). Judge Hobgood further found: "The fact that Tracey E. Cline stated that Judge Orlando F. Hudson, Jr. is 'corrupt' is not only false; it is inexcusable and clearly, cogently and convincingly demonstrates the personal animosity and ill will of Tracey E. Cline toward Judge Hudson and her actual malice in making the statements." (*Id.*)

V. BEFORE MAKING HER FALSE AND DEFAMATORY STATEMENTS, CLINE CONSIDERED AND THEN CHOSE TO IGNORE THE RULES OF PROFESSIONAL CONDUCT.

Before she launched her attacks on Judge Hudson, Cline had clear notice that her conduct violated the Rules of Professional Conduct. Cline testified that she considered Rule 8.2 of the Rules of Professional Conduct before making her accusations against Judge Hudson. (2/27/12 T pp 411-14).

Cline wrote the *Yearwood*, *Peterson* and *Pollard* motions herself. (*Id.* pp 417-18). When she prepared the first disqualification motion (*Yearwood*), she did not share the draft with any other attorneys to get input on whether it was appropriate, nor did she consult with the Attorney General's office, the State Bar, or a district attorney colleague about her accusations and the language she used. (*Id.* p 419) While Cline testified that she consulted with the State Bar, the

Attorney General, the AOC, and friends, "[n]ot one of these resources suggested that she do anything other than file a complaint with the Judicial Standards Commission." (R pp 93-94, # 52). No one advised her to use the language at issue here. (R p 94, # 52).

Before making the statements quoted in Judge Hobgood's Findings of Fact, Cline warned her staff what she was going to do. (2/24/12 T pp 265, 267; R p 94, # 53). She told them that her planned course of action may result in her being "removed from office." (2/27/12 T p 410).

STANDARD OF REVIEW

The statute governing the removal of district attorneys, N.C. Gen. Stat. § 7A-66, defines and limits the scope of judicial review. The district attorney may only appeal from an order of removal to the Court of Appeals "on the basis of an error of law by the superior court judge."

"When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Lyons-Hart v. Hart*, 205 N.C. App. 232, 235, 695 S.E.2d 818, 821 (2010). "Findings of fact by the trial court in a non-jury

trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings." *Id.* "A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* Unchallenged findings are presumed to be supported by competent evidence and are binding on appeal. *Mussa v. Palmer-Mussa*, __ N.C. __, 731 S.E.2d 404, 409 (2012); *Countrywide Home Loans, Inc. v. Bank One, N.A.*, 190 N.C. App. 586, 587, 661 S.E.2d 259, 261 (2008).

The standard of review for a trial court's denial of a motion to continue is abuse of discretion. *Kimball v. Vernik*, 208 N.C. App. 462, 466, 703 S.E.2d 178, 181 (2010). Orders regarding discovery are also reviewed for abuse of discretion. *Fulmore v. Howell*, 189 N.C. App. 93, 96, 657 S.E.2d 437, 440 (2008). The same deferential review applies to decisions about whether to admit lay or expert witness testimony. *State v. Faulkner*, 180 N.C. App. 499, 512, 638 S.E.2d 18, 27 (2006). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 44 (2005).

"The standard of review for questions concerning constitutional rights is *de novo*. Furthermore, when considering

the constitutionality of a statute or act there is a presumption in favor of constitutionality, and all doubts must be resolved in favor of the act." *Row v. Row*, 185 N.C. App. 450, 454–55, 650 S.E.2d 1, 4 (2007).

ARGUMENT

Affiant Kerstin Sutton petitioned for the removal of District Attorney Tracey Cline because Cline made numerous false and outrageous accusations against Judge Orlando F. Hudson, Jr. in public pleadings. Strictly complying with the procedure set forth in N.C. Gen. Stat. § 7A-66, the trial court properly conducted a removal hearing for Cline. In issuing its Removal Order on 2 March 2012, the court correctly concluded that Cline engaged in conduct that was prejudicial to the administration of justice and brought the office of the Durham County District Attorney into disrepute. On appeal, Cline has not challenged any of the trial court's findings of fact.

Cline's procedural and evidentiary arguments fail. The trial court appropriately denied Cline's motion for a continuance because it was required to conduct the hearing within the 30-day deadline imposed by N.C. Gen. Stat. § 7A-66. The court correctly denied Cline pre-hearing discovery in light of the deadline to complete the hearing and the limited nature

of the allegations against her. The court properly admitted lay testimony describing how Cline's misconduct prejudiced the administration of justice and brought her office into disrepute. Finally, the court required the affiant to prove her allegations against Cline by "clear, cogent, and convincing" evidence and applied that standard in making its findings of fact.

The proceedings below and the Removal Order did not violate any of Cline's constitutional rights. Cline was not deprived of due process because she was given notice of the charges against her and a full opportunity to contest those charges in a hearing before an impartial adjudicator. As the North Carolina Supreme Court has previously held, the operative standard – whether Cline engaged in "conduct prejudicial to the administration of justice which brings the office into disrepute" – is not unconstitutionally vague. The decision to remove Cline from office did not violate the First Amendment. Because Cline's malicious accusations against Judge Hudson were false and made with reckless disregard of the truth, they are not protected by the First Amendment. The trial court's order removing Cline from office should be affirmed.

I. THE TRIAL COURT COMMITTED NO PROCEDURAL ERRORS IN THE REMOVAL HEARING.

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETON IN DENYING CLINE'S MOTION FOR A CONTINUANCE.

Cline challenges the trial court's denial of the motion for a continuance she filed on 16 February 2012. (App. Br. at 17-21). The standard of review for the denial of a motion to continue is abuse of discretion. *Kimball v. Vernik*, 208 N.C. App. 462, 466, 703 S.E.2d 178, 181 (2010). "Continuances are generally disfavored, and the burden of demonstrating sufficient grounds for continuation is placed upon the party seeking the continuation." *In re J.B.,* 172 N.C. App. 1, 10, 616 S.E.2d 264, 270 (2005).

The removal statute for district attorneys, N.C. Gen. Stat. § 7A-66, dictated the scheduling of the Removal Hearing. The Supreme Court has described the mandated procedure for a district attorney removal proceeding:

> It is commenced by the filing of one or more sworn affidavits with the clerk of superior court of the county where the district attorney resides. The matter is then brought to the attention of the senior regular resident superior court judge who within thirty days shall act on the charges or refer them to another superior court judge to be acted upon. If probable cause exists to believe that the charges are true and, if true, create grounds for removal, then a hearing will be ordered. The hearing shall be held in not less than ten days nor more than thirty days after the district attorney has received written notice of the proceedings and a true copy of the charges. At

> the hearing, the superior court judge shall hear evidence and make findings of fact and conclusions of law. If he finds that grounds for removal exist, then he shall enter an order permanently removing the district attorney from office.

In re Spivey, 345 N.C. 404, 418, 480 S.E.2d 693, 701 (1997) (citing N.C. Gen. Stat. § 7A-66) (emphasis added, citations omitted).

Judge Robert H. Hobgood issued an order on 27 January 2012, finding probable cause for grounds for removing Cline under N.C. Gen. Stat. § 7A-66(6). (R pp 16-20). Cline was served with the order on 30 January 2012. (R p 21). The statute is explicit that "the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter." N.C. Gen. Stat. § 7A-66. Therefore, the hearing was required to be held between 9 February and 29 February 2012, and the trial court did not have discretion to conduct it later.

In the order finding probable cause, the court initially scheduled the hearing for 13 February 2012. (R p 19). When Cline first moved for a continuance on February 10, the court granted the motion and rescheduled the hearing to February 20. (R p 84). Having retained counsel, Cline then filed a second motion for a continuance on February 16. (R pp 26-30).

Constrained by the statutory time limit for the hearing, the court denied Cline's second motion but stated that Cline

would not be called upon to present evidence until February 24. (R p 84). The court also announced that it would limit evidence of Cline's misconduct to statements that she had made in written court filings and in open court on the record as shown by official transcripts. (*Id.*) This directive limited the scope of the factual inquiry and preparation for all parties. The hearing was then conducted on February 20, 24, 27 and 29. (R pp 84-86). Cline presented witnesses, including herself and four others, on February 24 and 27. (R p 85). The court issued its final order on March 2. (R p 84).

The court's denial of Cline's second continuance motion was reasonable and appropriate. Required to conduct the hearing by February 29, the court scheduled the multi-day hearing to fit within that timeframe. There is no basis to find that the court abused it discretion. *See Cornett v. Watauga Surgical Group*, P.A., 194 N.C. App. 490, 498-99, 669 S.E.2d 805, 810 (2008).

Without addressing how the trial court should have acted otherwise to meet the statutory deadline, Cline argues that she did not have adequate time to investigate and prepare for the hearing. (App. Br. at 21.) Cline's argument plainly lacks merit. First, Cline was put on notice of the charged basis for her removal on 30 January 2012, 21 days before the hearing commenced, permitting adequate time to prepare her defense.

Second, the trial court limited the scope of the hearing by specifying that only Cline's statements in written pleadings and open court would be considered as evidence of her misconduct. Because the relevant misconduct was limited to Cline's statements on the record, the time needed for her investigation and preparation was greatly reduced.

The trial court did not abuse its discretion in denying Cline's second continuance motion.[5]

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLINE PRE-HEARING DISCOVERY.

Cline challenges the trial court's denial of her February 17 motion for pre-trial discovery but provides no legal basis for her position. (App. Br. at 21-23). Cline did not have any statutory or constitutional right to pre-hearing discovery, and has failed to demonstrate how the lack of discovery prejudiced her in the proceedings below.

"[A] district attorney removal proceeding under N.C.G.S. § 7A–66 is an inquiry; it is neither a civil suit nor a criminal prosecution." *In re Spivey*, 345 N.C. 404, 418, 480 S.E.2d 693, 701 (1997). Because N.C. Gen. Stat. § 7A-66 does not provide for any pre-trial discovery, Cline is plainly wrong in arguing

[5] To the extent Cline argues that the timing of the hearing violated her constitutional rights to due process, the argument fails as discussed in Section III, *infra*.

that "public policy" requires pre-trial discovery in a removal hearing.

Instead, the General Assembly created an expedited procedure for district attorney removal proceedings that does not include pre-trial discovery. Because a prosecutorial district has no district attorney during the pendency of removal proceedings, an expeditious process is warranted, and the courts must respect the legislature's policy choice. Given the 30-day time limit for conducting the removal hearing, civil pre-trial discovery is impractical.

Nor did Cline have any constitutional right to pre-trial discovery. The removal proceeding under Section 7A-66 is similar to an attorney disciplinary proceeding, a judicial disciplinary proceeding, or a criminal trial. In none of those proceedings is there a constitutional right to pre-trial discovery. *See In re Greene*, 328 N.C. 639, 648-49, 403 S.E.2d 257, 262-63 (1991) (judge had no constitutional right to discovery in judicial disciplinary proceeding); *State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) ("With the exception of evidence falling within the realm of the *Brady* rule, there is no general right to discovery in criminal cases under the United States Constitution.") (citation omitted)); *Gunter v. Va. State Bar*, 399 S.E.2d 820, 823 (Va.

1991) (attorney has no due process right to discovery in disciplinary proceeding given that there "is no general constitutional right to discovery in a criminal case").

Moreover, to the extent the trial court had discretion to permit pre-trial discovery, Cline has not demonstrated how she was prejudiced by the lack of discovery. Cline was presented with a detailed order explaining the probable basis for her removal on 30 January 2012, so she had clear notice of which of her actions were at issue in the hearing. The trial court then further limited the scope of the hearing by specifying that only Cline's statements in written pleadings and open court would be considered as evidence of her misconduct. Because the conduct at issue was limited to these statements, Cline had no need for discovery. Cline was the sole author of all the evidence of her misconduct. In no way was Cline "in the dark" about the evidence against her as she now claims. (App. Br. at 23.)

The trial court did not abuse its discretion in denying Cline's motion for discovery.

C. THE TRIAL COURT CORRECTLY DECIDED AND APPLIED THE BURDEN OF PROOF.

Cline inexplicably contends that the trial court failed to define the burden of proof for the removal hearing. (App. Br. at 24-26). To the contrary, the court explicitly stated during the

hearing on 24 February 2012, that it would apply the "clear, cogent and convincing" standard of proof. (2/24/12 T p 124). In the Removal Order, the court made all its findings of fact using this standard and placed the burden of proof on the affiant. (R pp 86, 94). The court's selection and application of the burden of proof was entirely correct.

N.C. Gen. Stat. § 7A-66 does not specify the burden of proof in a district attorney removal proceeding. The trial court appropriately used the "clear, cogent and convincing" burden of proof that is applied in attorney and judicial disciplinary proceedings. *See* N.C. State Bar Rule Ch. B, 0.114(u) ("If the hearing panel finds that the charges of misconduct are established by clear, cogent, and convincing evidence, the hearing panel will enter an order of discipline."); N.C. Judicial Standards Comm'n Rule 18 ("Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence.").

The trial court certainly was not required to use any higher standard of proof. *See Matter of Palmisano*, 70 F.3d 483, 486 (7th Cir. 1995) ("Proof beyond a reasonable doubt is a specialty of criminal law, and we agree with other courts of appeals that have held its use unnecessary in attorney-

discipline proceedings."); *United States District Court v. Sandlin*, 12 F.3d 861, 865 (9th Cir.1993). In fact, use of the "greater weight of the evidence" standard would have been constitutionally permissible. *See N.C. State Bar v. DuMont*, 304 N.C. 627, 631, 286 S.E.2d 89, 92 (1982) (holding that due process permits this standard in disciplinary proceedings).

Cline appears to argue that the trial court erred in failing to distinguish the burden of production from the burden of persuasion. (App. Br. at 24-25.) To the extent those concepts apply to this proceeding, the burden of production was satisfied when Judge Hobgood issued his order finding probable cause, and he then placed the "clear, cogent and convincing" burden of persuasion on the affiant. The trial court found that the charges of misconduct against Cline were established by clear, cogent and convincing evidence, and that they constituted grounds for removal under section 7A-66(6). The trial court did not err with respect to the burden of proof.

D. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING LAY TESTIMONY REGARDING THE EFFECTS OF CLINE'S MISCONDUCT.

Cline contends that the trial court abused its discretion in admitting lay opinion testimony. (App. Br. at 46-50). Pursuant to the Rules of Evidence, admissible lay opinion testimony "is limited to those opinions or inferences which are

(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C–1, Rule 701; *State v. Ligon*, 206 N.C. App. 458, 462, 697 S.E.2d 481, 485 (2010). "As long as the lay witness has a basis of personal knowledge for his opinion, the evidence is admissible." *State v. Freeman*, 185 N.C. App. 408, 414, 648 S.E.2d 876, 881 (2007).

In this case, the trial court admitted testimony concerning the effects of Cline's misconduct. Staples Hughes, Director of the North Carolina Office of the Appellate Defender, testified that Cline had failed to provide any factual support for her claims that Judge Hudson conspired to act against her or has utter disregard for justice. (R p 92). Thomas Maher, Director of the North Carolina Office of Indigent Defense Services, testified that Cline's accusations that Judge Hudson is corrupt are inflammatory and without factual support. (*Id.*) Cheri Patrick, an attorney practicing in Durham and other counties, testified about the media coverage and public knowledge of Cline's accusations against Judge Hudson. (*Id.*) David Ball, long-time jury consultant and Durham resident, testified about the impact on the public's respect for the judicial system. (*Id.*) All this evidence was relevant to the issue of whether Cline's conduct was prejudicial to the administration of

justice, bringing her office into disrepute. *See* N.C. Gen. Stat. § 7A-66(6).

The North Carolina Supreme Court has previously approved this type of evidence in a district attorney removal proceeding. In the case of *In re Spivey*, the Court endorsed the trial court's finding that "this incident has resulted in the loss of confidence, trust, and respect for this high office by a significant number of residents of the Fifth Prosecutorial District." *In re Spivey*, 345 N.C. at 416, 480 S.E.2d at 699. Evidence of the views of residents of the prosecutorial district supported the conclusion that the district attorney's conduct was prejudicial to the administration of justice by bringing the office into disrepute. *Id.* at 416-17, 480 S.E.2d at 700. The trial court here did not abuse its discretion in admitting similar lay testimony concerning the effects of Cline's misconduct.

Contrary to Cline's contention, App. Br. at 50, the trial court considered the testimony of her lay witnesses. The court noted all of the witnesses presented by Cline, referenced one of them in Conclusion # 25, and stated that it made its findings based on the "evidence presented." (R pp 85-86, 96). The court was not required to make explicit factual findings regarding testimony it did not ultimately find persuasive. *See In re*

J.A.A., 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) ("the trial court is not required to make findings of fact on all the evidence presented, nor state every option it considered").

The trial court did not abuse its discretion with respect to the testimony of the lay witnesses.

II. THE REMOVAL PROCEEDINGS DID NOT VIOLATE CLINE'S RIGHTS TO DUE PROCESS.

The proceeding below satisfied the constitutional requirements of due process because Cline was given notice of the charges against her after a probable cause determination and received a full opportunity to contest those charges in a hearing before an impartial adjudicator. As discussed in Section I.B, *supra*, due process did not require that Cline be given pretrial discovery.

"Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved." *In re Lamm*, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994) *aff'd per curiam*, 341 N.C. 196, 458 S.E.2d 921 (1995). "In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the governmental entity seeking a remedy." *Id.*

An attorney facing discipline is entitled to "fair notice of the charge made against her" under procedural due process. *N.C. State Bar v. Barrett*, 724 S.E.2d 126, 129-30 (N.C. Ct. App. 2012) (citing *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 117 (1968)). In addition, when the government engages in prompt action adverse to an individual, the Law of the Land Clause of the North Carolina Constitution requires "that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist." *Lamm*, 116 N.C. App. at 388-89, 448 S.E.2d at 130.

The North Carolina Supreme Court further specified the due process requirements for an inquiry into the fitness of a legal officer in *In re Greene*, 328 N.C. at 639, 403 S.E.2d at 257. *In re Greene* involved a judicial disciplinary proceeding which, like a district attorney removal hearing, "is neither criminal nor civil in nature. It is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of judges." *Id.* at 647-48, 403 S.E.2d at 262.

The *In re Greene* Court held that due process and the Law of Land Clause guarantee to a litigant an "adequate and fair hearing" and that she "be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it." *Id.* at 648, 403 S.E.2d at 262. No discovery procedures are constitutionally required. *Id.* Of course, as part of a fair hearing, "Due process requires a neutral decision-maker." *In re Spivey*, 345 N.C. at 417, 480 S.E.2d at 700.

In sum, due process requires: (1) fair notice of the charges; (2) a judicial determination of probable cause: (3) a neutral decision-maker; and (4) a fair hearing where the litigant can test, explain, or rebut the evidence. All of those requirements were satisfied here. Judge Hobgood found probable cause for Cline's removal on 27 January 2012. Cline was given notice of the charges against her on 30 January 2012. Cline does not dispute that Judge Hobgood is a neutral decision-maker. And Cline was given the opportunity to test, explain, and rebut the evidence by testifying herself, cross-examining the affiant's witnesses, and presenting her own witnesses. Her due process rights were not violated.

III. N.C. GEN. STAT. § 7A-66 IS NOT UNCONSTITUTIONALLY VAGUE.

N.C. Gen. Stat. § 7A-66 is not unconstitutionally vague because it gives district attorneys adequate warning about the conduct it proscribes. "The United States Supreme Court and the North Carolina Supreme Court have adopted similar tests for determining whether a statute is unconstitutionally vague." *Malloy v. Cooper*, 162 N.C. App. 504, 507, 592 S.E.2d 17, 20 (2004) (citing *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998)). "A statute is unconstitutionally vague if it either: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; or (2) fails to provide explicit standards for those who apply the law." *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972)).

"Although a statute must satisfy both prongs of this test, impossible standards of statutory clarity are not required by the constitution." *Id.* "Mere differences of opinion as to a statute's applicability do not render it unconstitutionally vague." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 187, 594 S.E.2d 1, 19 (2004). "As long as a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully

met." *Malloy*, 162 N.C. App. at 507, 592 S.E.2d at 20. It is Cline's burden to show, in light of the circumstances of this case, "that the statute is incapable of uniform judicial administration." *See Rhyne*, 358 N.C. at 186, 594 S.E.2d at 19. Cline plainly cannot do so.

The North Carolina Supreme Court has previously rejected vagueness challenges to the standard set forth in N.C. Gen. Stat. § 7A-66(6). Under N.C. Gen. Stat. § 7A-376, a judge may be disciplined for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." § 7A-376(b). When this standard was challenged as unconstitutionally vague, the Court squarely rejected the contention. *In re Nowell*, 293 N.C. 235, 242-43, 237 S.E.2d 246, 251-52 (1977); *see also Matter of Edens*, 290 N.C. 299, 305, 226 S.E.2d 5, 9 (1976) (similarly holding that this standard is not unconstitutionally vague or overbroad). The Court pointed out that the standard is "no more nebulous or less objective than the reasonable and prudent man test which has been a part of our negligence law for centuries." *In re Nowell*, 293 N.C. at 243, 237 S.E.2d at 251. The Court also noted that guidelines for determining grounds for removal are found in the ethical rules for attorneys. *Id.*

Cline was removed from office for "conduct prejudicial to the administration of justice which brings the office into

disrepute" under section 7A-66(6). This standard, identical to the standard for disciplining judges, is not unconstitutionally vague. *See id.* Moreover, Cline's conduct clearly fell within the bounds of the removal statute because it violated the Rules of Professional Conduct. Rule 8.2 states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." N.C. R. Prof. Conduct 8.2. Here, Cline's repeated outrageous accusations against Judge Hudson were false and made with reckless disregard for the truth. *See* Section IV, *infra*. Cline's actions violated the professional rules of conduct, and clearly constitute grounds for removal. *See Nowell*, 293 N.C. at 243, 237 S.E.2d at 251.

Moreover, Cline's calculated assault on Judge Hudson over a period of seven weeks is more detrimental to the justice system than a district attorney's utterance of a racial epithet in a single heated exchange in a bar, which the Supreme Court found to be sufficient grounds for removal in *In re Spivey*, 345 N.C. at 408, 417, 480 S.E.2d at 700. Cline has no basis for challenging section 7A-66(6) as unconstitutionally vague. *See Parker v. Levy*, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L. Ed. 2d 439 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

IV. THE REMOVAL OF CLINE FROM OFFICE DID NOT VIOLATE THE FIRST AMENDMENT.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and *Garrison v. State of Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964), the Supreme Court established that neither civil nor criminal liability can be imposed on an individual for derogatory statements about a public official unless the statements are false and, subjectively, are made with knowledge of their falsity or in reckless disregard of the truth. In the different context of disciplinary proceedings against attorneys, however, courts have uniformly rejected the subjective defamation standard for First Amendment protection and instead applied an objective standard, requiring inquiry into whether the attorney had a reasonable factual basis for making the critical statements. The trial court analyzed the case under the more protective *New York Times* standard, but under either standard, Cline's false, inflammatory, and outrageous accusations against Judge Hudson are not protected by the First Amendment.

A. REMOVING CLINE MEETS THE STANDARD UNDER *NEW YORK TIMES V. SULLIVAN* AND *GARRISON V. STATE OF LOUISIANA*.

In the seminal case of *New York Times Co. v. Sullivan*, the Supreme Court held that to protect robust public debate, the

First Amendment precludes a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice. 376 U.S. at 279-80, 84 S. Ct. at 726. Actual malice means knowledge of, or reckless disregard for, the falsity of a statement. *Id*.

The Court subsequently applied the same standard to cases of criminal defamation, and specifically to criticisms of judges by lawyers. *Garrison v. State of Louisiana* held that lawyers who make a derogatory statement about judges are protected from civil or criminal liability unless the statement is false and made "with knowledge of its falsity or in reckless disregard of whether it was false or true." 379 U.S. at 74, 85 S. Ct. at 215. "Hence the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection." *Id.* at 75, 85 S. Ct. at 216.

In the defamation context, "reckless disregard" is a subjective standard that focuses on the conduct and state of mind of the defendant. *Harte-Hanks Comm., Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562 (1989). The standard is satisfied by showing that "the defendant in fact entertained serious doubts as to the truth of his publication," or had a "high degree of awareness of probable

falsity." *Id.* A plaintiff can prove the defendant's state of mind through circumstantial evidence, and "it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." *Id.* at 668, 109 S. Ct. at 2686.

A defendant in a defamation action cannot "automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326, 20 L. Ed. 2d 262 (1968). "The finder of fact must determine whether the publication was indeed made in good faith." *Id.* "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or ... when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *Id.*

In response to Judge Hudson's dismissal of two cases and continuance of two others, Cline filed a series of motions in Durham County Superior Court accusing Judge Hudson of corruption, dishonesty, moral turpitude, malicious misconduct, manufacturing "media mayhem," "constant failure to follow the law for personal privilege to punish the prosecutor," abuse of power, violations of Code of Judicial Conduct, and of orchestrating a conspiracy to attack Cline and her office.

Cline's motions, totaling over 500 pages of wild and unsubstantiated accusations, lack any factual support for the attacks on Judge Hudson's character, conduct, and fitness to be a judge. Cline continued to repeat these accusations after Judge Fox found the factual support for her motions to be "woefully inadequate," and after both Judge Fox and Judge Hardin explicitly warned and admonished her about filing pleadings with false statements.

Cline's accusations in public documents were especially reckless because alternative means of disputing Judge Hudson's decisions were available. As was proper, Cline appealed Judge Hudson's dismissal orders. She also filed a complaint with the Judicial Standards Commission. Rather than waiting for these lawful forms of redress to proceed, Cline filed multiple invective-filled public motions, falsely impugning Judge Hudson's character and conduct.

The trial court found that "Cline has failed to lay out in factual terms any support for her statements that Judge Orlando F. Hudson, Jr. participated in any conspiracy against her or that he had utter disregard for the truth and justice." (R p 92, # 44). In its Findings of Fact 19-24, 26-30, and 32-42, the trial court quoted 22 particular statements that Cline made in her pleadings. The court found that these statements "are not

supported by facts, are inflammatory in nature and bring the office of the Durham County District Attorney into disrepute." (R p 93, # 51). The court emphasized that Cline's statement that Judge Hudson is "'corrupt' is not only false; it is inexcusable and clearly, cogently and convincingly demonstrates the personal animosity and ill will" of Cline toward Judge Hudson. (*Id.*) The court concluded that these statements "are not supported by the evidence, are not truthful and were made by Tracey E. Cline with reckless disregard for the truth." (R p 95, # 20). The trial court's findings have not been challenged by Cline, and are therefore binding on appeal. *See Countrywide Home Loans,* 190 N.C. App. at 587, 661 S.E.2d at 261.

The trial court's findings – not challenged on appeal and fully supported by the record in any event – establish that Cline's accusations against Judge Hudson are false and were made with reckless disregard of the truth. As such, they "do not enjoy constitutional protection." *See Garrison*, 379 U.S. at 75, 85 S. Ct. at 216.

Cline's only argument in defense of her conduct is that she genuinely believed her accusations were true. (App. Br. at 35.) Cline's declarations of good faith should be given no credence. Cline had no evidence that Judge Hudson is corrupt or that he orchestrated a conspiracy to attack her office. These

fantastical ideas, fabricated by Cline, are so inherently improbable that only a reckless person would have published them. The trial court appropriately found that Cline made her statements with reckless disregard for the truth. *See St. Amant*, 390 U.S. at 732, 88 S. Ct. at 1326. Accordingly, Cline's removal from office based on these false statements against Judge Hudson does not violate the First Amendment.

B. IN DISCIPLINARY PROCEEDINGS, A LEGAL OFFICER'S STATEMENTS ARE ENTITLED TO LESS STRINGENT FIRST AMENDMENT PROTECTION THAN IN PROCEEDINGS TO IMPOSE CIVIL OR CRIMINAL LIABILITY.

While the *New York Times Co. v. Sullivan* standard applies to cases imposing civil or criminal liability, a less stringent standard for First Amendment protection applies when attorneys are being sanctioned for making false accusations against judges. To accommodate the public interest in the effective administration of justice, courts that have addressed this issue have uniformly adopted an objective standard, assessing an attorney's statements by reference to what a reasonable attorney would do in the same circumstance. This standard is also appropriate where a legal officer is being removed from office. Because Cline's false statements about Judge Hudson were objectively unreasonable, they are unprotected by the First Amendment.

The Ninth Circuit Court of Appeals compellingly articulated the significant differences between the interests served by defamation law and those served by rules sanctioning attorneys. *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). "Defamation actions seek to remedy an essentially private wrong by compensating individuals for harm caused to their reputation and standing in the community." *Id.* at 1437. Laws and rules governing attorney conduct "that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice." *Id.* (citing *In re Terry*, 394 N.E.2d 94, 95 (Ind. 1979), and *In re Graham*, 453 N.W.2d 313, 322 (Minn. 1990)). "Though attorneys can play an important role in exposing problems with the judicial system, false statements impugning the integrity of a judge erode public confidence without serving to publicize problems that justifiably deserve attention." *Id.* at 1437-38 (citations omitted); *see also In re Holtzman*, 577 N.E.2d 30, 34 (N.Y. 1991) (observing that applying the subjective defamation standard "would immunize all accusations, however reckless or irresponsible, from censure as

long as the attorney uttering them did not actually entertain serious doubts as to their truth").

Because of the different interests at stake, when considering sanctions for an attorney's false statements about a judge, "reckless disregard for the truth" should be "governed by an objective standard, pursuant to which the court must determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Yagman*, 55 F.3d at 1437. "The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." *Id.* This objective standard "strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." *Id.* at 1438.

Numerous state supreme courts and federal circuit courts have adopted this objective standard for sanctioning an attorney's false statements. *See, e.g.*, *Disciplinary Counsel v. Gardner*, 793 N.E.2d 425, 432 (Ohio 2003) ("we hold that an attorney may be sanctioned for making accusations of judicial impropriety that a reasonable attorney would believe are

false"); *The Florida Bar v. Ray*, 797 So. 2d 556, 559 (Fla. 2001); *In re Chmura*, 608 N.W.2d 31, 43-44 (Mich. 2000) ("The state's compelling interest in preserving public confidence in the judiciary supports applying a different standard than that applicable in defamation cases."); *Idaho State Bar v. Topp*, 925 P.2d 1113, 1116 (Idaho 1996); *Holtzman*, 577 N.E.2d at 34; *Matter of Westfall*, 808 S.W.2d 829, 837 (Mo. 1991); *Graham*, 453 N.W.2d at 321-22; *Berry v. Schmitt*, 688 F.3d 290, 302 (6th Cir. 2012) ("ethics rules can permissibly reach speech that defamation suits cannot"); *Matter of Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) ("Even a statement cast in the form of an opinion ('I think that Judge X is dishonest') implies a factual basis, and the lack of support for that implied factual assertion may be a proper basis for a penalty."); *see also United States v. Cooper*, 872 F.2d 1, 3 (1st Cir.1989) ("Nor may an attorney seek refuge within his own First Amendment right of free speech to fill a courtroom with a litany of speculative accusations and insults which raise doubts as to a judge's impartiality."); *In re Evans*, 801 F.2d 703, 706 (4th Cir. 1986) (upholding disbarment for attorney's failure to investigate, coupled with his unrelenting reassertion of the charges against a judge).

The removal of a district attorney for conduct prejudicial to the administration of justice which brings the office into

disrepute implicates the same public interest in preserving confidence in the fairness and impartiality of our system of justice. *See Yagman*, 55 F.3d at 1437. Therefore, a district attorney's false statements about a judge should only be protected by the First Amendment if the district attorney had a reasonable factual basis for the statements. *See id.* at 1437-38. Otherwise, grossly irresponsible accusations against judges will irreparably tarnish the public perception of the justice system and render it ineffective.

In this case, Cline had no reasonable factual basis for her false statements that Judge Hudson was corrupt and engaged in a conspiracy to attack her office. Rather than resolve these issues through appeals to this Court or her complaint to the Judicial Standards Commission, Cline filed barrages of accusations against Judge Hudson. She continued to do so after her initial motions were rejected by Judge Fox, and after he and Judge Hardin explicitly warned her about filing false statements. No reasonable attorney would have taken this course of action in the same circumstance. Cline's conduct was objectively unreasonable, and is thus not entitled to First Amendment protection.

C. NO IMMUNITY APPLIES TO PROTECT CLINE'S MISCONDUCT.

Contrary to Cline's contention, App. Br. at 37-40, no doctrine of immunity shields Cline's false accusations from constituting the basis of her removal. Cline first relies on the defamation privilege for witness statements. Under this doctrine, "a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity." *Bailey v. McGill*, 247 N.C. 286, 293, 100 S.E.2d 860, 866 (1957); *Houpe v. City of Statesville*, 128 N.C. App. 334, 346, 497 S.E.2d 82, 90 (1998). The privilege does not apply here because (1) this is a removal proceeding, not a defamation action; and (2) Cline was not a witness, but rather an officer of the court making false statements against a judge. Cline cites no authority for applying this privilege to removal or disciplinary proceedings for an attorney or judicial officer.

Similarly, the qualified privilege for a federal officer discussed in *Barr v. Matteo*, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959), is only a defense in "a suit against him personally for damages." *Id.* at 570, 79 S.Ct. at 1339. Of course, this is not a suit for damages and Cline is not a

federal officer. *See Butz v. Economou*, 438 U.S. 478, 495, 98 S. Ct. 2894, 2905, 57 L. Ed. 2d 895 (1978) (limiting application of *Barr* to "federal officials executing their duties under federal law"); *Mangold v. Analytic Services, Inc.*, 77 F.3d 1442, 1446 (4th Cir. 1996) (holding that *Barr* creates an "immunity from state law tort liability for federal officials"). *Barr* thus has no bearing on this case.

D. STRICT SCRUTINY AND *PICKERING* ANALYSIS ARE INAPPLICABLE BECAUSE CLINE'S SPEECH IS NOT PROTECTED UNDER THE FIRST AMENDMENT.

Strict scrutiny analysis does not apply here because Cline's false statements are not protected speech. When statements fall into a category of unprotected speech, regulations restricting such statements are not subject to strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542-43, 120 L. Ed. 2d 305 (1992); *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397, 409 (6th Cir. 1999). As discussed above, Cline's false statements made with reckless disregard of the truth are unprotected speech, so there is no need for strict scrutiny analysis.

Similarly, the balancing test articulated in *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d

811 (1968), regarding the discipline or discharge of public employees is inapplicable for several reasons. First, Cline was not discharged by her employer; rather she was removed from office by virtue of state law. Second, even if the state is deemed to be Cline's employer, the Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960, 164 L. Ed. 2d 689 (2006). As Cline repeatedly states, she published her accusations of Judge Hudson pursuant to her duties as district attorney, and thus receives no protection under *Pickering*. Finally, even for non-official speech in the workplace, "an employee's speech is not protected where it is made with a reckless disregard for the truth, or is otherwise profane and disparaging." *Brenner v. Brown*, 36 F.3d 18, 20 (7th Cir. 1994); *see Henry v. Dep't of Navy*, 902 F.2d 949, 953 (Fed. Cir. 1990) (upholding dismissal of public employee for making "patently false and unfounded accusations").

Even if strict scrutiny or *Pickering* analysis applied here, the removal of Cline passes muster. As discussed in Section IV.B, *supra*, the state has a compelling interest in preserving

an effective judicial system. Sanctioning attorneys for making false statements against judges without any reasonable factual basis is a narrowly tailored restriction that furthers the interest in an effective judicial system. *See Matter of Westfall*, 808 S.W.2d 829, 836-38 (Mo. 1991) (applying strict scrutiny analysis to conclude that attorneys can be sanctioned for false statements using an objective standard). This objective standard "strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." *Yagman*, 55 F.3d at 1438. Cline's baseless accusations of corruption and conspiracy against Judge Hudson have prejudiced the administration of justice, warranting her removal from office.

CONCLUSION

For the foregoing reasons, the Court should affirm the order removing Cline from office.

Respectfully submitted, this 10th day of December, 2012.

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CERTIFICATE OF SERVICE

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