SUPREME COURT OF NEW JERSEY
ADVISORY COMMITTEE ON
JUDICIAL CONDUCT

DOCKET NO.: ACJC 2020-001

IN THE MATTER OF

NINO F. FALCONE
JUDGE OF THE MUNICIPAL COURT

PRESENTMENT

The Advisory Committee on Judicial Conduct (the "Committee") hereby presents to the Supreme Court its Findings and Recommendation in this matter in accordance with Rule 2:15-15(a) of the New Jersey Court Rules. The Committee's findings and the evidence of record demonstrate that the charges set forth in the Formal Complaint filed against Nino F. Falcone ("Respondent"), a part-time judge of the Municipal Court, relating to his offensive touching of a client's representative in his private practice of law on August 29, 2019, for which he was charged with criminal sexual contact, a crime of the fourth degree, have been proven by clear and convincing evidence. The Committee's findings and the evidence of record likewise demonstrate, clearly and convincingly, that Respondent was duplicitous when testifying before this Committee in defense of these ethics charges.

Respondent's offensive touching and, separately, his pervasive dishonesty when testifying before this Committee about that conduct, constitute egregious violations of the Code of Judicial Conduct for which removal would ordinarily be warranted. Respondent, however, retired from judicial office on August 31, 2020, and has not served as a jurist since September 12, 2019. See Stipulations at ¶4.

For these reasons, the Committee respectfully recommends that Respondent be censured and permanently disqualified from holding or securing future judicial office for his conduct in this matter.

I. **PROCEDURAL HISTORY**

The New Jersey Supreme Court, by order dated September 12, 2019, suspended Respondent from the exercise of his judicial duties, without pay, following his arrest on a charge of criminal sexual contact, a fourth-degree offense. See N.J.S.A. 2C:14-3(b). See Stipulations at ¶3; see also P-12; P-13; P-16 thru P-18. The Supreme Court, in addition, referred Respondent to the Committee for appropriate action.

The Committee, consistent with its standing policy, held this ethics matter pending the conclusion of Respondent's criminal matter. On March 12, 2020, Respondent was admitted into the Pretrial Intervention Program ("PTI"). Stipulations at ¶8; see also R-1. Respondent complied with all conditions of PTI and on

May 18, 2021, Respondent's criminal matter was dismissed. Stipulations at ¶9; see also R-2.

The Committee, on June 7, 2021, following an investigation, filed a Formal Complaint against Respondent charging him with conduct in contravention of Canon 1, Rule 1.1 and Rule 1.2, Canon 2, Rule 2.1, and Canon 5, Rule 5.1(A) of the Code of Judicial Conduct. These charges emanate from Respondent's conduct on August 29, 2019 while he was meeting with a client's representative at his law office for which he was charged with criminal sexual contact.

Respondent filed a verified Answer to the Complaint on July 27, 2021 in which he admitted certain factual allegations, denied others, and denied violating the cited canons of the Code of Judicial Conduct.

The Committee convened a Formal Hearing on January 26, 2022. Respondent appeared, with counsel, and offered testimony in defense of the asserted disciplinary charges. The Presenter called one fact witness, the victim, in support of the asserted disciplinary charges. The Presenter and Respondent offered exhibits, the majority of which were admitted into evidence, without objection. See Stipulations at ¶1; see also T3-14 to T8-

13[1]; Presenter's Exhibits P-1 thru P-19;[2] Respondent's Exhibits R-1 thru R-8.

After carefully reviewing the record, the Committee makes the following findings, supported by clear and convincing evidence, which form the basis for its recommendation.[3]

II. FINDINGS

A.

Respondent is a member of the Bar of the State of New Jersey, having been admitted to the practice of law in 1984. See Stipulations at ¶2. At all times relevant to this matter, Respondent served as a part-time judge in the Township of North Bergen Municipal Court, a position from which he retired on August 31, 2020, and maintained a private law office in North Bergen Township. Id. at ¶¶3-4; see also Formal Complaint and Answer at ¶3.

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[1] "T" refers to the transcript of the Formal Hearing held on January 26, 2022.

[2] Exhibits P-4, P-5, P-7, and P-17 were admitted into evidence over Respondent's objection for the limited purpose of demonstrating that the victim made contemporaneous complaints to anticipated individuals about her interactions with Respondent on August 29, 2019, lending to her credibility.

[3] Consistent with N.J.S.A. 2C:43-13(f) and Rule 3:28-8, the fact Respondent was charged with a crime, the criminal proceedings, enrollment, and participation in the PTI Program (or "Supervisory Treatment"), and dismissal of the criminal complaint have not been considered by the Committee in its consideration of this matter. Cf. N.J.S.A. 2C:52-27.

On Thursday, August 29, 2019, A.C.,[4] a business acquaintance of Respondent's, went to Respondent's law office on her employer's behalf to discuss a legal issue. See Formal Complaint and Answer at ¶4. A.C.'s employer, for whom she has worked since April 2007, is a physician with whom Respondent had a years-long professional relationship. Ibid.; T67-8-23. A.C. works as her employer's "office manager" and is responsible for managing several of her employer's rental properties. T9-12 to T10-10. As part of her job duties in August 2019, A.C. would periodically discuss with Respondent the status of her employer's then-pending real estate disputes in which Respondent was serving as her employer's legal counsel. T9-5 to T11-17. Given the proximity of Respondent's law office to that of A.C.'s employer, located within the same city block, A.C. would, on occasion, appear at Respondent's law office unannounced in lieu of telephoning Respondent whose calls were directed to an answering service. T10-24 to T11-21; see also P-2 at p. 2.

Respondent and A.C. were otherwise familiar with each other due to Respondent's legal representation of A.C. and several of

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[4] The Presenter referred to the victim by her initials in the Formal Complaint to preserve the victim's anonymity. See In re Seaman 133 N.J. 67, 75 (1993) (directing that "judicial-disciplinary cases involving . . . activities that humiliate or degrade those with whom a judge comes into contact, should preserve the anonymity of the alleged victim."). We continue this practice in our Presentment to the Court.

her family members in various personal legal matters over several years. See Formal Complaint and Answer at ¶5; T10-14-23; T79-16 to T80-7. As of August 29, 2019, Respondent and A.C., between whom there is a 45-year age difference, had known each other for more than 12 years. T67-8-23; see also P-17 at Affidavit of Probable Cause, State v. Falcone, 0908-S-2019-000715.

By all accounts, the purpose of A.C.'s meeting with Respondent on August 29, 2019, at approximately 12:00 p.m., was to discuss A.C.'s employer's then-pending real estate issues. T13-7-12; T15-10-24; T35-20 to T36-5; T84-8-22. On arriving at Respondent's office, A.C. rang the doorbell and Respondent "buzzed" her into the building. T37-5-8; T84-10; T86-13-16; P-2 at p. 2. Respondent was seated at a conference table alone when A.C. entered his second-floor office area. T14-3-6; T37-21 to T40-7; T83-20 to T84-2; P-2 at p. 2. No other individuals were present in Respondent's office. T43-3-6; T83-20 to T84-2. A.C. sat across from Respondent at the conference table and, following a brief discussion about A.C.'s recent birthday and celebratory vacation a week earlier, A.C. addressed with Respondent the business purpose for their meeting. T15-10-24; T86-17 to T88-12.

The events occurring at the conclusion of this business meeting were the subject of conflicting testimony, with a stark dichotomy existing between A.C.'s account and that of Respondent's. T15-25 to T20-13; T87-2 to T91-2. While each

testified to having embraced at the conclusion of their business meeting, Respondent's and A.C.'s testimony differed markedly as to the circumstances of that embrace and its aftermath. T15-25 to T16-9; T47-18-23; T88-9-20.

Having considered Respondent's and A.C.'s testimony and the evidence of record, we find A.C.'s account, which is supported by the record, credible, and Respondent's newly proffered version of events, which bears no reasonable relationship to the evidence of record, wholly contrived. Indeed, at points, Respondent's proffered testimony is demonstrably inconsistent with that of his statements to A.C. during a recorded telephone conversation less than two weeks after the events of August 29, 2019.

As revealed in the record, Respondent, at the conclusion of his business meeting with A.C., stood up from the conference table and approached A.C. with his arms outstretched, seemingly to hug her, while wishing her a happy birthday. T15-25 to T16-9; T47-18-23; P-2 at p. 2. Respondent and A.C. had never previously hugged during their 12-year professional acquaintanceship. T18-5-11; T82-10-12. A.C., feeling "uncomfortable," responded with a "halfway hug" before Respondent forcibly "pulled" A.C. towards him into a prolonged embrace and began rubbing her back with both of his hands. T16-2-14; T:47-24 to T:48-4; P-2 at p. 2. A.C., feeling increasingly "uncomfortable," pushed against Respondent to extricate herself from his embrace, but Respondent, at 5'10" and

between 280 lbs. to 300 lbs., resisted releasing A.C., who stands 5'5", and, placing his hands on either side of A.C.'s breasts and ribcage, held her tightly. T16-15 to T17-3; T18-21-24; P-2 at p. 2; P-16. As A.C. continued to resist, Respondent placed his hands directly on A.C.'s breasts and squeezed them, prompting A.C. to push Respondent away strenuously and state, "no." T17-2-15; T18-25 to T19-3; T19-11-14; P-2 at p. 2. Respondent then grabbed A.C.'s wrist and stated, "come on, let me touch you. Let me play with you," while continuously reaching towards her. T17-8-15; T19-7-10; P-2 at p. 2. A.C. continued to struggle with Respondent before he ultimately released her wrist and offered her "birthday money," which A.C. refused before quickly leaving Respondent's office. T17-16-25; P-2 at p. 2.

On exiting Respondent's office, A.C. went directly to her employer's office and immediately advised her employer of Respondent's unwanted and offensive groping of her breasts and body and of his sexually charged comments. T20-14-20; P-2 at p. 3; P-19 at T24-8 to T27-13. A.C. reported to her employer that she felt "disgusted," "violated," "angry," and "upset" by Respondent's physical and verbal assault. T52-10-17. Visibly upset throughout the remainder of that day, A.C. repeated to her employer's receptionist the details of Respondent's conduct and recounted those same events to her husband that evening. T20-21 to T21-6; T52-21 to T53-20; P-2 at p. 3. A.C.'s employer, the employer's

receptionist, and A.C.'s husband, when interviewed by personnel in the Special Victims Unit ("SVU") of the Hudson County Prosecutor's Office, confirmed A.C.'s account of her interactions with each of them that day. See P-4, P-5, and P-7.

A.C.'s testimony before this Committee about these events is consistent with her telephonic statement to the SVU on August 29, 2019, mere hours after the incident, and is also consistent with her recorded, in-person interview with an SVU detective on August 30, 2019. See P-1; P-2; P-19. Similarly, A.C.'s demeanor when testifying before this Committee, which included moments in which she wept openly, resembled A.C.'s recorded demeanor during the SVU's investigation and further buttressed A.C.'s credibility. T17-1-7; P-10. See In re Seaman, 133 N.J. 67, 88 (1993) (internal citations omitted) (reiterating that "[c]onsistency of testimony, both internally and between witnesses, is an important indicator of truthful testimony.").

On September 11, 2019, as part of the SVU's investigation, A.C. telephoned Respondent from an interview room at the SVU office on a recorded telephone line ("Consensual Intercept"). T23-16 to T24-5; P-9. A video recording of the Consensual Intercept, which includes audio, is part of the record, as is a transcript of that recording. See P-10; P-11. During the Consensual Intercept, A.C. appeared noticeably uncomfortable while speaking with Respondent and, at points, was overcome with emotion. P-10. For his part,

Respondent admitted during this discussion to touching A.C. inappropriately in the manner A.C. described and to asking A.C. to let him "play with her." P-11 at T6-15-25. The relevant details of that colloquy are as follows:

> **A.C.:** I feel uncomfortable. I've known you for years and I've been wanting to talk to you . . . . I didn't tell the doctor nothing. I didn't want to bring -- I wanted to talk to you, but, you know, you touched my breasts and then you asked me to play with me and . . . .
>
> **RESPONDENT:** I know, it was just an impulse, and I do apologize. And I would appreciate if you don't talk to the doctor about it. All right?
>
> . . .
>
> **A.C.:** Like did you think by you touching my breasts or asking me to play with me that I was going to let you do that? . . .
>
> **RESPONDENT:** No, no, it was -- oh, my God, A.C. I don't know what it was, but it's over. You know I didn't mean to do it. You should have slapped my face, kicked [me] in the ass or something, you know. I know, A.C., you're not that kind of a person, of course you're not . . . And I'm sorry I caused a certain amount of anxiety.
>
> . . .
>
> **A.C.:** What are you sorry about?
>
> **RESPONDENT:** I'm sorry that I did something that I shouldn't have done, and I really apologize. Absolutely.
>
> **A.C.:** I want to hear you say, though. I want you to hear what you did to me . . . .
>
> **RESPONDENT:** I inappropriately touched you, okay, that's what I did, and it --
>
> **A.C.:** Right.

> **RESPONDENT**: -- was not in any way to embarrass you -- or I'm embarrassed to talk about it, absolutely embarrassed. And I want you to feel comfortable that it will never, ever happen again, that's all.

P-11 at T6-15-25; T7-22 to T8-7; T9-4-18.

B.

Respondent, in denying before this Committee any impropriety in respect of his conduct when meeting with A.C. privately on August 29, 2019, attempts to recast his admittedly inappropriate touching of A.C. as an "accident" that was limited to the "side[s] of [A.C.'s] breasts" occurring while they were separating from a hug that A.C. purportedly initiated. T88-9 to T89-5. Respondent testified that A.C., on advising him it was her birthday, solicited a hug from Respondent, which he claims to have initially refused. T88-9-20. With her "arms outstretched," A.C., according to Respondent, "came closer to [him]," and he was "embarrassed." T88-14-17. A.C. allegedly hugged Respondent who admits to having "pat[ted]" A.C.'s back when returning her hug. T88-17-18. While separating from that hug, Respondent maintains his hands accidentally "touch[ed] the side[s] of her breasts" causing him "embarrassment." T88-18-20. Respondent claims to have "sensed" a "change" in A.C.'s "manner" immediately thereafter that caused him "to say that was not appropriate." T88-24 to T89-2. In response, A.C., according to Respondent, "walked away" and left his office. T89-18-24.

Respondent denies having "grabbed" or "squeezed" the front of A.C.'s breasts and denies having "grabbed" her wrist or of having pulled A.C. towards him. T89-25 to T90-8. Respondent, likewise, denies saying to A.C., "let me touch you" or "let me play with you." T90-9-12. Lastly, Respondent denies having offered A.C. money before she left his office. T90-13-16.

This account stands in stark contrast to Respondent's several admissions to A.C. during their discussion as captured on the Consensual Intercept, i.e., Respondent admitted to touching A.C.'s breasts inappropriately, not inadvertently, and asking to "play" with her, both of which he attributed to an "impulse." P-11 at T6-15-25. In other words, he claimed to have acted on an urge when touching A.C.'s breasts. We find incredible Respondent's testimony that his use of the word "impulse" in this context referred to his impulsivity in "inadvertently" touching A.C.'s breasts while "disengaging" from their embrace. T93-11-16. Respondent's proffered explanation does not coincide with that to which he attributed the impulse, namely, his touching of A.C.'s breasts *and* asking A.C. to allow him to "play" with her. Indeed, at no point during their recorded conversation on September 11, 2019 did Respondent deny *intentionally* touching A.C.'s breasts or state that A.C. initiated their embrace.

Respondent's proffered account is, likewise, incongruous with his statements to A.C. during the Consensual Intercept, wherein he

requested A.C. not discuss the incident with her employer and asserted that she should have "slapped [his] face, kicked [him] in the ass or something, . . ." in response to his offensive touching of her breasts and body. P-11 at T6-15-25, T8-1-7. Had the encounter between A.C. and Respondent occurred as Respondent described and his touching of her breasts merely accidental, there would have been no reason for A.C. to slap or kick Respondent and no reason to keep the incident a secret from A.C.'s employer.

It simply strains credulity to believe that A.C. cajoled Respondent into hugging her, neither having hugged each other during their 12-year professional acquaintanceship, and that while doing so Respondent inadvertently touched *both* of A.C.'s breasts for which he neither apologized immediately nor sought to deny culpability when speaking with A.C. thereafter on the Consensual Intercept.

Given the totality of the circumstances, we find Respondent acted intentionally when grabbing A.C.'s breasts and body, without her consent, having, by his own admission, acceded to an "impulse" to do so. We find, moreover, that Respondent repeatedly sought to avoid accountability for this conduct both when interacting with A.C. immediately thereafter and when appearing before this Committee more than two years later about these events.

In this regard, Respondent attempted initially to assuage A.C. with an offer of "birthday money," which she refused. Failing

that, Respondent promised A.C. he would never repeat this misconduct and coupled that apology with a request that she not tell her employer about his aberrant behavior. When ultimately required to account publicly and for the first time before this Committee for his victimization of A.C., Respondent again sought to conceal his misconduct by recasting himself the victim of an unfortunate accident involving A.C.'s breasts that is wholly at odds with the facts of record. Respondent's demonstrable dishonesty, under oath, has revictimized A.C. who was compelled to relive this painful experience publicly with the knowledge that Respondent denies any responsibility for its occurrence.

These circumstances - Respondent's physical and verbal assault of A.C., attempts to solicit her silence, and demonstrably false testimony before this Committee - shock the conscience and reveal a lack of self-control and sound judgment on Respondent's part, and a disrespect for the rule of law and the judicial disciplinary process. Moreover, such conduct evinces Respondent's knowing and purposeful violation of Canon 1, Rule 1.1 and Rule 1.2, Canon 2, Rule 2.1, and Canon 5, Rule 5.1(A) of the Code of Judicial Conduct, for which the strongest measure of public discipline available, i.e., a public censure and permanent disqualification from judicial service, is warranted.

III. ANALYSIS

Judges are charged with the duty to abide by and to enforce the provisions of the Code of Judicial Conduct and the Rules of Professional Conduct. R. 1:18 ("It shall be the duty of every judge to abide by and to enforce the provisions of the Rules of Professional Conduct, the Code of Judicial Conduct and the provisions of R. 1:15 and R. 1:17."). This obligation applies equally to a judge's professional and personal conduct. In re Hyland, 101 N.J. 631 (1985) (finding that the "Court's disciplinary power extends to private as well as public and professional conduct by attorneys, and *a fortiori* by judges.") (Internal citation omitted). "When judges engage in private conduct that is irresponsible or improper, or can be perceived as involving poor judgment or dubious values, '[p]ublic confidence in the judiciary is eroded.'" In re Blackman, 124 N.J. 547, 551 (1991).

In matters of judicial discipline "there are two determinations to be made" -- whether a violation of the Code of Judicial Conduct has been proven and whether the proven violation "amount[s] to unethical behavior warranting discipline." In re DiLeo, 216 N.J. 449, 468 (2014).

The burden of proof in judicial disciplinary matters is clear-and-convincing evidence. See R. 2:15-15(a). Clear-and-convincing evidence is that which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations

sought to be established, evidence, so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (citations and internal quotations omitted).

We find, based on our review of the evidence of record, that the charges filed against Respondent involving his violation of Canon 1, Rule 1.1 and Rule 1.2, Canon 2, Rule 2.1, and Canon 5, Rule 5.1(A) of the Code of Judicial Conduct in respect of his offensive touching of A.C. on August 29, 2019, have been proven by clear and convincing evidence.[5] We, likewise, find that Respondent's repeated attempts to avoid responsibility for victimizing A.C., to include offers of money and dishonesty before this tribunal, have been proven by clear and convincing evidence.

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[5] Canon 1:

> Rule 1.1: "A judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved."
>
> Rule 1.2: "A judge shall respect and comply with the law."

Canon 2, Rule 2.1: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

Canon 5, Rule 5.1(A): "Judges shall conduct their extrajudicial activities in a manner that would not. . . demean the judicial office . . . ."

Respondent's misconduct in each instance warrants the most severe measure of public discipline available, to wit censure and permanent disqualification from future judicial service. To be certain, had Respondent held judicial office at the time of these proceedings, we would be recommending his removal from office.

Respondent's groping of A.C.'s breasts and body without her consent to satisfy, in his words, a base "impulse," so plainly and irretrievably impugns Respondent's integrity and that of the Judiciary and constitutes such an extreme violation of the charged canons of the Code of Judicial Conduct as to require no further comment. Respondent's censure and permanent disqualification from future judicial service for these excesses is wholly justified and necessary to restore the public's confidence in the Judiciary as a body of integrity committed to the rule of law. Cf. In re Russo, 242 N.J. 179 (2020).

Were this the sum of Respondent's ethical violations, the damage to the Judiciary, the public's perception of the Judiciary, and more specifically A.C., would be significant and, without more, would require Respondent's censure and permanent disqualification from judicial service. This conduct, however, has been aggravated considerably by Respondent's pervasive and persistent attempts to conceal his misconduct, initially with an offer of money to A.C. and thereafter by testifying falsely before this tribunal, conduct that further evinces Respondent's unfitness for judicial office.

False swearing, as this Court has previously held, and attempts to manipulate a victim, irretrievably impugn Respondent's integrity and that of the Judiciary and renders his future service on the bench untenable. See In re DeAvila-Silebi, 235 N.J. 218 (2018) (removing a judge for pervasive dishonesty before ethics authorities to avoid discipline for abusing the judicial office); In re Samay, 166 N.J. 25 (finding the judge's lack of candor further evidence of his unfitness to serve on the bench). Accord In re McClain, 662 N.E.2d 935 (Ind. 1996) (removing a judge for dishonesty before the ethics panel and for manufacturing a defense to avoid discipline).

In reaching this recommended quantum of discipline, we have carefully weighed both the aggravating[6] and mitigating[7] factors present in this case, mindful that the primary purpose of judicial discipline is to preserve the public's confidence in the integrity and independence of the judiciary, not to punish an offending judge. In re Seaman, supra, 133 N.J. at 96, 98-99 (1993).

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[6] Factors considered in aggravation include the extent to which the misconduct demonstrates a lack of integrity and probity, a lack of independence or impartiality, misuse of judicial authority that indicates unfitness, and whether the conduct has been repeated or has harmed others. In re Seaman, supra, 133 N.J. at 98-99.

[7] Factors considered in mitigation include the length and quality of the judge's tenure in office, the judge's sincere commitment to overcoming the fault, the judge's remorse and attempts at apology, and whether the inappropriate behavior is susceptible to modification. In re Subryan, 187 N.J. 139, 154 (2006).

Having discussed the aggravating factors herein, we will not recount them again. In respect of any mitigating factors, the record before us is largely silent save for six letters of character, four from members of the New Jersey State Bar and two from former clients. R-3 thru R-8. While we appreciate these comments and recognize Respondent's service as a municipal court judge for the past 32 years, neither mitigates Respondent's significant abuses in this instance.

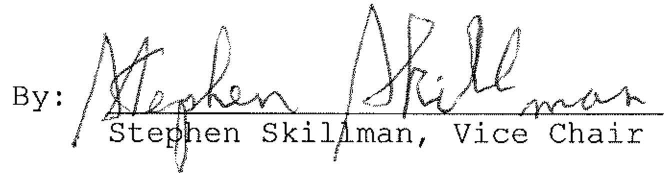
IV. RECOMMENDATION

For the foregoing reasons, the Committee recommends that Respondent be censured and permanently disqualified from future judicial service for his violations of Canon 1, Rule 1.1 and Rule 1.2, Canon 2, Rule 2.1, and Canon 5, Rule 5.1(A), of the Code of Judicial Conduct. This recommendation considers the seriousness of Respondent's ethical infractions, and the aggravating factors present in this case, which justify the recommended quantum of discipline. The Committee has referred Respondent to the Office of Attorney Ethics given that his conduct occurred while involved in the private practice of law.

Respectfully submitted,

ADVISORY COMMITTEE ON JUDICIAL CONDUCT

April 6, 2022

By: 
Stephen Skillman, Vice Chair

Virginia A. Long, Chair, did not participate